Appeal No. 24-CO-362

DISTRICT OF COLUMBIA COURT OF APPEALS

TONY MCCLAM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT

SAMIA FAM

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DISCLOSURE STATEMENT

Appellant Tony McClam was represented in Superior Court by Jason Tulley, Esq., Aubrey Dillon, Esq., and James King, Esq., of the Public Defender Service (PDS). On appeal, Mr. McClam is represented by PDS attorneys Samia Fam, Esq., Jaclyn S. Frankfurt, Esq., and Daniel Gonen, Esq.

Appellee the United States was represented in Superior Court by Assistant United States Attorneys (AUSAs) Michael Liebman Esq., Rachel Forman, Esq., and Miles Janssen, Esq. The United States is represented on appeal by AUSAs Chrisellen R. Kolb, Esq., and Timothy R. Cahill, Esq.

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ISSUE PRESENTED

Where "duplicitous" counts of the indictment present two factually distinct criminal offenses, and the trial judge offers to cure any prejudice to the defense by giving a special-unanimity instruction that would permit the government to present all charges to the jury, but the government instead elects—after jeopardy has attached—to pursue only one charge for each duplicitous count, does the Double Jeopardy Clause bar a retrial of the unelected offenses?

STATEMENT OF THE CASE AND JURISDICTION

On December 9, 2019, Mr. McClam was charged with first-degree premeditated murder while armed against a minor with aggravating circumstances, D.C. Code §§ 22-2101, 4502, 3611, 2104.01(b)(10); two counts of assault with intent to kill (AWIK) while armed, *id.* §§ 22-401, 4502; three counts of possessing a firearm during a crime of violence (PFCV), *id.* § 22-4504(b); and carrying a pistol without a license (CPWL), *id.* § 22-4504(a). R. 191-93 (Indictment pp. 1-3).

A jury trial commenced before the Honorable Neal Kravitz on December 6, 2021. On January 12, 2022, the jury acquitted Mr. McClam of first-degree murder, found him guilty of CPWL, and was deadlocked on second-degree murder (as a lesser-included offense), the AWIKs, and the PFCVs. 1/12/22 Tr. 36-37. A mistrial was declared for the charges on which the jury could not agree. *Id.* at 41.

On March 15, 2024, the Honorable Michael O'Keefe denied Mr. McClam's motion to preclude, under the Double Jeopardy Clause, retrial of charges that the government elected not to pursue after jeopardy had attached at the first trial. 3/15/24 Tr. 14-17. Mr. McClam timely noted an appeal on April 10, 2024.

Because this appeal raises a colorable double-jeopardy claim, the Court has jurisdiction under the collateral-order doctrine. *See Abney v. United States*, 431 U.S. 651, 662-63 (1977); *Jones v. United States*, 669 A.2d 724, 728 (D.C. 1995).[1]

STATEMENT OF FACTS

A. The evidence at trial

The two shootings in this case happened in a triangle formed by Naylor Road, SE (on the west), Good Hope Road, SE (on the north, later renamed Marion Barry Avenue), and Alabama Avenue, SE (on the east). The shootings and surrounding events were largely captured by surveillance cameras. Only two eyewitnesses testified—Mr. McClam and Kamaal Porter-Greene, the complaining witness for one of the AWIK counts.[2]

1. The Naylor Road shooting

On July 18, 2019, Mr. McClam was walking home from the McDonald's parking lot on Good Hope Road with a group of children including his 8-year-old stepson, A., two other boys, and their father, Tae. 12/16/21 Tr. 61-62, 66-67.

As they were about to cross Naylor Road, a Nissan Sentra suddenly stopped in the middle of the street—not at an intersection, and despite a green light and no cars ahead—blocking Mr. McClam's group's path. *See id.* at 67-68; 12/7/21 Tr. 30.

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[1] This Court denied the government's motion to dismiss the appeal for lack of jurisdiction, but deferred resolution of whether this appeal fell under the collateral-order doctrine. *See* Order, May 8, 2024, at 1. For the reasons explained below why Mr. McClam's double-jeopardy claim is meritorious, it is colorable.

[2] The other AWIK complaining witness, Rodre Holloway, was in the front passenger seat of Mr. Porter-Greene's car; Mr. Holloway did not testify at trial.

Mr. McClam tried to walk around the car, but the driver was "angry" and loudly yelling out the window. 12/16/21 Tr. 67-68. The driver said something like, "you all like to put you all hands on F'ing kids or you all like to put you all hand on my nephew or something in that category." *Id.* at 68. Mr. McClam responded that he didn't put his hand on any kids. *Id.* at 69. The driver responded "oh, yeah, oh, yeah" and started reaching for what Mr. McClam thought was a gun. *Id.* at 70-71.

Mr. McClam, afraid that he or the children were about to be shot, then reached for his own gun, which he had lawfully purchased and regularly kept in his fanny pack because he was scared of moving back to a dangerous neighborhood in Southeast D.C. *Id.* at 72; 12/6/21 Tr. 114, 118-21; 12/7/21 Tr. 67; 12/8/21 Tr. 56-58, 60. As the car sped off, Mr. McClam believed a drive-by shooting was about to happen.[3] 12/16/21 Tr. 26-27, 72-73. Video shows Mr. McClam pushed the children back and shot twice at the car, as it turned right onto Good Hope Road. *Id.* at 74, 85. He did not know if either shot hit the car. *Id.* at 85.

Mr. McClam believed the car was gone and not coming back. *Id.* at 89, 121. He and his group ran along their usual route through the BP gas station to Alabama Avenue, intending to go home. *Id.* at 52, 67, 86.

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[3] Mr. McClam was particularly afraid in those moments because he feared he was being targeted for "snitch[ing]." 1/5/22 Tr. 49. Mr. McClam assisted police investigating his brother's murder, including by identifying a suspect and testifying in the grand jury. *See* 12/16/21 Tr. 79-82; *see also* 12/15/21 Tr. 141-45.

2. The Alabama Avenue shooting

Unbeknownst to Mr. McClam,[4] the Sentra was not gone. After turning right on Good Hope Road, the Sentra could have continued to the left onto Alabama Avenue, away from Mr. McClam. Instead, the Sentra turned *right* (from the *left*-turn only lane) onto Alabama Avenue. 12/7/21 Tr. 19, 31-32. This completed a roughly 180-degree turn that had it headed right back into the path of Mr. McClam and his group. The Sentra initially slowed, but then accelerated toward them. 12/13/21 Tr. 59-61. Tae said, "oh, s***, there go that car again." 12/16/21 Tr. 26, 86.

Seeing the same Sentra speeding toward him and the group, Mr. McClam believed the car would either hit them or the driver or front-seat passenger would shoot them. *Id.* at 88. Mr. McClam shot four times as the Sentra abruptly turned left and sped through the parking lot of a Safeway across Alabama Avenue. *Id.* at 86-87, 121-22. As before, Mr. McClam did not know if he hit the car. *Id.* at 94.

3. The aftermath

The Sentra was hit twice in the rear, from the right. *See* 12/14/21 Tr. 124-26, 137, 145-46, 148. One of the shots hit K.B., an 11-year-old child, who was in the backseat. 12/7/21 Tr. 119; 12/15/21 Tr. 82, 96. The driver, Mr. Porter-Greene, did not realize that K.B. was shot until after the second shooting on Alabama Avenue. 12/13/21 Tr. 188-89. He heard sounds consistent with the car being hit by a bullet at both locations. *See id.* at 178, 185. Based on the angles, the government contended that the fatal shot was "almost certainly" fired on Naylor Road. *E.g.*, 12/17/21 Tr. 6.

[4] It is undisputed that Mr. McClam had his back turned to Good Hope Road as he headed home, and did not see the Sentra's next turn. *See* 12/20/21 Tr. 11-13, 44.

Mr. McClam, who was legally blind in his left eye and had poor vision in his right eye, 12/9/21 Tr. 56; 12/16/21 Tr. 36, testified that he never saw anyone in the backseat and had no idea a child was in the car, 12/16/21 Tr. 27, 77. Video shown by the defense confirmed that no one was visible in the backseat as the car drove down Naylor Road, suggesting that K.B. ducked his head down. 1/4/22 Tr. 99-101.

Mr. McClam's then-girlfriend, Aundrea Reed, testified as a government witness. She said that Mr. McClam came home out of breath, upset, and distraught. 12/9/21 Tr. 64. She testified that Mr. McClam immediately told her, corroborating his trial testimony, that he had to start shooting because he was "terrified" when a car pulled up on him and the kids, and the driver was reaching down aggressively and threatening them. *Id.* at 65, 68-70.

4. The government's theory

The government contended that Mr. McClam deliberately targeted and intended to kill K.B., a stranger, knowing that he was in the Sentra. The purported motive was a brief interaction between Mr. McClam's group and K.B. in the McDonald's parking lot. In that encounter, one of Tae's sons punched K.B., mistaking him for one of the bullies that had been antagonizing A. and his friends. 12/16/21 Tr. 55-58, 64. K.B. then ran off. *Id.* at 64. No one chased him. *Id.* at 66; 12/13/21 Tr. 234-35; 12/14/21 Tr. 17, 24

The driver of the Sentra, Mr. Porter-Greene—who did not know Mr. McClam, K.B., or anyone else involved—happened to be driving past the McDonald's. He testified that he "believe[d]"—though he was not certain because he was focused on

driving—that he saw a "grown man" (he could not say which) strike K.B.[5] 12/13/21 Tr. 152-54. Mr. Porter-Greene sped down Naylor Road to make sure this unknown child was okay, encountered him a block away, and agreed to drive K.B. home. *Id.* at 156, 158-60, 162, 234-36; 12/14/21 Tr. 17-18, 22-25. From the McDonald's parking lot, Mr. McClam could not have seen K.B. get into the Sentra a block away. *See* 12/6/21 Tr. 139-41.

According to Mr. Porter-Greene, he ended up encountering Mr. McClam both on Naylor Road and Alabama Avenue inadvertently, through a series of wrong turns and coincidences. *See* 12/13/21 Tr. 162, 164; 12/14/21 Tr. 26, 31-32, 55-57. Mr. Porter-Greene denied having any interaction with Mr. McClam or the group when he stopped in the middle of Naylor Road before the shooting. 12/13/21 Tr. 176-77.

