DISTRICT OF COLUMBIA COURT OF APPEALS

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Appeal No. 23-CM-939

DWAYNE DAVIDSON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the
District of Columbia – Criminal Division
2023 CMD 1954

APPELLANT'S REPLY BRIEF

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I. MR. DAVIDSON DID NOT WAIVE HIS CONFRONTATION AND HEARSAY OBJECTIONS BY "MAK[ING] THE BEST OF [AN] UNWANTED RULING."

In his opening brief, Mr. Davidson argued, inter alia, that the trial court erred both by finding that hearsay statements of a non-testifying WMATA technician fell within the business records exception to the rule against hearsay and by concluding that the admission of such hearsay statements violated Mr. Davidson's Sixth Amendment right to confront witnesses against him. Br. 31-41.[1] In response, the United States, relying on *Mack v. United States*, 570 A.2d 777, 778 n.1 (D.C. 1990),[2] argues that Mr. Davidson "waived [these] claim[s] by eliciting the contents of the technician's conversation with [Wanda] Robinson on cross-examination…" Br. App. 17. Not so, as the accused does not waive claims of error on appeal by "mak[ing] the best of the unwanted ruling,"[3] and because Mr. Davidson's cross-examination was

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[1] "Br." refers to Mr. Davidson's opening brief. "Br. App." refers to the United States' brief. "R." refers to the record on appeal. "DX" refers to defense exhibit by number, and "GX" refers to government exhibit by number. "Tr." refers to transcript by date of proceedings, all in 2023.

[2] *Hood v. United States*, 268 A.3d 1241, 1250 (D.C. 2022), to which the United States points, quotes *Mack*. As explained, *infra*, *Mack* presents markedly different facts in which Mack's trial counsel raised *no* objection, even after alerted by the trial court to the inadmissibility of damaging government evidence, a far cry from the instant case in which Mr. Davidson repeatedly objected and renewed his objections on multiple days.

[3] *Fuller v. United States*, 873 A.2d 1108, 1118 n.14 (D.C. 2005).

plainly aimed at persuading the trial court to revisit his objections in light of the additional testimony.

a. The Appellant in *Mack*, Quite Unlike Mr. Davidson, "For All Practical Purposes,… Did Nothing" in the Face of "Devastating Hearsay Evidence… Coming to the Attention of the Jury," Then Argued on Appeal That the "Trial Judge Erred by Failing to Intervene Sua Sponte to Assure the Exclusion of Hearsay Testimony."

In *Mack*, a three-codefendant drug distribution case based on execution of a search warrant, as this court observed, "[u]nfortunately, the legitimately admitted evidence described above was not all that came before the jury," as an officer, "Officer Wallace[,] also provided hearsay testimony to the effect that Darnell Mack was a drug dealer and that the drugs and paraphernalia in the house belonged to him," which "[h]is trial counsel did little or nothing to prevent this from happening." 570 A.2d at 780. This hearsay included "testimony that a judge had received information about activity at the Mack residence which was sufficient to convince him or her that there were unlawful drugs on the premises." *Id.* at 780-81. On cross-examination by a co-defendant's counsel, the officer then, based on hearsay, stated that (Darnell) Mack was the owner of the drugs, without any objection from Darnell's counsel, who "said nothing." *Id.* at 781. When, on continued cross-examination by the co-defendant's counsel, "the officer [then] effectively vouched for the credibility of Darnell Mack's faceless accuser, there still was not a peep out of counsel." *Id.* "[T]hings became even more explicit" when Officer Wallace, again

based on hearsay, testified that Darnell Mack "was the regulator" and "distributed the drugs probably in the Southwest area," finally leading to an "objection [which] did not come after Darnell was identified as the 'regulator,' or even immediately after his alleged distribution activities were described, but only at the mention of his mother." *Id.* Darnell Mack's "[c]ounsel made no motion to strike, nor did he ask the judge to instruct the jury to disregard this extraordinarily prejudicial evidence." *Id*

