Appeal No. 24-CO-362

Regular Calendar: November 19, 2024

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

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

The trial court erred in allowing the government to retry Mr. McClam for a set of charges—a homicide arising from the shooting on Alabama Avenue and two assaults with intent to kill (AWIK) arising from the shooting on Naylor Road—that the government voluntarily abandoned, after jeopardy attached, during Mr. McClam's first trial. This Court has interlocutory appellate jurisdiction under the collateral-order doctrine, and should reverse.

The government—at least partially—concedes both jurisdiction and the merits. It concedes that this Court should reverse Judge O'Keefe's ruling permitting retrial of the two Naylor Road AWIKs. Br. for Appellee 19-20, 39-41. The government concedes that the Naylor Road shooting and the Alabama Avenue shooting constitute two "distinct assaults" giving rise to separate AWIKs. *Id.* at 39. The government also concedes, in a reversal of its position below, that it "*voluntarily* abandoned" the Naylor Road AWIKs. *Id.* at 40 (emphasis added). And the government further concedes, as it must, that this voluntarily abandonment after jeopardy attached establishes a double-jeopardy bar to any retrial of those charges. *See id.* Finally, because double jeopardy would bar retrial of distinct AWIK offenses, though not discrete counts, the government now concedes that this Court "has interlocutory jurisdiction" to bar that retrial. *Id.*

The only remaining disputed issue is whether that same logic applies to the homicide count. And for that issue, the dispute is limited to whether there are two factually distinct homicide charges arising from the Naylor Road and Alabama Avenue shootings—just as there are (undisputedly) two distinct sets of AWIK

charges. If the Court agrees that there are two distinct homicide charges, then it is undisputed that this Court has interlocutory jurisdiction to decide if a retrial of the separate Alabama Avenue homicide is jeopardy barred. And reversal of Judge O'Keefe's ruling is required, given that the government has disavowed its argument below that its abandonment of that homicide charge was not voluntary.

The government's claim that there can never be factually distinct homicide charges involving a single decedent—in a case where it concedes there were factually distinct *assaults*—is based on little more than a tenuous appeal to "common sense." The government makes no attempt to grapple with this Court's jurisprudence holding that a person can properly be charged with multiple homicides for a single killing. To the extent it cites caselaw, it relies on cases involving different *means* of committing a single homicide—not the circumstance presented here where the shootings are concededly distinct *offenses*. Finally, the government cannot answer for the paradoxes, injustices, and absurdities that result from its position.

Ultimately, however, the Court need not decide whether the two shootings constitute *factually* distinct homicide charges. That is because of yet another reversal by the government. The government's position (at 31-32 & n.8), contrary to the one it took below, is that the Naylor Road and Alabama Avenue shootings give rise to *legally* distinct homicide charges because of "different legal defenses."

That concession resolves this case. This Court in *Scarborough v. United States*, 522 A.2d 869 (D.C. 1987) (en banc), did away with the prior distinction between factual separability and legal separability of offenses and held that either type of separability leads to the same result—conceptually distinct offenses

subsumed within a single count. *See id.* at 872-73. Because the government voluntarily abandoned the *legally* distinct Alabama Avenue homicide after jeopardy attached, retrial of that distinct homicide charge is barred by double jeopardy.

BACKGROUND: THE GOVERNMENT'S EVOLVING ARGUMENTS

Now that the government has filed its brief on the merits, it has altered its legal positions in this case at least five different times.

First, after arguing that the two shootings were not factually distinct under the fork-in-the-road test, the government now concedes (at 39-40 & n.10) that Judge Kravitz properly found that the shootings *were* separated by a fork in the road. *Second*, after contending in the trial court that the duplicity question is governed by the fork-in-the-road test, R. 2520-22 (Gov. Mem. Re Unanimity Instr. pp. 2-4), the government argues (at 26) to this Court that homicide is not subject to that test at all. *Third*, after persuading Judge O'Keefe that its abandonment of charges at the first trial was not voluntary (and therefore raised no jeopardy bar), *see* 11/15/23 Tr. 32; 3/15/24 Tr. 15, the government now concedes (at 40) that its abandonment was voluntary. *Fourth*, contrary to its position below, R. 2526 (Gov. Mem. Re Unanimity Instr. p. 8), the government now concedes (at 31-32) that the shootings give rise to legally separate homicides. And *fifth*, after contending in a motion to this Court that this appeal must be dismissed in its entirety, the government now concedes (at 39 n.10) that this Court has jurisdiction to bar retrial of distinct offenses contained in a single duplicitous count and that it should bar retrial of the Naylor Road AWIKs.