B. The litigation during the first trial over duplicity and unanimity

The government, as it revealed during trial, internally deliberated whether to charge the Naylor Road and Alabama Avenue shootings as separate incidents, supporting separate charges. *See* 12/17/21 Tr. 7-8, 30. Although the government saw it as a "close issue," it ultimately decided not to charge them separately. *Id.* at 30.

However, that charging decision was not revealed to the defense until the end of trial; before that point, the government litigated the case as if *only* the Naylor Road shooting was charged. The initial charging documents, the preliminary hearing, the government's pretrial pleadings, and its opening statement at trial all

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[5] The government did not endorse this uncertain testimony that an adult struck K.B. In closing, the government argued that K.B was "confronted and *almost* hit by *one of the people* in [Mr. McClam's] group." 1/4/22 Tr. 79 (emphases added).

identified the location of the murder as Naylor Road. *See, e.g.*, 9/4/19 Tr. 186-88, 204; 11/23/21 Tr. 15-16, 23; 12/6/21 Tr. 54; R. 120 (Aff. in Support of Arrest Warrant p.1); R. 1733 (Opp'n to Def.'s Mot. to Suppress Stmts. Made on July 18, 2019 p. 2). The government also filed a pretrial notice of "other crimes" evidence informing the defense (or at least strongly implying) that the Alabama Avenue shooting was uncharged misconduct. R. 296-97 (Supp. Notice Re *Drew*/*Johnson* Evidence pp. 1-2).[6]

After all the testimony was in, defense counsel explained that he would be requesting a jury instruction that the jury could convict Mr. McClam of murder only if it unanimously agreed that the fatal shot was fired on Naylor Road. 12/16/21 Tr. 213; *see also id.* at 216-17. Counsel explained that he had structured the defense case to establish that the fatal shot was fired on Alabama Avenue, which he believed was uncharged. *Id.* at 212-13.

The following day, the government asserted—for the very first time—that the jury could convict Mr. McClam of murder based on *either* the Naylor Road shooting *or* the Alabama Avenue shooting. *See* 12/17/21 Tr. 24. Moreover, the government argued that the jury could convict Mr. McClam even if it disagreed on which shooting resulted in the death—a result that would permit a guilty verdict even if

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[6] During trial, the government revealed that it had deliberately made the notice ambiguous as to *which* shooting was charged and which was uncharged. *See* 12/17/21 6-8. But the government admitted that its notice indicated that *one* of the two shootings was uncharged. *See id.* And in light of the government's consistent assertions, including in the notice itself, that the murder "almost certainly" occurred on Naylor Road, the Alabama Avenue shooting had to be the uncharged one. R. 296-97 (Supp. Notice Re *Drew*/*Johnson* Evidence pp. 1-2).

some jurors believed that he acted in self-defense on Naylor Road, while others believed he acted in self-defense on Alabama Avenue. *See id.* at 21-22.

The defense argued that, if both shootings were charged, then the counts were "duplicitous." Each count charging murder and AWIK contained a pair of distinct criminal charges—one for Naylor Road and one for Alabama Avenue. *See id.* at 5-6, 31-32. The defense argued that this duplicity could be cured by limiting the government to the charges arising from the Naylor Road shooting, in accordance with the government's consistent pretrial representations. *See id.* at 18-20. The defense also argued that permitting a verdict based on the two shootings combined was inconsistent with the requirement of juror unanimity. *See id.* at 14-17.

In resolving whether the indictment was duplicitous and whether the jurors had to unanimously agree that a particular shooting constituted each crime, the parties and Judge Kravitz agreed that the ultimate question was whether the Naylor Road shooting and the Alabama Avenue shooting were separate criminal incidents. *See, e.g.*, *id.* at 24-34, 40-44.

1. Judge Kravitz finds that the shootings are separated by a fork in the road.

After additional briefing from the parties, everyone agreed that the controlling legal standard was whether the shootings were separated by a "fork in the road" or a "fresh impulse." *See* 12/20/21 Tr. 23, 25, 43-44, 47; R. 2514-16 (Mem. Re Site of Fatal Shot pp. 16-18); R. 2520-22 (Gov. Mem. Re Unanimity Instr. pp. 2-4). And everyone agreed that Judge Kravitz should make that factual determination.

Under that standard, the defense argued that there were separate offenses. After the first shooting, Mr. McClam believed that the incident was over, and he and

the Sentra were headed in roughly opposite directions, at least initially, with Mr. McClam heading southeast to his home, while the Sentra appeared to be headed northeast on Alabama Avenue; when the Sentra unexpectedly reencountered Mr. McClam soon after, the interaction was a separate incident motivated by a separate impulse. *See, e.g.*, 12/17/21 Tr. 31-32. The government argued, however, that Mr. McClam kept his gun in his hand after the Naylor Road shooting, suggesting that he intended to chase the Sentra and continue his alleged assault on it. 12/20/21 Tr. 43-44; R. 2525 (Gov. Mem. Re Unanimity Instr. p. 7).

Applying the undisputed legal standard, Judge Kravitz carefully reviewed the evidence he had heard at trial. He found that Mr. McClam "not only didn't chase after the Sentra" after the Naylor Road shooting, "but didn't even kind of run in a way that could be perceived as tracking or even following where it was going." 12/20/21 Tr. 89. Mr. McClam "rather, was pretty clearly going toward his home to get away from this confrontation." *Id.*

Judge Kravitz continued: "I conclude that these two incidents—and by 'two incidents,' I'm referring to the shooting incident on Naylor Road and the shooting incident on Alabama Avenue—are factually separate." *Id.* at 90. "[T]he first act, the shooting on Naylor Road, *had come to an end*, and Mr. McClam was *on his way home* when the next act, the shooting on Alabama Avenue, was motivated by a *fresh impulse*; that being the reaction to—Mr. McClam's reaction to seeing the Sentra driving toward him on Alabama Avenue." *Id.* (emphases added).

Based on these findings, Judge Kravitz agreed "that this is a duplicitous indictment." *Id.* at 124. But Judge Kravitz refused to require the government to elect

one offense per duplicitous count. *See id.* Instead, he decided to cure any prejudice to the defense with a special-unanimity instruction, requiring the jury to unanimously agree for each charged offense that it was based on the conduct on either Naylor Road or Alabama Avenue. *See id.* at 91-93. He explained, "The case law certainly suggests that while an election by the government is one way to remedy a duplicitous indictment, it's not the only way. A special unanimity instruction is another way. And that's what I'm going to give." *Id.* at 124.

2. The government makes an election

Despite Judge Kravitz's ruling that he would not require an election, the government announced it would elect to "argue that the AWIKs happened on Alabama Avenue," due to the fact that "the case law about concurrent intent talks about barrage of gunfire, and I think with four shots we're on safer ground than with two." 12/20/21 Tr. 107. The government then said it would pursue only the homicide charge arising from the Naylor Road shooting, and would not ask the jury to find Mr. McClam guilty of homicide for the Alabama Avenue shooting. *Id.* at 116.

Judge Kravitz asked the prosecutor if he understood that he was "permitted" to present murder charges at both locations, and the prosecutor confirmed, "I do. I do understand that." *Id.* at 116. But rather than concede any uncertainty, he felt he was "on stronger ground if I tell them or argue that the fatal shot was fired on Naylor Road." *Id.* at 117.

Judge Kravitz noted that the government, to his "surprise," was "going to make the election now, *although not required to make it*, and argue that the murder happened on Naylor Road and that the AWIKs happened on Alabama Avenue." *Id.*

at 124-25 (emphasis added). The government registered no objection to this finding.

The next day, the government confirmed that there was no need for a special-verdict form, which would have had the jury specify whether the verdict for each offense was based on Naylor Road or Alabama Avenue, because it was electing to pursue only one charge per duplicitous count. *See* 12/21/21 Tr. 21, 23-24.

The following day, Judge Kravitz denied a related defense motion, which had argued that permitting the government to pursue charges from the Alabama Avenue shooting would be a constructive amendment of the indictment. *See* 12/22/21 Tr. 5-6. That motion was based on the defense's belief that the grand jury had never been asked to find probable cause for any charges from that separate shooting. *See* R. 2501-2510 (Mem. Re Site of Fatal Shot pp. 3-12). However, in the ensuing discussion, Judge Kravitz expressed come "concern[]" that, based on the prosecutor's recollection of what he told the grand jury, there might be the potential for a constructive amendment of the indictment. 12/22/21 Tr. 14-16. Judge Kravitz asked the government to provide him with the transcript of the prosecutor's instructions to the grand jury as soon as possible. *Id.* at 17-18. Judge Kravitz again suggested that a special-unanimity instruction with a special-verdict form could avoid any potential issue about the constructive amendment. *Id.* at 16.

When the parties reconvened after a twelve-day break, the government still did not have the grand-jury transcript. 1/3/22 Tr. 16-20. The prosecutor's own recollection was that he *only* argued in the grand jury that the murder was on Naylor Road, but urged Judge Kravitz to find that the defense waived the issue by failing to move to dismiss the indictment before trial. *Id.* at 22, 24. Judge Kravitz believed it

would be a "big mistake" to find that the defense waived the issue given the history of the case and the course of the litigation. *Id.* at 26.

Nevertheless, Judge Kravitz again extended the option of a special-verdict form "to indicate for any guilty verdict which location the jury has determined the crime was committed so that we know." *Id.* Again, he did not rule that there was a constructive amendment; he was merely "hesitating," but did not preclude the government from pursuing any of the charges. *Id.* at 27. He explained that the special-verdict form would protect the government in the event that there was later found to be a grand-jury problem. *Id.* at 26; *see also* 12/22/21 Tr. 16.

The government, however, elected not to take this course. Given the court's ruling that the Alabama homicide was a separate offense, the prosecutor chose to maintain his original election of the Naylor Road homicide. 1/3/22 Tr. 28. For the AWIKs, he also stuck with his election of the Alabama Avenue shooting, despite Judge Kravitz's concern about the grand-jury issue, because "the applicability of concurrent intent specifically is more well founded" for that shooting, and "[he] consider[s] it one incident anyway." *Id.*

Based on the prosecutor's representations, Judge Kravitz concluded that "there's no reason then to have a special verdict form." *Id.* at 29. He further reasoned that not even a special-unanimity instruction was needed because "the Government at this point is curing the duplicity issue by basing [*sic*] an election." *Id.* The government did not object to this finding.