On appeal, Mack argued that the trial court erred by failing to sua sponte exclude the hearsay and opinion testimony (that Mack owned the drugs and was the "regulator" or the drug dealing operation), leading this court to discuss the importance of the adversary system, but also note that the trial court "sustained the only objection" Mack made to such testimony, "remarked, sua sponte, that the testimony about the informant was not properly in the case, and that Darnell Mack's counsel should have objected to it," and "instructed the prosecutor not to mention in his argument to the jury what the [confidential] source had told the officer." 570 A2d at 782. Despite the judge's efforts, Mack's "attorney did not ask the court to direct the jury to disregard the evidence[,]… made no motion for a mistrial or for a severance," and, "[f]or all practical purposes… did nothing." *Id.*

Against this backdrop, when Mack's counsel on appeal complained of the prosecutor having elicited testimony regarding Mack's post-arrest silence, this court again rejected the argument, pointing out that Mack's trial counsel, despite having

been apprised of the impropriety by the trial court, not only failed to object, request that the testimony be stricken, or move for other curative action, but "sought [instead] to turn the violation to its own advantage, and attempted in its cross-examination of the officer to show that he treated Mack and his mother unfairly, and in fact discriminated against them, by singling them out for arrest because they exercised their constitutional right to remain silent." *Id.* at 778 n.1. This court observed in the same footnote that "Mack cannot have his cake and eat it too; having participated for tactical reasons in the significant compounding of the problem, he cannot now be heard to complain of the prejudice it allegedly caused." *Id.*[4]

This case could hardly be more different than *Mack*, where Mr. Davidson—properly, with the blessing of the trial court, and without objection from the government[5]—repeatedly objected on hearsay and Confrontation grounds, renewing the objections each time the witness provided additional information relevant to the admissibility of the hearsay or the Confrontation analysis and calling for a different ruling,[6] at times leading the trial court to further inquire of the witness or change its

[4] This reading of *Mack* is reinforced not only by the facts of *Mack* itself, but by this court's characterization of *Mack* in *Hicks-Bey v. United States*, 649 A.2d 569, 583 n.17 (D.C. 1994), in which this court summarized *Mack* as "reviewing for plain error whether the trial judge erred by failing to intervene sua sponte to assure the exclusion of hearsay testimony."

[5] *See, e.g.*, pp. 5-6, *infra*.

[6] *See, e.g.*, 10/25 Tr. 21 ("But the second point is I think Your Honor said you were going to come back to -- and I just didn't know if Your Honor had additional findings

ruling, and reminding the trial court of the need to rule on objections held in abeyance.[7]

> THE COURT:….There's two issues that are being raised. One issue is whether there was hearsay, whether -- how is it that this witness knows that the tech, in fact, went and pulled and downloaded it and preserved it? The testimony before was she could watch the cameras. The testimony just now was it was communicated to her. Okay. So you have a hearsay problem.
> Even if we get over the hearsay problem with a business records objection, there's an additional objection being raised, and that is a Sixth Amendment confrontation issue, which is to say, how does the defendant get to ask questions of the person who pulled the video?
> MS. TOTH: But Your Honor, the video is a business record for WMATA, and she was testifying that it was taken in the normal course of business.
> THE COURT: So a defendant can't ask questions of a file cabinet. The fact that there is a business record doesn't address the Sixth Amendment at all, and I'm asking for you to address. I need authority for the proposition that the defendant is not -- that his Sixth Amendment rights are not being violated. Isn't it a confrontation clause issue? He can't cross the person who pulled the video --

The trial court likewise (correctly) recognized Mr. Davidson's ability to renew his objections upon further inquiry during cross-examination.

> THE COURT: All right. I'm going to overrule the objection. I hear no hearsay.
> MR. MADSEN: Okay. I may renew it on cross, but thank you.
> THE COURT: Yep. Yes.

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regarding the statement from the technician to Ms. Robinson. THE COURT: Oh, yes. Yes. Thank you. I'm sorry. I forgot that. You're absolutely right.").

[7]

10/24 Tr. 79-80 (24-2).

> MR. MADSEN: No, Your Honor, except that I plan to cross and renew the objection.
> THE COURT: Okay. That's fine.

10/24 Tr. 81-82 (25-2).