While there is nothing wrong with a party reassessing its position, and the government's concessions are well taken, the unusual frequency of these about-faces

reveals the weaknesses of the government's arguments at every stage. The government's latest reversal cannot salvage its attempt to put Mr. McClam twice in jeopardy for the distinct Alabama Avenue homicide charge.

ARGUMENT

I. THE HOMICIDES ARE FACTUALLY DISTINCT.

The government now concedes that Judge Kravitz properly found that the shootings on Naylor Road and Alabama Avenue were separated by a fork in the road, and thus gave rise to two factually distinct sets of assault charges. Yet the government disputes the logical result that follows from that concession: just as there are two factually distinct assault charges for each AWIK complainant, there are two factually distinct homicide charges arising from each separate shooting.

The government invokes (at 24) what it calls the "common sense" notion that there can never be more than one count of murder per decedent. But its citation for that "common sense" proposition—*Byrd v. United States*, 500 A.2d 1376 (D.C. 1985), *adopted on reh'g en banc*, 510 A.2d 1035 (D.C. 1986)—is a puzzling choice. It directly refutes the government's view of "common sense."

Byrd held it was proper for a defendant to be charged with and convicted of *three* counts of first-degree murder for the killing of just *one* person. *See id.* at 1387 ("[T]he indictment may separately charge a defendant for *one death* by *more than one count* of felony murder . . . ." (emphasis added). Though *Byrd*, overruling prior precedent, held that these convictions merge, it also held that they were properly charged and submitted to the jury as separate counts. *Id.* at 387-89; *see also Byrd*, 510 A.2d at 1036-37. Before *Byrd*, multiple homicide convictions for one death were

permissible, even *without* merger. *See, e.g.*, *Adams v. United States*, 466 A.2d 439, 446 (D.C. 1983) (defendant's claim "that he should have been sentenced for only one murder [for one decedent] is without merit"). That remains the law in some jurisdictions. *See, e.g.*, *Ex parte Peraita*, 897 So. 2d 1227, 1236 (Ala. 2004).

Multiple homicide counts are also required where the government alleges both voluntary and involuntary manslaughter of the same person. *See United States v. Bradford*, 344 A.2d 208, 216 (D.C. 1975); *see also Comber v. United States*, 584 A.2d 26, 37 (D.C. 1990) (en banc). Although the counts are "inconsistent" such that a defendant can be convicted of only one, the separate charging and submission to the jury of these counts as alternative bases for conviction is required. *Bradford*, 344 A.2d at 216-18. However strongly the government asserts that its proposed rule is rooted in "common sense," its rule does not harmonize with current binding precedent.

The government's argument conflates the notion that a person can be *convicted* of only one homicide per decedent with the different and incorrect notion that a person can be *charged* with only one homicide per decedent. Mr. McClam readily agrees that a person should be convicted of only one completed homicide per decedent.[1] But that is because of the factual reality that a person can die only once—not any special legal rule applicable to homicides. As cases like *Byrd*, *Bradford*, and

[1] A person charged with two factually distinct homicide counts involving one decedent, however, can be convicted on *both* counts: one for a completed homicide, and one for a lesser-included offense such as attempted murder or AWIK. *See* Br. for Appellant 38-39.

this one show, there are sound reasons to recognize distinct homicide *charges* for a single death, even if there can in the end be only one homicide *conviction*.[2]

Mr. McClam's opening brief identified several illustrations and hypotheticals to show why logic and justice require the potential for factually distinct homicide charges for one decedent. The government responds to only some of these points. And where it does respond, its argument only underscores the problems created by the special legal rule it posits for homicide, i.e., that there can never be distinct charges for a single victim.

First, Mr. McClam's brief explained (at 43-44) why the government's position would unconstitutionally permit conviction on the basis of a patchwork verdict: If there is only one unitary homicide charge covering both shootings, Mr. McClam could be convicted of murder even if the jury could not unanimously agree that he committed any unlawful act. He could be convicted of murder even if half the jury

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[2] The government acknowledges (at 27 n.6) that Mr. McClam's opening brief cites three cases recognizing factually distinct homicide charges for a single death. *See* Br. for Appellant 43 n.19. The government's only response is that two of the three cases were factually distinct for different reasons than this case, without identifying any legal relevance to that fact.