Judge Kravitz explained, however, that due to the potential grand-jury issue with the Alabama Avenue charges, "if Mr. McClam is convicted of the AWIK or

any of the AWIKs, I still would feel the need to look at the Grand Jury transcript to make sure that there wasn't a constructive amendment as to the—of the Indictment as to the AWIKS." *Id.* at 29-30. Everyone agreed that review could occur after trial. *Id.* at 30.

The trial proceeded with jury instructions reflecting the government's election to drop the Alabama Avenue murder and Naylor Road AWIKs. *See* 1/4/22 Tr. 43-44, 57-58, 62. The government did not object to these instructions.

As noted above, the jury acquitted on first-degree murder, convicted on CPWL, and hung on the other charges that it was asked to consider. 1/12/22 Tr. 36-37. The court declared a mistrial for the charges that the jury could not unanimously agree on. *Id.* at 41.

C. Double jeopardy litigation before the pending retrial

Prior to the retrial, the government asked Judge O'Keefe, now presiding, to reconsider Judge Kravitz's ruling that a special-unanimity instruction was required. The government did not challenge Judge Kravitz's ruling that special unanimity was required for the AWIKs, conceding that it "was arguably appropriate" to find that the two shootings gave rise to two separate sets of AWIK charges. R. 4017 (Gov. Mot. to Reconsider Trial Court's Ruling Re Special Unanimity Instr. p. 11). But it contended that the murder charge was different.

The government asserted that while a person "may be a victim of an assault on multiple occasions, and therefore during multiple incidents, he can only be a victim of a homicide exactly once." *Id.* Thus, it asked the court to instruct the jury at a retrial that it did not need to agree which shooting constituted the homicide. R.

4023-24 (*id.* at 17-18 & n.7). In the government's view, if six jurors found that Mr. McClam was acting in self-defense on Naylor Road, but that the fatal shot was fired on Alabama Avenue, and six jurors found the opposite, a guilty verdict would be permissible—even though the jury was sharply divided on whether either shooting was unjustified. *See* 11/15/23 Tr. 18-19.

The defense responded that the request to reconsider the special-unanimity instruction was moot: no such instruction was given at the trial because of the government's election. R. 4185 (Def. Opp'n to Gov. Mot. To Reconsider Ruling Re Special Unanimity Instr. & Cross-Mot. To Preclude Retrial on Double Jeopardy Grounds p. 10).

Furthermore, because the government indicated it intended to seek conviction based on the charges that were abandoned during the first trial, the defense cross-moved to preclude retrial of those offenses under the Double Jeopardy Clause. R. 4176, 4187-89 (*id.* at 1, 12-14). The defense argued that an election, made after jeopardy attached, barred retrial of the charges that were not elected. *See id.*

In response, the government did not dispute the rule that an election made after jeopardy has attached triggers a double jeopardy bar. However, it adopted the argument from its motion to reconsider that "there is only a single unitary charge of homicide in this case, regardless of where and when" the fatal shot was fired. R. 4200-01 (Gov. Cons. Reply to Def. Opp'n Re Gov. Mot. To Reconsider & Opp'n to Def. Cross-Mot. To Preclude Retrial on Double Jeopardy Grounds pp. 4-5). It also argued that its decision to abandon the Alabama Avenue homicide and Naylor Road AWIKs "was not 'a deliberate decision'" because it was "necessitated by a ruling of

the trial court" that the charges were duplicitous. R. 4205 (*id.* at 9).

At oral argument on the cross-motions, the government was "ready to concede today, if it wasn't clear from [the government's] papers, that we have to make an election as to the AWIK counts" and was "not asking [Judge O'Keefe] to revisit" the ruling of "two AWIK incidents." 11/15/23 Tr. 29-30. But the government contended that "homicide is different," because a person can be killed only once. *Id.*

In response to the claim that the election was "necessitated" by Judge Kravitz, Judge O'Keefe noted that Judge Kravitz "never actually ruled you had to make a[n election]. I think [the government] just voluntarily made a[n election]."[7] *Id.* at 31-32. When the prosecutor countered that he "was forced to do so, frankly," Judge O'Keefe responded, "I think you *felt* forced. But I don't know whether he actually said you must make a[n election]." *Id.* at 32 (emphasis added). The prosecutor simply responded, "Correct." *Id.* The prosecutor added that he made an election because "the judge's ruling was directing us through there," while adding that he liked the video evidence better for the Naylor Road shooting. *Id.* Judge O'Keefe reiterated that Judge Kravitz never ruled "that the government had to cho[o]se one [location]. He didn't actually force them." *Id.* at 34.

Judge O'Keefe agreed with Judge Kravitz that a special-unanimity instruction was required, but proposed a modified one. Under his proposal, like Judge Kravitz's, the jury could find Mr. McClam guilty of murder if it unanimously agreed that the fatal shot was on Naylor Road, or if it instead unanimously agreed it was on Alabama

[7] Although the transcript has the word "decision," it is clear from context that Judge O'Keefe was referring to an "election."

Avenue. But, because Mr. McClam was not disputing the element that he caused the decedent's death, Judge O'Keefe proposed telling the jury that it could also find Mr. McClam guilty if the jury unanimously found the remaining elements of murder, including no self-defense, were satisfied at *both* locations. *Id.* at 14-15; *see also id.* at 33, 37. Judge O'Keefe then explained that he needed more time "to focus on the double jeopardy aspect of it, which [he] hadn't done." *Id.* at 51; *see also id.* at 65.

Judge O'Keefe addressed the double-jeopardy motion again on March 15, 2024. He began by repeating his "idea of the special unanimity instruction" that would require the jury to unanimously agree that the fatal shot was fired (along with the requisite mens rea and lack of justification) either on Naylor Road or on Alabama Avenue. 3/15/24 Tr. 3-4. But if "they couldn't all agree, then there would be sort of a catchall. They would have to find no self-defense anywhere." *Id.* at 4; *see also id.* at 7-12.

Judge O'Keefe then denied the double-jeopardy motion. He did not expressly address whether the fork-in-the-road test applied to murder or, if not, why he believed a special-unanimity instruction was required. He said, without explanation or analysis, that he did "not find that Mr. McClam['s] homicide charge is duplicitous," but "even if it was, the Court finds that double jeopardy would not bar the government from arguing the fatal shot occurred on Alabama Avenue. And two, the AWIKS occurred on Naylor Road." *Id.* at 15.

He based his ruling on the absence of "binding caselaw" and his belief that "the government did not *willfully* elect their narrowed argument at the first trial." *Id.* (emphasis added). He believed that the election was not willful because "Judge

Kravitz had already ruled the shootings were separate instances," the prosecutor "could not confident[]ly recall" if he instructed the grand jury to consider both shootings, and the transcript of the grand jury proceedings was not procured until after trial. *Id.* at 15-16.[8]

SUMMARY OF ARGUMENT

The Double Jeopardy Clause bars retrial of the offenses that the government chose not to present to the jury during the first trial. Overwhelming precedent holds that any decision by the prosecution to dismiss, abandon, or otherwise fail to seek a verdict on charges, if made after jeopardy has attached, triggers a double-jeopardy bar. *See, e.g.*, *Crist v. Bretz*, 437 U.S. 28, 35 (1978). An election made by the prosecution to cure a duplicitous indictment—an indictment that charges two distinct offenses in a single count—is a decision to pursue only one of the duplicitous charges, and to therefore abandon the unelected one. Here, the government made that election midtrial, after jeopardy had attached. It chose not to pursue the homicide charge from the Alabama Avenue shooting, and the AWIK charges from the Naylor Road shooting. The result is that Mr. McClam was effectively acquitted of those charges. *See Livingston v. Murdaugh*, 183 F.3d 300, 302 (4th Cir. 1999).

The government's election was voluntary. As a factual matter, the record shows that Judge Kravitz consistently gave the government the option of presenting

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[8] Judge O'Keefe reviewed the grand-jury transcript himself *in camera*, but did not permit the defense to see it. R. 4389-90 (Order pp. 1-2). He rejected the defense's Grand Jury Clause claim, concluding that the grand jury found probable cause for murder and AWIK for both locations. 3/15/24 Tr. 16-17.

all charges to the jury with a special-unanimity instruction. The government declined that option for tactical reasons, preferring to pursue only one charge for each duplicitous count. As a legal matter, the fact that the government made its election in the wake of an adverse ruling does not relieve it of the consequences of its choice.

The unelected offenses—a murder charge arising from the shooting on Alabama Avenue and the AWIK charges arising from the shooting on Naylor Road—were factually distinct offenses under the applicable "fork in the road" test, which the parties and Judge Kravitz agreed was the governing standard. This is conceded for the AWIKs.

The government's position that the fork-in-the-road test does not apply to murder is analytically flawed and would produce absurd and unacceptable results. The factual limitation that a person can only die once need not give rise to a *legal* limitation that precludes distinct murder charges. To the contrary, it is essential to treat separate violent incidents as separate murder offenses in the rare instances where the fork-in-the-road test is met.

First, without applying the fork-in-the road test, it would be impossible to convict a person of both murder and AWIK/attempted murder of the same person, even in separate attacks, because those are the "same offense" for double-jeopardy purposes. *Second*, in cases where a person was erroneously convicted or acquitted of murder, the government's position would give that person a license to commit murder with total immunity. *Finally*, the fork-in-the-road test is essential to a defendant's right to a unanimous verdict. The government's position would permit a murder conviction even where the jury cannot unanimously agree that the

defendant committed any criminal act at all. It would permit the jury to combine two separate alleged assaults into a patchwork verdict, even where some jurors reasonably doubt that either alleged assault was, in fact, a crime.

Even if Judge Kravitz erred in applying the fork-in-the-road test, his ruling must stand. It was based on the evidence at trial and related to the question of guilt or innocence. Such a substantive ruling cannot be reconsidered, no matter how erroneous it may be. *See Evans v. Michigan*, 568 U.S. 313, 321 (2013).

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL OF THE ALABAMA AVENUE HOMICIDE AND THE NAYLOR ROAD ASSAULTS.

The Double Jeopardy Clause of the Fifth Amendment states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Although the Double Jeopardy Clause most obviously bars retrial after a conviction or acquittal, "it is not . . . essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Green v. United States*, 355 U.S. 184, 188 (1957). Rather, "even without acquittal or conviction, [double jeopardy] bars a second prosecution for the same offense if the first prosecution is dismissed after jeopardy has attached." *United States v. Andrews*, 146 F.3d 933, 936 n.3 (D.C. Cir. 1998) (Garland, J.) (citing *Crist v. Bretz*, 437 U.S. 28, 35 (1978)).