That Mr. Davidson's purpose in cross-examining Ms. Robinson about the manner in which she obtained the video is made clear not only by Mr. Davidson's stated intent to do so prior to cross-examining Ms. Robinson, but by the questions asked on cross-examination,[8] his renewal of the objections during cross-examination,[9] the absence of any argument in closing[10] that the judge should give the video less weight because of what the United States characterizes as "exploring" the information relevant to hearsay, authentication, and Confrontation "in far more detail than the limited testimony [Ms.] Robinson offered on direct examination,"[11] and his statement that he had no questions for Ms. Robinson if the court sustained his hearsay, Confrontation, and authentication objections.

> MR. MADSEN: Your Honor, what I mean is, if Your Honor sustains my objection, I have no questions for this witness. If Your Honor does not sustain my objection, I have additional questions.

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[8] *See, e.g.*, 10/24 Tr. 86-88; 10/25 Tr. 24-27.
[9] *See, e.g.*, 10/14 Tr. 95 ("MR. MADSEN: -- I understand Your Honor is at least seemingly ruling in my favor on the confrontation issue. I actually don't believe that the foundation has been proper either. So I have proper -- THE COURT: I know, but I've overruled that. I think we're past hearsay.").
[10] 10/26 Tr. 97-106.
[11] Br. App. 17.

10/24 Tr. 93-94.

Put simply, *Mack* does not in any way support the government's meritless argument regarding waiver.[12]

b. *Brooks,* Involving an Identification Issue *Before the Jury*, Has No Relevance to this Appeal, a Point Underscored by the Absence of a Single Case Citing it for the Proposition Advanced by the United States.

In a footnote, the United States, citing *United States v. Brooks*, 449 F.2d 1077, 1082-83 (D.C. Cir. 1971), also argues that to the extent Mr. "Davidson might argue that he elicited" Wanda Robinson's "testimony [on cross-examination] at trial to further develop his objection, the appropriate method to address that concern would

[12] The court's remark in *Hood*, quoting *Mack*, both misreads *Mack* and is foreclosed by *Jenkins v. United States*, 75 A.3d 174, 193 n.26 (D.C. 2013) ("We cannot agree with the dissent's alternative rationale for affirming appellant's conviction—that appellant waived his confrontation rights by strategically using Dr. Baechtel's inadmissible testimony to bolster his defense… Although a defendant may waive an objection to the admission or use of improper evidence when he introduces such evidence himself, there is a fundamental difference between independently introducing improper evidence or making an argument that relies on improper evidence, on the one hand, and, *on the other hand, responding to the government's affirmative case by cross-examining a witness the defense had tried to exclude from testifying*.") (internal citations omitted, emphasis added). Notably, without any apparent change in intervening law, the dissenting position in *Jenkins* entered the court's opinion in *Hood. Compare Jenkins*, 75 A.3d at 210 ("[W]e should hold that by affirmatively relying on Dr. Baechtel's knowledge about what the non-testifying analysts did and did not do and on the accuracy of their test results, appellant forfeited or strategically waived his Confrontation Clause claim with respect to Dr. Baechtel's testimony that relayed the analysts' statements.") (Thompson, J., dissenting) *with Hood*, 268 A.3d at 1250 (Thompson, J., for the court).

have been requesting a separate hearing to voir dire the witness instead of developing that testimony at trial." Br. App. 17-18 n.8. As discussed in Part I(a), *supra*, this is incorrect,[13] and *Brooks*, involving an issue of identification before a jury, does not stand for this proposition.

In *Brooks*, a witness, Eddie Pressley, who purported to have seen Brooks shortly after the charged offenses, saw and identified Brooks during a pretrial hearing (in February) or circumstances surrounding the hearing. 449 F.2d at 1081 & n.5. The government did *not* elicit testimony regarding Pressley's February identification of Brooks; Brooks instead did so before the jury on cross-examination for reasons unclear. *Id.* at 1081. On appeal, the D.C. Circuit observed that, "since this was elicited on cross-examination, it is not ground for reversal," and Brooks "could have aired the confrontation issues without putting evidence of pre-trial identification before the jury by requesting a hearing, outside the presence of the jury, on whether the pre-trial identification by Pressley violated [Brooks'] rights." *Id.* at 1082-83.