The government characterizes the third citation as a "dissenting opinion," "albeit in a decision where a dissenting judge *announced the ruling of the court.*" Br. for Appellee 27 n.6 (emphasis added). To be more precise, the citation to that case, *State v. Rasmussen*, 68 P.2d 176 (Utah 1937), was to the Justice Moffat's lead opinion for the court (not a dissent). That opinion announced the relevant legal rule, as the government acknowledges. *See id.* at 182-83. It also announced that the court's judgment was affirmance (on harmlessness grounds), but Justice Moffat noted that he and one other justice found the error prejudicial and would have reversed. *See id.* at 183.

believe that the Naylor Road shooting was justified, while the other half believe that the Alabama Avenue shooting was justified. And further, it would create a paradox in which the jury could find Mr. McClam guilty of the *greater* offense of murder even if the jury could *not* find him guilty of the lesser offense of assault.

The government agrees that this is a problem. But its proffer of a solution—the special-unanimity instruction proposed by Judge O'Keefe—lacks coherence. There can be no special-unanimity instruction unless the shootings amount to different homicide *offenses*, not just different "means" of committing a single offense, a premise that the government strongly resists in its brief.

A special-unanimity instruction "should be given when 'distinct incidents go from being different *means* of committing the same crime[] to being *different crimes*.'" *Hagood v. United States*, 93 A.3d 210, 217 (D.C. 2014) (quoting *Hargrove v. United States*, 55 A.3d 852, 857 (D.C. 2012)) (alteration in original) (emphases added). Juries should *not* be instructed that they must "agree on the particular 'means' or 'mode' of committing a single crime." *Williams v. United States*, 981 A.2d 1224, 1228-29 (D.C. 2009). It is only "[w]hen the 'distinct incidents' amount to '*different crimes*,' [that] jury unanimity on the particular incident supporting the verdict is mandated by the Sixth Amendment." *Id.* at 1229 (emphasis added); *see also Washington v. United States*, 760 A.2d 187, 199 (D.C. 2000) (conduct "constituted a single offense (not two separate offenses), and . . . [defendant] was therefore not entitled to a special unanimity instruction").

Thus, if the government is correct that the separate shootings were merely different "means" of committing a single homicide, then no special-unanimity

instruction could be given.[3] But without that instruction, the fundamental problem of a patchwork verdict remains. A jury that could not unanimously agree that Mr. McClam committed even any degree of *assault* on K.B. (because, as the government concedes, the two shootings give rise to separate assault offenses), could nonetheless convict him of the greater offense of *murder* of K.B., without unanimously agreeing that he ever acted without legitimate justification. In short, the unanimity instruction can solve the problem only if the Court acknowledges the problem for what it is—the presence of two distinct homicide charges.[4]

The government essentially concedes that its position yields another absurd result. As explained in Mr. McClam's opening brief (at 40-41), the film *Double Jeopardy* (Paramount 1999) posited the fanciful theory that a woman convicted of murdering her husband, who had secretly faked his death, was free to kill him after discovering his treachery because a second murder prosecution would be jeopardy barred—i.e., it would be a second trial for the "same" murder. The government *agrees*: "Outside the strained reasoning of a Hollywood script, the later (actual)

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[3] As explained on pp. 17-19 below, the government's reliance on dubious dicta from *Brown v. United States*, 542 A.2d 1231 (D.C. 1988), cannot contradict this Court's holdings that special-unanimity instructions are required by the Sixth Amendment only where there are distinct *offenses* charged within a single count.

[4] The inadequacy of the government's response to the patchwork verdict problem can be seen from another example in Mr. McClam's opening brief (at 44 n.20): where twelve different witnesses present twelve different, and inconsistent, accounts of a killing at totally different times and places. If all twelve contradictory accounts of the death were deemed merely different "means," then no special-unanimity instruction could be given and the defendant could be convicted even if each juror credited a different account of the murder. The government has no response.

murder of the victim could not be considered based on the same 'killing,' even if it involved the same victim." Br. for Appellee 33. In other words, the two alleged "killings," separated by time and place, are factually distinct. But if, as the government contends, homicide is uniquely exempt from the fork in the road test such that homicide of the same decedent can *never* be factually distinct, then both alleged killings must be the same offense (murder of the same person) and a retrial after conviction is barred.