That is what happened here. The government faced a problem when it first revealed, during trial, that it was seeking to convict Mr. McClam for murder (and assault) on *either* Naylor Road *or* on Alabama Avenue. As Judge Kravitz found, the

Naylor Road and Alabama Avenue shootings were factually distinct criminal episodes, separated by a fork in the road and motivated by a "fresh impulse." 12/20/21 Tr. 89-90. Yet the government combined both episodes into a single duplicitous count of murder and two duplicitous counts of AWIK.

Judge Kravitz offered to cure the duplicity by giving a special-unanimity instruction (and, potentially, a special-verdict form) that would require the jury to unanimously agree that each offense occurred on Naylor Road or Alabama Avenue. That would have permitted the government to present all charges to the jury.

But, instead, the government opted to proceed only on the Naylor Road murder and the Alabama Avenue AWIKs. It therefore abandoned the separate Alabama Avenue murder and Naylor Road AWIKs, and failed to seek a verdict from the jury on those charges. The government's decision to discontinue its prosecution of those charges, after jeopardy had attached, bars any retrial those charges under the Double Jeopardy Clause.

I. THE FIRST TRIAL RESULTED IN AN EFFECTIVE ACQUITTAL OF THE UNELECTED CHARGES.

A. An election after jeopardy has attached is equivalent to an acquittal of the unelected charges.

The Double Jeopardy Clause generally gives the government only one chance to prove a charge at trial. *See Arizona v. Washington*, 434 U.S. 497, 505 (1978); *(Alphonso) Walker v. United States*, --- A.3d ----, 2024 WL 3058646, at *8 (D.C. June 20, 2024). If the government spoils that one chance by dismissing, abandoning, or otherwise failing to seek a verdict on a charge after the trial has begun, that decision "functions as an acquittal on the charge, and issues implicated by the

dismissed counts are deemed to be resolved in the defendant's favor." *United States v. Hoeffner*, 626 F.3d 857, 867 (5th Cir. 2010); *accord Crist*, 437 U.S. at 35; *Livingston v. Murdaugh*, 183 F.3d 300, 302 (4th Cir. 1999) (Wilkinson, J.).

In *Crist*, after the jury was sworn, the prosecutor asked the judge to dismiss the information due to a technical error, intending to file a corrected information. *See* 437 U.S. at 30. The motion was granted, a new information was filed, and a retrial was sought. *See id. Crist* recognized the longstanding and "integral part of double jeopardy jurisprudence" holding "that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal." *Id.* at 34. Even a "criminal trial that ends inconclusively" may bar a retrial. *Id.* at 35. *Crist* held that the mid-trial dismissal presented such a case, and retrial was barred. *Id.*

Courts of the District of Columbia have recognized this same principle for at least two centuries. *See District of Columbia v. Whitley*, 934 A.2d 387, 388-89 (D.C. 2007) ("[B]ecause the judge dismissed the case *sua sponte* after jeopardy had attached, that is, after the defendant had pleaded guilty, the result was tantamount to a dismissal with prejudice." (citation omitted)); *Clawans v. Rives*, 104 F.2d 240, 242 (D.C. Cir. 1939) (when prosecutor moved to dismiss charge after jeopardy attached, retrial was barred by double jeopardy); *United States v. Farring*, 25 F. Cas. 1052, 1052 (C.C.D.D.C. 1834).

Overwhelming authority from state and federal courts confirms this principle: After jeopardy attaches, any decision by the prosecution to dismiss, abandon, *nolle*

prosequi,[9] or otherwise fail to seek a verdict on a charge bars retrial. *See, e.g.*, *United States v. McIntosh*, 580 F.3d 1222, 1224-25 (11th Cir. 2009) (Pryor, J.) (government's post-jeopardy dismissal of indictment, due to its erroneous belief that indictment was defective, barred further prosecution); *United States v. Cavanaugh*, 948 F.2d 405, 417 (8th Cir. 1991); *United States v. Rivera*, 872 F.2d 507, 509 (1st Cir. 1989); *Saylor v. Cornelius*, 845 F.2d 1401, 1403 (6th Cir. 1988); *Wilson v. Meyer*, 665 F.2d 118, 123 (7th Cir. 1981); *Midgett v. McClelland*, 547 F.2d 1194, 1196 (4th Cir. 1977); *Little v. Commonwealth*, 422 S.W.3d 238, 249-50 (Ky. 2013); *Ex parte Goodman*, 152 S.W.3d 67, 71 (Tex. Crim. App. 2004).

The dismissal or abandonment of a charge after jeopardy attaches is, for double jeopardy purposes, equivalent to an "acquittal" and the charge is "deemed to be resolved in the defendant's favor." *Hoeffner*, 626 F.3d at 867; *Livingston*, 183 F.3d at 302 ("Because [a nolle prosequi] was entered after the jury was empaneled, *it constituted an acquittal* and double jeopardy attached." (emphasis added)); *Hooper v. State*, 443 A.2d 86, 90 n.3 (Md. 1982) (nolle prosequi "will ordinarily operate as an *acquittal* of the underlying charges because of double jeopardy principles" (emphasis added)); *Brown v. State*, 900 S.W.2d 805, 807 (Tex. App. 1995) ("[A]bandonment after jeopardy attaches is *tantamount to an acquittal* on the

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[9] A variety of "terms of art" may be used when the prosecution decides to not pursue a charge. *Proctor v. State*, 841 S.W.2d 1, 4 n.1 (Tex. Crim. App. 1992). But "it is of no moment that the State uses one term rather than another," or whether a charge is "formally" dismissed or "informally" abandoned. *Id.* If the prosecution wants to preserve a pending charge for a possible future trial, it must "take some . . . affirmative action *before jeopardy attaches*." *Id.* (emphasis in original).

abandoned count . . . .” (emphasis added)); *State v. Patterson*, 22 S.W. 696, 697 (Mo. 1893); 22A *C.J.S. Criminal Procedure & Rights of Accused* § 632 (“With respect to the operation of the rule of double jeopardy, the withdrawal of a count of an indictment from the consideration of the jury amounts to an acquittal of the charge contained in that count . . . .”).

An election made by the prosecution to cure its own duplicitous indictment is no different. If the election is made after jeopardy attached, it bars a retrial on the unelected charges. *See, e.g.*, *State v. Jones*, 346 S.E.2d 657, 661 (N.C. 1986) (“[A]n announced election by the district attorney becomes binding on the State and tantamount to acquittal of charges contained in the indictment but not prosecuted at trial only when jeopardy has attached as the result of a jury being impaneled and sworn to try the defendant.” (emphasis removed) (citation omitted)); *State ex rel. James v. Williams*, 164 So. 2d 873, 874 (Fla. Dist. Ct. App. 1964).

Otherwise, the government’s election would not cure the prejudice from a duplicitous indictment, but compound it. If a trial is going poorly for the prosecution and a conviction seems unlikely, the government can elect to drop some of the charges. If the defendant were acquitted at the first trial, then the government could simply retry the defendant on the abandoned charges. The government would be guaranteed two bites at the apple, even though “the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Washington*, 434 U.S. at 505; *see also Green*, 355 U.S. at 188 (double jeopardy “prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict”); *Saylor*, 845 F.2d at 1408 (“A

prosecutor could indict on several counts or theories, present evidence on each of them, and then go to the jury only on selected ones, in effect holding the others in reserve for a subsequent or improved effort.").

The government did not dispute this point below. Judge O'Keefe, however, appeared to reject it, concluding that "the defense offers no binding caselaw to substantiate their double jeopardy assertion." 3/15/24 Tr. 15. But as shown above, binding precedent and overwhelming authority confirm that the government was right to not dispute this point.

B. The government cannot avoid the double-jeopardy bar by claiming its election was involuntary.

The government's argument below, and Judge O'Keefe's ruling, that its election to abandon charges at the first trial was not voluntary lacks support in the record. Judge Kravitz consistently ruled that he would *not* require the government to elect or abandon any charges at the first trial. He instead decided that he would cure the duplicity by giving a special-unanimity instruction, which would permit the government to present all charges to the jury. *See* 12/20/21 Tr. 51, 91-92, 124; 12/22/21 Tr. 5-6; *see also Roberts v. United States*, 752 A.2d 583, 588 n.13 (D.C. 2000) ("proper remedy" for duplicity is either "to require the government to elect" *or* a special-unanimity instruction (internal quotation marks and citation omitted)).

It was the government that then freely chose, as a matter of trial tactics, to elect only the Naylor Road homicide and Alabama Avenue AWIKs. The prosecutor explained he had a better concurrent-intent argument for the AWIKs on Alabama Avenue, 12/20/21 Tr. 107, and felt he was on "stronger ground" with the jury if he

presented a single theory that the fatal shot was fired on Naylor Road, *id.* at 117. Judge Kravitz confirmed that the government "underst[ood] that [it was] permitted to" pursue the murder charges for both locations, and the prosecutor responded unequivocally, "I do. I do understand that." *Id.* at 116. Judge Kravitz found, without objection, that the government's choice was an "election" that the government was "not required to make." *Id.* at 124-25.

Even after this election, Judge Kravitz continued to offer a special-unanimity instruction, accompanied by a special-verdict form, that would permit all the charges to be presented to the jury. *See* 1/3/22 Tr. 26. Judge Kravitz extended this offer even after he and the prosecutor became "concerned" that the Alabama Avenue shooting might not have been properly charged by the grand jury. 12/22/21 Tr. 15-16; *see also* 1/3/22 Tr. 26 ("[I]t would be wise . . . to require the jury on the verdict form to indicate for any guilty verdict which location the jury has determined the crime was committed so that we know."). The government again declined this option for tactical reasons, *id.* at 28, and Judge Kravitz again found, again without objection, that no special-unanimity instruction or special-verdict form was needed because "the Government at this point is *curing the duplicity* issue by basing [*sic*] an *election*." *Id.* at 29 (emphasis added).

Judge O'Keefe, having reviewed the record of the prior trial, recognized that Judge Kravitz "never actually ruled you had to make a[n election]." 11/15/23 Tr. 31. When the prosecutor claimed that he was "forced to do so," Judge O'Keefe responded, "you *felt* forced. But I don't know whether he actually said you must make a[n election]." *Id.* at 32 (emphasis added). Judge O'Keefe explained that Judge

Kravitz never ruled "that the government had to choose one [location]. He didn't actually force them." *Id.* at 34. The trial transcript confirms that.