Unlike the objectionable testimony in *Brooks*, the offending testimony and exhibit were admitted on direct examination. Only once the trial court, here in a

[13] Tellingly, the United States points to no authority that actually stands for this proposition.

bench trial,[14] overruled Mr. Davidson's repeated objections did Mr. Davidson—believing that the trial court lacked additional information that would inform its ruling—continue to cross-examine Ms. Robinson in an effort to persuade the trial court to reverse its earlier rulings.

In addition to failing on the merits, the United States' arguments fails for a second reason—its inconsistent positions and halfhearted suggestion[15] that Mr. Davidson should have requested that trial be recessed and the court conduct an evidentiary hearing[16]—involving the same witness, parties, and trial court. Where it elsewhere recognizes, when arguing against any argument that the objectionable testimony "could not be elicited before the trier-of-fact"[17]—i.e., arguing that evidence relevant to evidentiary rulings in a bench trial may be elicited before the court during trial because the court is "presumed to disregard inadmissible evidence"—the United States may not take a contradictory position on this issue.

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[14] That is, unlike *Brooks*, where the factfinder would not have been present for a hearing "outside the presence of the jury," the trial court, also the factfinder, here would have been present for and presided over any pretrial hearing.

[15] *See, e.g.*, *Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 (D.C. 2001) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones ...." (quoting *United States v. Zannino*, 895 F.2d 1, 16 (1st Cir. 1990)); *see also Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (quoting *Zannino*, 895 F.2d at 16).

[16] Br. App. 17-18 n.8.

[17] Br. App. 22 n.12.

Moreover, when Mr. Davidson indicated that he would elicit further testimony on cross-examination of Ms. Robinson to further develop his objections and request that the trial court revisit its rulings, the United States agreed, and the United States offered no objection. On these facts, the United States has additionally forfeited[18] any argument that Mr. Davidson was required to request that the court recess trial and hold an evidentiary hearing on the issue.

c. The Accused Does Not Waive Claims of Error by "Mak[ing] the Best of an Unwanted Ruling."

Beyond having markedly different facts from *Mack*—the former involving an utter failure to object, even when informed by the trial court of the inadmissibility of government evidence, and a decision to use the inadmissible as part of a trial strategy, and the latter involving repeated objections and efforts to persuade the trial court to revisit its ruling and exclude the evidence (including GX 2)—and *Brooks* simply not being relevant to the instant case, the United States overlooks or fails to acknowledge the more fundamental point that the accused does not waive claims of error by "mak[ing] the best of an unwanted ruling." *Fuller*, 873 A.2d at 1118 n.14.

[18] "[F]orfeiture, by contrast, is a defendant's 'default' or failure to raise a claim before the trial court." *Chew v. United States*, 314 A.3d 80, 91 (D.C. 2024) (quoting *Allen v. United States*, 495 A.2 1145, 1151 & n.11 (en banc)) (Easterly, J., concurring). That principle applies to the government no less than to the defendant in a criminal case. 'Parties, prosecutors included, should select the arguments they do and don't make with great care.'" *Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993) (quoting *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991)).

In *Jenkins*, this court rejected "the dissent's alternative rationale for affirming [Jenkins'] conviction—that [he] waived his confrontation rights by strategically using Dr. Baechtel's inadmissible testimony to bolster his defense," noting that "[a]lthough a defendant may waive an objection to the admission or use of improper evidence when he introduces such evidence himself, *there is a fundamental difference between independently introducing improper evidence or making an argument that relies on improper evidence, on the one hand, and, on the other hand, responding to the government's affirmative case by cross-examining a witness the defense had tried to exclude from testifying*." 75 A.3d at 193 n.26 (emphasis added). So too *In re Ty. B.*, 878 A.2d 1255 (D.C. 2005), in which this court, distinguishing *Mack*, rejected a similar argument:

> The District also asserts that the father cross-examined the maternal aunts regarding the mother's out-of-court statements and thereby waived his hearsay objection to these statements. In this case, however, the hearsay statements represented the principal proof of domestic abuse by the father. If we were to treat cross-examination of the aunts with respect to the mother's statements as a waiver, then, to resort to the vernacular, the father would find himself between a rock and a hard place. The father's attorney would be compelled either to leave damaging testimony against his client uncross-examined after it had been admitted by the court, or to waive his underlying (and, we think, sound) hearsay objection. We do not think it reasonable to put the father to such a choice.