To the extent that Judge O'Keefe ultimately concluded the government's election was not "willful[]," 3/25/24 Tr. 15, contrary to Judge Kravitz's repeated inquiries on that point, it appears he was focusing on the *potential* issue—identified by Judge Kravitz *after* the government made its election—that the Alabama Avenue shootings were not properly charged by the grand jury. Judge O'Keefe believed this issue made the government's election not willful because the government "could not confident[]ly recall" during the trial whether it presented both shootings to the grand jury and did not get the grand-jury transcript or audio tape before the trial ended three weeks later. *See id.* at 15-16.

The record refutes any notion that the government's election was forced by this issue. *First*, the government never even contended that it was forced to make an election by the grand-jury issue. Rather, it consistently claimed that it felt "forced" by the earlier duplicity ruling. *See, e.g.*, 11/15/23 Tr. 31-32 ("[T]he ruling was, this homicide incident was actually, in our view, one, was two by Judge Kravitz. And therefore, we had to make an election *because of that ruling*." (emphasis added)); *id.* at 41 ("[T]he election that the government made on the first trial in this case, we believe we were compelled to make that because of Judge Kravitz's ruling about separate incidents."). As Judge O'Keefe recognized, that ruling did not force an election. 11/15/23 Tr. 31-32, 34.

Second, the government made its election *before* either it or Judge Kravitz expressed any concern about the grand-jury issue. The government announced its

election to pursue only the Naylor Road homicide and the Alabama AWIKs on December 20. *See* 12/20/21 Tr. 116-17, 125. It was two days later when Judge Kravitz first raised any uncertainty about whether the Alabama Avenue shooting might be a constructive amendment. *See* 12/22/21 Tr. 12-16. Even then, Judge Kravitz gave the government the option of a special-unanimity instruction and special-verdict form. *See id.* at 15-16. The government declined that option, and instead stuck with its choice—as Judge Kravitz again found without objection—to "cur[e] the duplicity" issue by making an "election." 1/3/22 Tr. 29.

Third, the government's statements reveal that its election was a tactical choice, intended to increase the likelihood of a guilty verdict. For the murder charge, the government believed that the evidence made it almost certain the fatal shot was fired on Naylor Road, and so it was "on stronger ground" presenting that claim to the jury rather than invite a hung jury with an alternative argument that the murder was on Alabama Avenue. 12/20/21 Tr. 117. For the AWIKs, the government had a better "concurrent intent" argument for the Alabama Avenue shooting because there were "four shots" fired rather than "two" on Naylor Road. *Id.* at 107.

Fourth, the government's decision to pursue the Alabama Avenue AWIKs confirms that the grand-jury issue did not prompt its election. Even after the grand-jury issue became a potential concern, the government continued to pursue the AWIK charges based only on the Alabama Avenue shooting. It did so for the same tactical reason it had given before: "I think the applicability of concurrent intent specifically is more well founded if the AWIKs—if I only argue the AWIKs

happened on Alabama Avenue and that's what I intend to argue." 1/3/22 Tr. 28.[10]

Finally, the government's decision simply was not "forced" by any adverse ruling on the grand-jury issue. Rather, at all times, the trial court ruled in the government's favor on that claim. Judge Kravitz *denied* the defense motion arguing that there was a constructive amendment. *See* 12/22/21 Tr. 5-6. He merely expressed "concern[]" and "hesitat[ion]" about the issue, saying he would revisit it upon receipt of the grand-jury transcript. 12/22/21 Tr. 15-16; 1/3/22 Tr. 26-27, 29-30. When the transcript was eventually provided, Judge O'Keefe found that both shootings *were* properly charged by the grand jury. *See* 3/15/24 Tr. 16-17 (finding that the prosecutor told the grand jury "that while he believed it was likely that the [fatal] shot[] may have been on Naylor Road, *the murder count and the AWIK counts were based on Alabama shooting and Naylor Road shooting*"; "the government *did argue both shootings*"(emphases added)). Whatever the government thought about how Judge Kravitz or another judge *might* eventually rule on the grand-jury issue, those concerns did not "force" the government to make an election.

At all times, Judge Kravitz extended the option of a special-unanimity instruction and a special verdict, but the government repeatedly declined. *See*

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[10] The grand-jury issue raised by the defense applied equally to the AWIK charges. As Judge Kravitz explained, if Mr. McClam were convicted of the Alabama Avenue AWIKs, he "still would feel the need to look at the Grand Jury transcript to make sure that there wasn't a constructive amendment . . . of the Indictment as to the AWIKS." 1/3/22 Tr. 29-30. If the government felt forced by the grand-jury issue to abandon the Alabama Avenue homicide, it would have also felt forced to abandon the Alabama Avenue AWIKs. Instead, it abandoned the Naylor Road AWIKs, for which there was no grand-jury issue, for purely tactical reasons.

12/20/21 Tr. 91-92, 125; 12/22/21 Tr. 5-6, 16; 1/3/22 Tr. 26. The government preferred maximizing its chances of conviction in the trial underway rather than preserving its options, if necessary, in the event of a retrial. That was a reasonable tactical choice. But the government, like any litigant, bears the consequences of its decisions. *See, e.g.*, *Maddux v. District of Columbia*, 212 A.3d 827, 837 (D.C. 2019) (decision to plead guilty prompted by adverse pretrial detention ruling was not "coerced"). It cannot have its cake and eat it too.

There does not appear to be a single case, anywhere in the country, holding that a double-jeopardy bar did not apply because the prosecutor's decision to discontinue a charge midtrial was involuntary. To the contrary, such a decision will sustain a double-jeopardy challenge regardless of what prompted it. Retrial is barred, for example, if the dismissal of a charge was motivated to benefit the defendant, *Wilson*, 665 F.2d at 123, at the judge's urging, *Rivera*, 872 F.2d at 509; *Humphries v. Wainwright*, 584 F.2d 702, 705 n.4 (5th Cir. 1978), due to judicial error, *Livingston*, 183 F.3d at 301-02; *Saylor*, 845 F.2d at 1404, to avoid an adverse ruling, *State v. Pond*, 584 A.2d 770, 771-72 (N.H. 1990) (nolle prosequi to avoid grant of defense motion), based on the government's own mistaken belief that there was a problem with the indictment, *McIntosh*, 580 F.3d at 1224–25; or following the prosecution's election to cure a defendant's objection to the charges, *see, e.g.*, *Jones*, 346 S.E.2d at 661; *Williams*, 164 So. 2d at 874. Indeed, as this Court has recognized, a dismissal after jeopardy attaches will raise a double jeopardy bar even if the dismissal was ordered "*sua sponte*" by the court, over the government's objection. *Whitley*, 934 A.2d at 388-89.

II. THE NAYLOR ROAD AND ALABAMA AVENUE SHOOTINGS GIVE RISE TO FACTUALLY DISTINCT OFFENSES.

Before the defense asserted a double-jeopardy bar, the government asked Judge O'Keefe to revisit Judge Kravitz's determination that the indictment was duplicitous, and contended that no special-unanimity instruction was required at the retrial. It made no claim that Judge Kravitz misunderstood the fork-in-the-road test, nor did it challenge his duplicity ruling on the AWIK counts. Rather, despite its argument to Judge Kravitz that the fork-in-the-road test was the governing legal standard for homicide, it contended that it was error for Judge Kravitz to have applied that very standard to the homicide charge. In doing so, the government did not suggest that Judge Kravitz should have applied a *different* test. Nor did it identify any error in the manner he applied the test to homicide or his factual findings. It instead claimed that he should not have applied *any* test and was required, as a matter of law, to treat disparate allegations of murder as one amalgamated charge.

When the defense filed its double-jeopardy motion, the government adopted this position in response. The government claimed that the defense was merely "piggy-backing" on an erroneous duplicity ruling. R. 4200 (Gov. Cons. Reply to Def. Opp'n Re Gov. Mot. To Reconsider & Opp'n to Def. Cross-Mot. To Preclude Retrial on Double Jeopardy Grounds p. 4).

There was no error here. The government's contention that the fork-in-the-road test does not apply to homicide is wrong. This test is a generally applicable legal standard, and it applies to murders no less than assaults, robberies, or other crimes. The government offers no legal basis or rationale for its proposed exception. And adopting the government's position that there can, as a matter of law, be only

one homicide charge per decedent would lead to anomalous results that are incompatible with justice and even with the government's own interests.

While this Court could fairly conclude that Judge Kravitz's ruling on this issue should not be revisited whether or not it was correct, *see* Section II.B., *infra*, it can and should reject the government's argument on the merits.

A. Judge Kravitz correctly applied the fork-in-the-road test.

This Court has adopted a general standard for determining when two criminal acts are factually separate: "Criminal acts are 'factually separate' when they 'have occurred at different times and were separated by intervening events, when they occurred at different places, when the defendant has reached *a fork in the road* and has decided to invade a different interest, or when the first act has come to an end and the next act is motivated by *a fresh impulse*.'" *In re Richardson*, 273 A.3d 342, 348 (D.C. 2022) (quoting *Gray v. United States*, 544 A.2d 1255, 1257 (D.C. 1988)) (emphases added). This Court uses both the "fork-in-the-road" test or "fresh-impulse" test as a shorthand for this standard. *See Hagood v. United States*, 93 A.3d 210, 226 (D.C. 2014); *Hanna v. United States*, 666 A.2d 845, 853 (D.C. 1995); *see also Stevenson v. United States*, 760 A.2d 1034, 1037 (D.C. 2000) ("fork in the road" and "fresh impulse" capture the "same general concept"). !

The fork-in-the-road test is a general legal test for determining when the evidence establishes factually distinct offenses. *See Hagood*, 93 A.3d at 226 ("[T]o determine whether the defendant's conduct was a single act or distinct acts we employ the 'fresh impulse' or fork-in-the-road' test."). It applies to all types of offenses including AWIK, *Johnson v. United States*, 398 A.2d 354, 369-70 (D.C.

1979); sex assaults, *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002); robberies, *Maddox v. United States*, 745 A.2d 284, 294-95 (D.C. 2000); drug offenses, *Allen v. United States*, 580 A.2d 653, 658 (D.C. 1990); and PFCVs, *Stevenson*, 760 A.2d at 1037-38.