Id. at 1264.

Put simply, Mr. Davidson did not waive his Confrontation or hearsay objections.

II. THE UNITED STATES' ARGUMENTS FAIL BECAUSE THE VIDEO ERRONEOUSLY ADMITTED AS GOVERNMENT EXHIBIT TWO WAS NOT "A BUSINESS RECORD."

The United States also argues that "precluding judges from considering hearsay to establish the admissibility of a business record…. would render a dead-letter the system for admitting business records recently established by the D.C. Council." Br. App. 20-21 (citing D.C. Code § 14-508).[19] This argument, and several others,[20] suggest a fundamental misapprehension of D.C. Code § 14-508, and fail at the outset for a straightforward reason—because, even with the objectionable testimony, government exhibit 2 was not a business record (or, at minimum, would not satisfy the requirements of D.C. Code § 14-508), a point reinforced by the fact that the "business record exception" is an exception to the rule against hearsay.

D.C. Code § 14-508(b), recently enacted by the D.C. Council, provides that, "[t]he original or copy of a domestic record of a regularly conducted activity, as shown by a certification of the custodian or another qualified person, shall be

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[19] The United States' reference to *Giles v. District of Columbia*, 548 A.2d 48, 54 (D.C. 1988) and D.C. Code § 48-905.06, Br. App. 21, overlooks the intervening watershed decision of *Crawford v. Washington*, 541 U.S. 36 (2004) and later *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

[20] For example, the United States' argument that "the Confrontation Clause… does not reach statements or testimony laying the foundation for admitting a business record," Br. App. 27-28, fails for the same reason, a point reinforced by the cases to which the United States refers repeatedly referencing documents.

deemed authentic without further testimony as evidence in any judicial proceeding or administrative hearing."

> (3) "Records of a regularly conducted activity" means a record of an act, event, condition, opinion, or diagnosis, where:
> (A) The record was made at or near the time by, or from information transmitted by, someone with knowledge of the act, event, condition, opinion, or diagnosis;
> (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) Making the record was a regular practice of that activity; and
> (D) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

D.C. Code § 14-508(a)(3).

As most relevant here,[21] there can be no argument that the video satisfies subsection (a)(3)(A) because no government witness testifying to having "knowledge of the act, event, condition, opinion, or diagnosis" depicted in GX 2. That is, no government witness, and certainly Ms. Robinson, claimed to have observed the events—i.e., the interactions between Mr. Davidson, the complainant, and his erstwhile co-defendant, Mr. Allen on the Metro train—depicted in the video. Nor was there any evidence that any person was monitoring the camera which recorded the video admitted as government exhibit 2 in real-time, distinguishing all (out-of-jurisdiction) authorities

[21] The United States did not provide notice "written notice of the intent to offer the record of a regularly conducted activity" required by D.C. Code § 14-508(c).

to which the United States cites on page 35 of its brief (n.19). As this court has repeatedly reaffirmed, a person does not "'witness[ ]… events in question—and thereby obtained personal knowledge of them—solely by watching recorded surveillance footage." *Callaham v. United States*, 268 A.3d 833, 848 (D.C. 2022); *see also Geter v. United States*, 306 A.3d 126, 139 n.14 (D.C. 2023) ("Beyond just their identifications of Mr. Geter, much of the detectives' narrative testimony about the events depicted in the video appeared to lack any basis in their personal knowledge.").

The same is true of Federal Rule of Evidence 803(6),[22] which, as Mr. Davidson repeatedly argued below,[23] is an exception to the rule against hearsay, not a basis for authentication, reinforcing that in all but the most unusual circumstances, D.C. Code § 14-508, while readily providing for admission of many types of documentary evidence, will not provide a basis for admitting video footage, unless a person happens to be observing events depicted in video in real-time; i.e., he or she would then have "knowledge of the act, event, condition, opinion, or

[22] While generally aligning that with Super. Ct. Civ. R. 43-I, made applicable to criminal proceedings by Super. Ct. Crim. R. 57(a), D.C. Code § 14-508 makes more implicit what is implicit in the aforementioned rules regarding the knowledge required. The minor textual difference would not impact the inadmissibility of government exhibit 2 under the aforementioned rules or Fed. R. Evid. 803(6), not applicable in the Superior Court.