The fork-in-the-road test applies in two conceptually related situations. In both, the test determines the permissible arithmetic of offenses: It controls when the government can multiply what appears to be one offense into more than one, or if it can add seemingly separate criminal acts together into one combined offense.

The first situation is merger: the test determines if multiple counts charging the same offense involving the same victim are really a single indivisible crime, requiring merger of the counts after conviction.[11] *See Sanchez-Rengifo*, 815 A.2d at 354. Here, the fork-in-the-road test protects the defendant's right under the Double Jeopardy Clause to be free from double punishment. *See id.* Without some limiting principle, the government could "divid[e] a single crime into a series of temporal or spatial units," multiplying the defendant's potential punishment. *Brown v. Ohio*, 432 U.S. 161, 169 (1977). The government could, for example, treat each separate blow during a fistfight as a separate crime, resulting in multiple sentences, when there is really but one assault. *See Smith v. United States*, 418 F.2d 1120, 1121 (D.C. Cir. 1969). But, on the other hand, when the fork-in-the-road test is satisfied, the

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[11] If convictions are not for the "same offense" under the well-known *Blockburger* test—where each contains an element that the other does not—then they generally do not merge. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). The same is true for multiple convictions involving different victims; there is generally no merger. *See Wages v. United States*, 952 A.2d 952, 964 (D.C. 2008).

government may obtain multiple punishments because the defendant's conduct is properly treated as separate crimes. *See (Bernard) Jenkins v. United States*, 980 A.2d 421, 426 (D.C. 2009); *see also Hagood*, 93 A.3d at 218-19.

The flipside of that coin is where the government combines what are really separate crimes into a single count. Referred to as "duplicitous," such a count threatens the defendant's rights to a unanimous jury and to be found guilty only by proof beyond a reasonable doubt. *See Hagood*, 93 A.3d at 217; *Johnson*, 398 A.2d at 369; *United States v. Bradford*, 344 A.2d 208, 216 (D.C. 1975). Here, the concern is that the government could combine weak allegations of separate criminal acts into a single incriminatory mass. Such an amalgamation could permit the government to obtain a "patchwork" verdict—one where different sets of jurors find the defendant committed different crimes; all jurors might unanimously agree the defendant did *something*, but they cannot agree on what. *See Hagood*, 93 A.3d at 217-19; Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 Mo. L. Rev. 1, 16 (1993) (noting the consensus that such "a patchwork guilty verdict" is unconstitutional).

A duplicitous count is not "fatally defective," but any prejudice to the defendant's rights must be cured. *Murray v. United States*, 358 A.2d 314, 317 (D.C. 1976). One available cure is for the trial court to give the jury a special-unanimity instruction, explaining that "the jurors must be unanimous as to which incident or incidents they find the defendant guilty." *Hack v. United States*, 445 A.2d 634, 641 (D.C. 1982); *see also, e.g.*, *Johnson*, 398 A.2d at 369-70 (holding such an instruction was required to remedy duplicitous AWIK count). Alternatively, the government

can make an "election," i.e., choose to proceed on only one offense per duplicitous count. *See, e.g.*, *Murray*, 358 A.2d at 317 ("Such an election is an appropriate remedy for a duplicitous indictment.").

Although the fork-in-the-road test as applied to merger and to unanimity is not strictly identical, *see Hagood*, 93 A.3d at 219, their nuanced distinction is immaterial for purposes of this case.[12]

In applying the fork-in-the-road test, incidents may be separate even when they are quite close in time and place. "[O]ne can experience and act upon a fresh impulse almost immediately." *(Bernard) Jenkins*, 980 A.2d at 424-25 (citations omitted). Thus, separate offenses may be found "even if the interval [between them] is quite brief." *Gardner v. United States*, 698 A.2d 990, 1002 (D.C. 1997) (internal quotation marks and citation omitted); *see also, e.g.*, *Watson v. United States*, 267 A.3d 1035, 1051, *reh'g en banc granted, opinion vacated*, 284 A.3d 776 (D.C. 2022) (two shootings, just a few seconds apart and in the same place, were separated by a fork in the road); *Tann v. United States*, 127 A.3d 400, 497 (D.C. 2015) ("Tann reached a 'fork-in-the-road' and had the opportunity for a 'fresh impulse' when [, in the midst of a beating, the victim] began to run and Tann picked up the gun and

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[12] The test for unanimity is somewhat broader than for merger, turning on whether the jury "*could have* perceived that the defendant engaged in more than one criminal act," *Hagood*, 93 A.3d at 219 (emphasis added); *see also id.* at 220-21. Merger analysis, in contrast, focuses on the defendant's actual state of mind. *Id.* at 218-19. Thus, a finding that the defendant actually reached a fork in the road (as in a merger inquiry) would necessarily imply that a reasonable jury "could have" made that finding (thus triggering the need for special unanimity). In this case, neither party argued that anything turned on this conceptual difference.

made the decision to shoot."); *Owens v. United States*, 497 A.2d 1086, 1097 (D.C. 1985) (robbery victim's attempted flight produced "fresh impulse" to shoot him); *Hawkins v. United States*, 434 A.2d 446, 447, 449 (D.C. 1981).

Here, Judge Kravitz correctly applied the fork-in-the-road test to find separate criminal acts on Naylor Road and Alabama Avenue. The government expressly concedes as much for the AWIKs. 11/15/23 Tr. 29-30.

The break between the two shootings, though less than a minute, was long enough for the complainants to flee (as in *Owens* or *Tann*), and for Mr. McClam to head home, believing the incident was over. Mr. McClam faced a fork in the road, almost literally: he could have chased the car as it turned onto Good Hope Road, but he instead ran away, toward Alabama Avenue en route to his home. Seeing the same Nissan Sentra after it unexpectedly made a 180-degree turn and then accelerate toward him produced a "fresh impulse" to fire at the Sentra a second time, whether in self-defense or not. The government acknowledged below that Judge Kravitz's findings were, at the very least, not clearly erroneous.[13]

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[13] This Court has held that "[w]hether two charged offenses merge into one is not for the jury to decide; rather, it is a question of law for the court." *Spain v. United States*, 665 A.2d 658, 662 n.5 (D.C. 1995). While subject to de novo review, *see Nixon v. United States*, 730 A.2d 145, 151 (D.C. 1999), the *de novo* standard still requires deference to the trial judge's underlying factual findings unless clearly erroneous. *See, e.g.*, *K.A.T. v. C.A.B.*, 645 A.2d 570, 570 n.1 (D.C. 1994); *Gaetan v. Weber*, 729 A.2d 895, 897 (D.C. 1999). Deference is especially warranted here, where the findings were based on the trial judge's firsthand observations of witness testimony—particularly that of Mr. McClam, who testified, credibly in the judge's view, about his state of mind in between the two shootings, and that he was heading home after the first shooting. *See, e.g.*, *Mashaud v. Boone*, 295 A.3d 1139, 1150 (D.C. 2023) (en banc).

Thus, it is now undisputed that there were distinct pairs of AWIKs on Naylor Road and Alabama Avenue. And because the parties and Judge Kravitz agreed that the fork-in-the-road test applies to AWIK and murder alike, Judge Kravitz found two distinct murder offenses as well.

B. The government's new position would produce absurd and unacceptable results.

The disagreement at this point boils down to the government's contention, first made in its motion to reconsider Judge Kravitz's ruling, that "homicide is different." 11/15/23 Tr. 29. When it comes to homicide of a single victim, the government contends that there can be only one offense.

The government's position is the result of a simple analytic flaw. It conflates a *factual* limitation with a *legal* one. It is true, as a factual matter, that—putting aside speculative technologies like cloning—a person can die only once. But, as a legal matter, it does not follow that two separate assaults on the same person, one of which causes the person's death, must be treated as one combined offense.

To the contrary, as a legal matter, there can be two factually distinct criminal charges alleging murder of the same victim. This logically follows from the fact that murder and its lesser-included offenses, like AWIK or attempted murder, are the "same offense." *See Brown v. Ohio*, 432 U.S. 161, 168 (1977) ("The greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it."); *United States v. Rust*, 650 F.2d 927, 928 (8th Cir. 1981) (per curiam) ("[A] defendant may not be convicted of both the attempt and the completed crime, . . . and a dual conviction would amount to double jeopardy."). If two

factually distinct incidents targeting the same victim are separate offenses of AWIK (or attempted murder)—as everyone now agrees they were in this case—then they logically must remain separate offenses where one of the two satisfies the additional elements necessary for completed murder, i.e., that the AWIK caused a death.

To see this, imagine a defendant is charged with one count of murder arising from two assaults that are factually distinct under the fork-in-the-road test: On Monday, the defendant stabbed the decedent; on Tuesday, for an entirely different reason, the defendant shot him; and on Wednesday, the decedent was injured in an unrelated car accident and died. The medical evidence is conflicting about which injury—the stabbing, the shooting, or the accident alone—was fatal, and a rational jury could go either way on whether the defendant caused the death at all. The jury is therefore instructed on murder and, if it finds no causation, the lesser-included offense of AWIK (or attempted murder).

The question then arises: should the jury be given a special-unanimity instruction that they must unanimously agree on which of the two factually distinct acts, the shooting or the stabbing, constitutes the offense? If the offense is AWIK or attempted murder, then the answer must be yes. But if the offense is completed murder, then, according to the government, the answer must be no. The result is a "Schrödinger's Cat" offense—an offense that simultaneously *is*, *and is not*, two separate crimes depending on the unknowable findings of the jury.

Avoiding that paradox, however, is not the only reason to reject the government's position. It is, in fact, essential to use the fork-in-the-road test (or a similar one) to distinguish factually separate murder charges. This is true on both

sides of the debate: the interests of both defendants *and the government* require it.

Take the government's interests. The government uses the fork-in-the-road test to obtain multiple convictions and sentences. *See, e.g.*, *Sanchez-Rengifo*, 815 A.2d at 354. If that test did not apply to murder, it would be impossible for the government to obtain convictions for both completed murder and *attempted* murder (or AWIK) of the same victim arising from factually separate incidents. As just discussed, because attempted murder and AWIK are lesser-included offenses of murder, they are the "same offense" for purposes of merger. *See Brown*, 432 U.S. at 168. Thus, without the ability to distinguish factually separate incidents, convictions for murder and attempted murder/AWIK of the same victim would merge, even if they arose from separate attacks that are deserving of multiple punishments.