[23] *See, e.g.*, 10/24 Tr. 80-81, 96.

diagnosis."[24] That is, like D.C. Code § 14-508, Fed. R. Evid. 803(6)(A) provides that "a record of an act, event, condition, opinion, or diagnosis" is "not excluded by the rule against hearsay," only if, as relevant here, "the record was made at or near the time by — or from information transmitted by — *someone with knowledge*." (emphasis added).

III. *BUTLER* AND *JENKINS*, ON WHICH THE UNITED STATES RELIES, RELATE TO THE EVIDENCE PROPERLY CONSIDERED WHEN DETERMINING THE ADMISSIBILITY OF "HEARSAY STATEMENTS MADE BY ALLEGED CO-CONSPIRATORS" AND SAY NOTHING OF WHETHER A TRIAL COURT PROPERLY CONSIDERS HEARSAY WHEN MAKING EVIDENTIARY RULINGS.

The United States makes much of arguing that *Butler v. United States*, 481 A.2d 439 (D.C. 1984) and later *Jenkins v. United States*, 80 A.3d 978 (D.C. 2013) articulating the manner in which the trial court must determine the admissibility of statements of alleged co-conspirators—that is, based on "independent nonhearsay evidence"—constitute an exception to the propriety of considering hearsay when ruling on the admissibility of evidence. Br. App. 19-20 n.9. But it does not follow from *Butler* or *Jenkins* that a trial court properly considers hearsay evidence when determining the admissibility of evidence. Nor does it follow, as the United States

[24] As this court observed in *Holmes v. United States*, 92 A.3d (D.C. 2014), watching events through a "live video feed" does not make them hearsay and would ostensibly provide the personal knowledge required under D.C. Code § 14-508 and Super. Ct. Civ. R. 43-I.

acknowledges, that the Confrontation Clause does not apply to admissibility rulings, a question this court left open in *Roberson v. United States*, 961 A.2d 1092 (D.C. 2008), there in the context of forfeiture by wrongdoing.

IV. *BEDOY* AND *MORGAN* DO NOT EXTEND NEARLY AS FAR AS SUGGESTED BY THE UNITED STATES.

Pointing to *United States v. Bedoy*, 827 F.3d 495 (5th Cir. 2016), and *United States v. Morgan*, 505 F.3d 332 (5th Cir. 2007), on which *Bedoy* relies, the United States argues that the Fifth Circuit "address[ed] the exact issue presented here" and that this court should follow suit. Br. App. 27. But the holdings of *Morgan* and *Bedoy* do not salvage the trial court's ruling here and do not go so far as suggested by the United States. In *Bedoy*, the court determined that "it *need not decide* the issue" of… the court's preliminary determination of a recording's admissibility under the Federal Wiretap Act… to resolve th[e] case." 827 F.3d at 511-12. In *Morgan*, the Fifth Circuit held that the Confrontation Clause "does not apply to the foundational evidence *authenticating business records* in preliminary determinations of the admissibility of evidence." 505 F.3d at 339. As discussed, in greater detail in Part II, *supra*, government exhibit two was not a business record, and *Morgan* does not answer the question here. Moreover, other courts considering the issue have distinguished between evidentiary rulings at trial—where the Confrontation Clause applies and where the trial court's ruling occurred here—and a variety of pretrial hearings held not to implicate the Confrontation Clause. *See, e.g.*, *See, e.g.*, *United*

States v. Mitchell-Hunter, 663 F.3d 45, 50-52 (1st Cir. 2011) (collecting cases); *United States v. Campbell*, 743 F.3d 802, 808-09 (11th Cir. 2014). Still other courts have left open the possibility that the Confrontation Clause applies in certain pretrial hearings, including *Daubert* hearings. *See, e.g.*, *United States v. Karmue*, 841 F.3d 24, 26-27 (1st Cir. 2016) ("[W]e have not completely foreclosed the possibility that the Confrontation Clause might apply to a pretrial hearing of some sort, see id. at 53, and we also have not previously considered the specific issue of whether a pretrial Daubert hearing might qualify as a hearing to which the right guaranteed by the Confrontation Clause could attach.