To prevent such unjust results, courts around the country use a fork-in-the-road-type test to determine when a defendant may receive multiple sentences for both homicide and attempted murder or assault of the same victim.[14] *Cf. Blaize v. United States*, 21 A.3d 78, 85 (D.C. 2011) (ADW and voluntary manslaughter while armed of the same victim were, "[d]espite the proximity of the crimes in time and place," "distinct violent crimes" under the fork-in-the-road-test (quoting *(Anthony)*

[14] For example, see *Aleman v. Allen*, No. CV 17-6707, 2022 WL 4472477, at *8 (C.D. Cal. May 20, 2022) (two shootings, separated by a chase, "were two separate acts that did not amount to an indivisible course of conduct" and supported both murder and attempted murder convictions), *report and recommendation adopted*, 2022 WL 4466716 (C.D. Cal. Sept. 26, 2022); *Sam v. State*, 401 P.3d 834, 841 (Wyo. 2017); *Johnston v. State*, 578 N.E.2d 656, 658-59 (Ind. 1991); *State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000); *Salgat v. State*, 630 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 1993) ("[A] defendant may be convicted of murder and attempted murder of the same victim where there are two separate episodes of criminal conduct.").

Walker v. United States, 982 A.2d 723, 742-43 (D.C. 2009))).

Thus, by applying the fork-in-the-road test, the government may charge a defendant with two factually distinct murders of the same victim—for example, the Monday stabbing/Tuesday shooting described above—and obtain a conviction and separate sentence on *both* counts. While, as a factual matter, the jury may find that one or the other offense actually caused the death, a guilty verdict on both murder counts is still permitted—one conviction would be for completed murder, and the other would be for the lesser-included offense of AWIK or attempted murder. But without the fork-in-the-road test, the government could never convict a murderer for a factually distinct assault against the same victim.

The government's position would lead to additional anomalies that it cannot defend. It would create a license to commit murder in the case of an erroneous murder conviction or acquittal.

Imagine a shooting victim dies after spending a year hospitalized for his injuries. At the trial, the defendant presents compelling evidence that the shooting was in self-defense and is acquitted of murder. The defendant then openly boasts that, a year after the shooting, he snuck into the hospital and purposely infected the decedent with a deadly toxin, killing him. Surveillance video from the hospital and additional medical testing corroborate this confession. The defendant boasts that he infected the decedent because he knew he would be acquitted of the shooting, and believed he would get away with the later act of killing thanks to double jeopardy.

Surely his double-jeopardy claim should be rejected, despite the prior acquittal. Although he was acquitted of murdering the decedent by shooting him,

infecting him a year later was a totally separate offense. *See Smith & Hogan's Criminal Law* 96 (14th ed. 2015) (explaining that the infecting and the earlier wounding are "completely different transactions" that cannot be fused into a murder). The government's position, however, would require treating those separate murders as the same offense, precluding any conviction for a brazen murder.

Consider a similar anomaly. A woman is charged with murdering her husband. Although no body is recovered, the wife is convicted of murder. It is eventually discovered that the husband faked his death, framed his wife, and was still alive. The wife, enraged by this betrayal, kills her husband in cold-blood, this time for real. When tried for murder, she claims double jeopardy: Having already been convicted of her husband's murder, she argues that she cannot be tried a second time for the same offense—the murder of the same person.

This scenario is drawn from the plot of the film *Double Jeopardy* (Paramount 1999). Although the movie suggests that this double-jeopardy defense may be viable,[15] any practicing criminal lawyer knows better.[16] The two murders are clearly

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[15] In the movie, the legal theory is never put to the test because the wife (portrayed by Ashley Judd) shoots her husband in justifiable defense of her parole officer (portrayed by Tommy Lee Jones).

[16] *See, e.g.*, *The Movie "Double Jeopardy" Gets Its Named Concept Completely Wrong*, Criminal Law Consulting For Writers & Filmmakers, http://www.criminallawconsulting.com/blog/the-movie-double-jeopardy-gets-its-named-concept-completely-wrong ("Although both charged crimes are for the murder of Nick, they are two separate incidents. . . . Therefore, the charges are not for the same offense." (bold omitted)); Mike Floorwalker, *How Accurate Is the Movie Double Jeopardy*, Looper, Dec. 23, 2020, https://www.looper.com/223573/how-accurate-is-the-movie-double-jeopardy/ ("[E]very single lawyer you might ever ask this question will tell you that if Libby had just shot Nick, the act would have constituted a

not the "same offense" under the fork-in-the-road test. But the government's theory that there can be only one murder of a single victim would require sustaining the wife's double-jeopardy claim. Adopting the government's position would turn Hollywood fiction into real-world legal doctrine.

As applied to this very case, the government's own position would dictate a result it cannot defend. The logic of the government's position would *not* mean, as the government assumes, that it could now prosecute Mr. McClam for a combined Naylor Road/Alabama Avenue murder of K.B. To the contrary, it would mean that the government could not prosecute Mr. McClam for *any* murder of K.B.

That is because Mr. McClam has already been acquitted of murdering K.B. Even if Judge Kravitz's ruling that there was a separate Alabama Avenue murder was legally erroneous, the Supreme Court has squarely held that legal error does not vitiate an acquittal. *See Evans v. Michigan*, 568 U.S. 313, 321 (2013) (holding that double-jeopardy bar applied where "an antecedent legal error" resulted in judgment of acquittal based on the trial court's erroneous belief that the prosecution "failed to prove some fact it was not actually required to prove").[17] Because of his ruling that

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different crime, which happened in a different place, under a different legal jurisdiction—and she would totally have been held criminally liable."); *Double Jeopardy—What is It?*, UWorld Legal, https://legal.uworld.com/blog/bar-review/criminal-procedure-quick-tip-this-is-double-jeopardy/ (calling the movie's legal theory "Hollywood malarkey").

[17] For double-jeopardy purposes, it would not matter that the acquittal for the Alabama Avenue murder was for an offense that, if Judge Kravitz erred in applying the fork-in-the-road test, did not really exist as a separate murder. In *Evans*, it was the lone dissenting justice, not the majority, who would have embraced the view that a judge's erroneous addition of an "imaginary" element meant that the defendant

there were really two murder charges, "the situation was the same as though [Mr. McClam] had been charged with these different offenses in separate but alternative counts of the indictment." *Green v. United States*, 355 U.S. 184, 190 n.10 (1957). And, after the government abandoned one of those counts during trial, Mr. McClam is acquitted of that count for double-jeopardy purposes as much as he would be if the jury expressly returned a "not guilty" verdict for murder of K.B. on Alabama Avenue. *See* Section I.A., *supra.*

The bottom line is that Mr. McClam was, rightly or wrongly, implicitly acquitted of a murder of K.B. So, if there can be only one offense of murder, then Mr. McClam's implied acquittal of murder of K.B. on Alabama Avenue is, in fact, an acquittal of *any* and *every* charge of murder of K.B.—including on Naylor Road. There can be no murder retrial if the government's new position is adopted.[18]

Just as the fork-in-the-road test is essential for the government's ability to hold

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was not actually acquitted "of the charged offense." 568 U.S. at 330, 332-33 (Alito, J., dissenting). The majority disagreed. *See id.* at 323 (majority op.) (rejecting claim that "innocence of the charged offense cannot turn on something that is concededly not an element of the offense" (internal quotation marks omitted)).

[18] Because the government concedes that the Naylor Road and Alabama Avenue shootings support separate AWIK offenses, it is easy to see why Mr. McClam's implicit acquittal of the Alabama Avenue murder must be given double-jeopardy effect. Mr. McClam's implicit acquittal of the Alabama Avenue murder also applies to any lesser-included offense. This means Mr. McClam was acquitted of AWIK/attempted murder of K.B. on Alabama Avenue—which the government concedes is a distinct offense. And since double jeopardy precludes prosecuting Mr. McClam for AWIK/attempted murder of K.B. on Alabama Avenue, it necessarily precludes retrial of the *greater* offense of homicide. *See Brown v. Ohio*, 432 U.S. 161, 168-69 (1977).

people accountable for multiple attacks on a single decedent, it is also essential to a criminal defendant's right to a unanimous verdict, with guilt proven beyond a reasonable doubt, in a murder case. That right "requires jurors to be in substantial agreement *as to just what a defendant did* as a step preliminary to determining whether the defendant is guilty of the crime charged." *Scarborough v. United States*, 522 A.2d 869, 873 (D.C. 1987) (en banc) (quoting *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977)) (emphasis added) (internal quotation marks omitted). "[W]ithout jury agreement as to the *specific act* the defendant committed, the right to a unanimous jury verdict is meaningless." *Id.* (emphasis added).

In a murder case, it is equally essential for the jury agree on "just what the defendant did"—the "specific act" he committed that culpably caused a death—as in any other case. Where the jury is presented with two factually distinct assaults under the fork-in-the-road test and evidence that one of the two caused a death, combining the incidents into a single offense of murder is incompatible with the requirement of jury unanimity and proof beyond a reasonable doubt.[19]

This can be easily seen with an example: Suppose that in this case the decedent, K.B., survived. In that situation, it is now undisputed that, under the fork-in-the-road test, there would be two separate AWIK (or attempted murder) charges

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[19] Other courts have reached that conclusion. *See, e.g.*, *State v. Crane*, 804 P.2d 10, 17 (Wash. 1991) ("[U]nder the State's theory, half the jury may have concluded defendant committed one assault which led to Steven's death, while the other half of the jury relied on a different assault in order to convict. This is clearly erroneous."); *State v. Lotches*, 17 P.3d 1045, 1056-57 (Or. 2000); *State v. Rasmussen*, 68 P.2d 176, 182-83 (Utah 1937).

for K.B.: one for Naylor Road and the other for Alabama Avenue. If half the jury believed that Mr. McClam was acting in self-defense on Naylor Road, and the other half believed that he was acting in self-defense on Alabama Avenue, he could not be unanimously found guilty of anything. At least some jurors would harbor a reasonable doubt of his guilt on each distinct AWIK offense, and the jury could not unanimously agree that he committed any crime at all. No one disputes that.

But, according to the government, because of the tragic fact that K.B. died, these two concededly separate offenses may be amalgamated into a single offense. If the jurors vote the same way—half find self-defense on Naylor Road, and the other half find self-defense on Alabama Avenue—the result is no longer a hopelessly deadlocked jury that cannot unanimously agree that the defendant is guilty of anything, but a unanimous guilty verdict on murder. The jury could find Mr. McClam guilty of murder because they all agree that *some* act, though not necessarily one they unanimously find was a *criminal* act, caused the death. The absurd result would be that, although Mr. McClam could not be convicted of the *lesser* offense (AWIK/attempted murder or even simple assault), he could be convicted of the *greater* offense (completed murder).[20]

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[20] Taken to its logical extreme, the government's position is absurd. If twelve different witnesses each claim that the defendant killed the decedent on twelve different dates, at twelve different locations, by twelve different criminal acts, then the government could obtain a conviction even if each of the twelve jurors credited a different one of the twelve allegations. This is the kind of patchwork guilty verdict that is undoubtedly unconstitutional. *See Schad v. Arizona*, 501 U.S. 624, 633 (1991); *id.* at 651 (Scalia, J., concurring in part and in the judgment) ("We would not permit, for example, an indictment charging that the defendant assaulted either

Of course, no one contends that a guilty verdict requires that the jury unanimously agree on everything. It is well-established that the jury need not agree on a theory of liability (such as principal vs. accomplice) or the "means" or "mode" by which the crime was committed. *See Williams v. United States*, 981 A.2d 1224, 1228-29 (D.C. 2009). But these are general principles that apply to all offenses; they do not reflect anything unique about murder. *See, e.g.*, *(Joseph) Jenkins v. United States*, 113 A.3d 535, 550 (D.C. 2015) (unanimity not required for different "means" of violating the criminal street gang statute); *Simms v. United States*, 634 A.2d 442, 446 (D.C. 1993) (same as to robbery and kidnapping); *Gray v. United States*, 544 A.2d 1255, 1257-58 (D.C. 1988) (same as to sexual assault).

Thus, the cases the government cited below holding that the jury need not agree on the "means" or "modes" of committing a single offense, *see* R. 4019-23 (Gov. Mot. To Reconsider Trial Court's Ruling Re Special Unanimity Inst. pp. 13-17), are beside the point. Those cases, at most, could be cited to argue that Judge Kravitz drew the line between factually distinct murders in the wrong place—an argument that the government has conceded it cannot make. The government argued instead that Judge Kravitz erred by drawing a line at all.

But with all offenses, a line must be drawn at the point where "distinct incidents go from being different means of committing the same crime[] to being different crimes." *Hagood*, 93 A.3d at 217 (quoting *Hargrove v. United States*, 55 A.3d 852, 857 (D.C. 2012) (alteration in original) (internal quotation marks

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X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts.").

omitted); *see also Williams*, 981 A.2d at 1228-29. The fork-in-the-road test is the means of drawing that line. *See id.* at 1227 & n.7 (citing *Gray v. United States*, 544 A.2d 1255, 1257 (D.C. 1988)). And under that test, it is now undisputed that the two shootings in this case were "different crimes," not just "different means."

C. The finding of factually distinct homicides cannot be revisited.

Even if the government's altered position—that there cannot be distinct offenses of murder of a single victim—were correct, Judge Kravitz's ruling cannot be revisited. The finding that there were two factually distinct murder offenses, even if erroneous, is a "substantive" ruling that cannot be revisited under the Double Jeopardy Clause. *Evans v. Michigan*, 568 U.S. 313, 320, 325 (2013).[21]

The Supreme Court has embraced a broad notion of when a ruling must be treated as an "acquittal" for double-jeopardy purposes. Although the Court has characterized an acquittal as "a resolution, correct or not, of some or all of the factual elements of the offense charged," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), it has clarified that acquittals are not strictly limited to rulings addressing the formal elements of an offense. *See Evans*, 568 U.S. at 323-24.

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[21] It is unclear to what extent, if any, Judge O'Keefe reconsidered Judge Kravitz's ruling. Although Judge O'Keefe said, without explanation, that the murder count was not "duplicitous," 3/15/24 Tr. 15, he also agreed with Judge Kravitz that a special-unanimity instruction was required for the murder, *id.* at 4, 7-12; 11/15/23 Tr. 14-15, 33, 37—meaning that he agreed that there were factually distinct offenses. Judge O'Keefe's statement that the murder count was not duplicitous may have reflected the view that "an indictment should be labeled 'duplicitous' only where it actually causes unavoidable prejudice to the defendant." *United States v. Sturdivant*, 244 F.3d 71, 75 n.3 (2d Cir. 2001).

Rather an acquittal encompasses "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case." *Martin Linen Supply*, 430 U.S. at 575 (citations omitted). This includes a finding on an affirmative defense or the statute of limitations, findings by the court at a sentencing hearing, or "*any* other 'rulin[g] which *relate[s]* to the ultimate question of guilt or innocence.'" *Evans*, 568 U.S. at 319 (quoting *United States v. Scott*, 437 U.S. 82, 98 n.11 (1978)) (emphasis added) (alterations in original); *see also Arizona v. Rumsey*, 467 U.S. 203, 211-12 (1984); *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916).

Under this test, Judge Kravitz's ruling was an "acquittal." It was "a legal determination on the basis of facts adduced at the trial," *Martin Linen Supply*, 430 U.S. at 575 (citation omitted), and it "relate[s] to the ultimate question of guilt or innocence," *Evans*, 568 U.S. at 319 (citation omitted) (alteration in original).

There is "no doubt" that Judge Kravitz "made [his] determination on the basis of '"[t]he testimony"' that the [parties] had presented." *Id.* at 320 (citation omitted) (second alteration in original). At the close of trial, he made factual findings about Mr. McClam's state of mind based on the trial evidence. *See* 12/20/21 Tr. 90.

And this ruling "relate[d]" to the question of guilt or innocence. Judge Kravitz found that the government failed to prove something that it was required to prove at trial to proceed on its primary theory of one unbroken criminal assault. To prevail on that theory, the government needed to prove there was no fork in the road between the shootings. Judge Kravitz found the government failed to prove its theory that Mr. McClam kept his gun out and purposefully chased the Sentra to continue his alleged assault. This ruling thereby narrowed the grounds for conviction, eliminating the

continuous-assault theory as one potential theory of liability for murder. That is an acquittal for double-jeopardy purposes. *See Evans*, 568 U.S. at 325 (court's ruling counted as an acquittal "because it acted on its view that the prosecution had failed to prove its case"). While Judge Kravitz did not ultimately resolve Mr. McClam's guilt or innocence, his ruling directly "relate[d]" to that issue.[22]

Judge Kravitz's ruling should be treated as an acquittal for a second, independent reason: the existence of separate offenses under the fork-in-the-road test is constitutionally required to be treated as an "element" under the Supreme Court's *Apprendi* line of cases. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under *Apprendi* and its progeny, any "'fact that increases' a defendant's exposure to punishment, whether by triggering a higher maximum *or* minimum sentence, must 'be submitted to a jury' and found unanimously and beyond a reasonable doubt." *Erlinger v. United States*, No. 23-370, 2024 WL 3074427, at *7 (U.S. June 21, 2024) (internal quotation marks and citation omitted) (emphasis in original). Most recently in *Erlinger*, the Supreme Court held that a question similar to the one in this case—whether crimes were committed on separate occasions—presents a factual question that must be resolved by the jury at trial. 2024 WL 3074427, at *7-8.

Here, Judge Kravitz's finding that Mr. McClam reached a fork in the road between the two shootings necessarily increased Mr. McClam's "exposure to punishment." Because of the finding, a PFCV for the Naylor Road murder will not

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[22] This ruling cannot, in contrast, be characterized as a "procedural" ruling. Procedural rulings address things like "preindictment delay," exclusion of evidence, or charging defects. *Evans*, 568 U.S. at 320; *see also Scott*, 437 U.S. at 98 n.11.

merge with PFCVs for the Alabama Avenue AWIKs. *See, e.g.*, *Blaize v. United States*, 21 A.3d 78, 84-85 (D.C. 2011). This added five to fifteen years to his potential sentence. *See* D.C. Code § 22-4504(b). Under *Erlinger*, this was an "element," which the parties agreed to submit to the judge rather than the jury.

This Court has not yet grappled with how *Apprendi* and its progeny affect merger. No case has yet raised the question whether *Apprendi* and its progeny abrogated this Court's cases treating the fork-in-the-road test as an issue to be resolved by the court, with *de novo* appellate review. *See* p. 35 n.13, *supra*. But *Erlinger* makes it clear that, where a defendant's potential sentencing exposure turns on factual questions, such as whether offenses were separate, the Sixth Amendment requires that those findings be made by the jury. *See* 2024 WL 3074427, at *7-8. And an issue that must be submitted to the jury under *Apprendi* is necessarily an "element" for purposes of double jeopardy. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality) ("We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause.").

Ultimately, it is unnecessary in this case for the Court to decide whether *Erlinger* requires that the fork-in-the-road test be submitted to the jury to determine if convictions merge. Here, the parties agreed that Judge Kravitz should resolve the fork-in-the-road issue based on his findings drawn from the trial evidence. He did so, and that finding directly affects not only Mr. McClam's potential culpability for murder, but also his potential sentence if convicted. That is a substantive ruling for

double-jeopardy purposes.

The government's claim that Judge Kravitz applied an erroneous legal standard, even were it correct, cannot overcome this double-jeopardy bar. As explained above on pp. 41-42, double jeopardy applies to substantive rulings even if based on a legal error. This includes where the court found that the government failed to prove something—here that there was an unbroken assault—that it purportedly was not required to prove. *See Evans*, 568 U.S. at 318, 320; *Scott*, 437 U.S. at 98.

Given Judge Kravitz's ruling during trial that there were two separate murder charges, the government's decision to abandon one murder charge resulted in the equivalent of an acquittal on that separate count of murder. Whether that ruling was right or wrong, the Double Jeopardy Clause now bars a retrial of the acquitted count.

CONCLUSION

The Court should reverse and remand with instructions to bar any retrial of the Alabama Avenue homicide and the Naylor Road assaults.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served electronically, by the Appellate E-Filing System, upon Chrisellen R. Kolb, Esq., Chief of the Appellate Division, Office of the United States Attorney, at USADC.DCCAFilings@usdoj.gov, this 12th day of July, 2024.

/s Daniel Gonen
Daniel Gonen