But even if *Morgan* and *Bedoy* stood for precisely the propositions advanced by the United States, and even if this court elected to adopt an identical rule, doing so would not aid the United States in this case, because, as discussed in Part II, *supra*—even if considering the WMATA technician's hearsay statements—the video erroneously admitted as government exhibit two *was not a business record*, as it was not "made at or near the time by, or from information transmitted by, *someone with knowledge of the act, event, condition, opinion, or diagnosis*." D.C. Code § 14-508(a)(3)(A) (emphasis added).

V. MS. ROBINSON RELAYED TESTIMONIAL HEARSAY BY DESCRIBING THE DATE AND TIME ON WHICH THE VIDEO WAS RECORDED, FACTS OF WHICH SHE HAD NO PERSONAL KNOWLEDGE, AND WITHOUT WHICH GOVERNMENT EXHIBIT TWO WOULD HAVE HAD NO RELEVANCE.

As one of several fallback positions, the United States argues that "it is not clear that" the hearsay statements of the non-testifying WMATA technician were testimonial, such that the admission of the hearsay would not offend the Confrontation Clause. Br. App. 29-30 n.16. Without support, and again erroneously asserting that the video footage was a business record[25]—which it was not within the meaning of Super. Ct. Civ. R. 43-I or D.C. Code § 14-508, on which the United States relies—the United States asserts without support that "the 'primary purpose' of the non-testifying technician's statement[s] w[ere] not to create evidence against [Mr.] Davidson." As discussed in greater detail in Mr. Davidson's opening brief,[26] this was precisely the purpose of the technician's statements—an employee of a "Digital Evidence Unit," which services cameras on Metro trains "like the one that recorded what [was] depicted in Government's Exhibit 2," "the one purpose of" which "is to create evidence." 10/25 Tr. 26.

[25] Both Super. Ct. Civ. R. 43-I and D.C. Code § 14-508 refer to and contain in their titles "records of a regularly conducted activity," which the United States (not unreasonably) uses interchangeably with "business records." For ease, Mr. Davidson follows suit.

[26] Br. 39-40.

VI. THE ERRORS WERE NOT HARMLESS.

When arguing that the trial court's admission of the non-testifying WMATA technician's hearsay statements and resulting erroneous admission of government exhibit two were harmless beyond a reasonable doubt, the United States, citing *Dutch v. United States*, 997 A.2d 685, 689-91 (D.C. 2010), argues that "a records custodian or another qualified witness… need not have created the record" or "have knowledge of the record's contents or its accuracy." Br. App. 34. But *Dutch* did not address the knowledge requirement of D.C. Code § 14-508(a)(3)(A), enacted after *Dutch*, or Super. Ct. Civ. R. 43-I(a), and "[t]he rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994) (quoting *Fletcher v. Scott*, 201 Minn. 609, 277 N.W. 270, 272 (1938)). And in any event, there was no evidence below, and the United States made no showing below and necessarily fails to argue here that the video admitted as government exhibit two "was made at or near the time by, or from information transmitted by, *someone with knowledge of the act, event, condition, opinion, or diagnosis*." D.C. Code § 14-508(a)(3)(A).

Conclusion

Because the evidence was insufficient to prove beyond a reasonable doubt that Mr. Davidson was not acting in self-defense, both of his convictions must be vacated.

Both because the trial court applied an incorrect legal standard and because the evidence was insufficient to support a finding that Mr. Davidson's shod foot was "likely to produce death or great bodily in the manner that it was used," Mr. Davidson's conviction for attempted PPW(b) must be vacated. Assuming, *arguendo*, that this court does not vacate Mr. Davidson's convictions on sufficiency grounds, Mr. Davidson's convictions must be reversed on both constitutional and non-constitutional grounds where the trial court erroneously permitted Ms. Robinson to relay testimonial hearsay in violation of Mr. Davidson's Sixth Amendment right to confront witnesses against him, erroneously found authentic WMATA video footage admitted as government exhibit two, and erroneously admitted statements of a non-testifying WMATA technician under the business records exception to the rule against hearsay, the elements of which were not satisfied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this reply brief was electronically served upon the United States Attorney's Office for the District of Columbia, this 23rd day of January, 2025.

/s/ Adrian Madsen
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