In a lengthy footnote, the government suggests that the absurd double-jeopardy bar presented by its theory could be solved if the first "conviction [is] vacated or otherwise treated as a legal nullity after the victim is discovered alive." Br. for Appellee 33 n.9.[5] To see why that doesn't solve the problem, simply tweak the hypothetical: Imagine the wife is *acquitted* at the first trial for murdering her husband. The Double Jeopardy Clause categorically forbids a retrial for the same offense after an acquittal, even where the prior verdict is claimed to be a "nullity." *McElrath v. Georgia*, 144 S. Ct. 651, 659-60 (2024). The only way to permit a trial for the wife's *actual* murder of her husband after a prior acquittal for murdering her husband is to acknowledge that the two murders, though of the same person, are factually distinct, with all the legal implications that normally flow from that fact.[6]

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[5] Presumably, a person relying on double jeopardy to get away with murder would not move to vacate her conviction. And even assuming that the government could seek vacatur over the defendant's objection, the Constitution "permit[s] retrials after convictions have been set aside at the *defendant's* behest"—not the government's. *United States v. Dinitz*, 424 U.S. 600, 610 n.13 (1976) (emphasis added).

[6] This tweak explains why the government is unable to offer any response to the related hypothetical in Mr. McClam's opening brief (at 39-40): A defendant who is

Mr. McClam's opening brief also explained (at 38-39) another reason why it is necessary to recognize factually distinct homicide charges: to permit convictions for both a completed murder and an attempted murder/assault of the same victim. As the government acknowledges (at 33 n.9), murder and attempted-murder or assault of a single victim are the "same offense" for double-jeopardy purposes, and thus would merge at sentencing unless they are factually distinct.

The government responds that it is sometimes too "difficult as a factual matter to prove how many distinct assaults were committed against a victim found dead," so it will simply settle for a homicide conviction. *Id.* But the fork-in-the-road test is routinely applied in difficult cases to draw the line between different criminal acts where multiple punishments are warranted. If the Court adopted the government's position in this case, it would hamstring future prosecutions: The government could not obtain multiple sentences for an AWIK and murder of the same victim, even where the fork-in-the-road test would permit it and justice would be served.[7]

The government also cannot adequately respond to its position's implication in this very case. The government concedes (at 40), as it must, that the voluntary dismissal of a charge after jeopardy attaches is equivalent to an acquittal. Mr.

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acquitted of murder for a shooting in self-defense, but later reveals that he purposefully infected the decedent with a deadly toxin that killed him.

[7] Imagine a case where the defendant purposely tries to kill someone, but then, after a fork-in-the-road, kills the person under circumstances that a jury might find to be manslaughter. A conviction for manslaughter alone, without a separate and permissible non-merging conviction for attempted murder or AWIK, would not reflect the gravity of the defendant's actions of deliberately, and without any justification or mitigation, attempting to kill.

McClam was thus implicitly acquitted at his first trial of a charge of murdering K.B. (on Alabama Avenue). If there can be only one charge of murdering K.B., as the government contends, then that implicit acquittal on the Alabama Avenue murder, even if mistaken, bars a retrial for *any* murder of K.B. *See* Br. for Appellant 41-42 (citing *Evans v. Michigan*, 568 U.S. 313, 321 (2013)).

The government's response is that the erroneous acquittal in *Evans*, unlike the acquittal here, was for "a real (not imaginary) charged offense." Br. for Appellee 34. But the alleged murder of K.B. is a very real offense, and there is no dispute that Mr. McClam was, erroneously in the government's view, implicitly acquitted of it. The only dispute is the scope of that acquittal. Mr. McClam's position is that it covers only the murder arising from the Alabama Avenue shooting, which is distinct from the Naylor Road shooting. But the government's position, that there is only one murder charge, means the acquittal for the Alabama Avenue murder of K.B. is really an acquittal of *any* and *every* charge for the murder of K.B., including that arising from the Naylor Road shooting.

Thus, the government's claim that "there is no dispute that McClam remains charged with second-degree murder and can face retrial on that charge," Br. for Appellee 34, is true only contingently. If the Naylor Road shooting gives rise to a distinct murder charge, then Mr. McClam concedes he can be retried for that charge. But if the Court accepts the government's position that there can be only one murder charge for the death of K.B., then the result is not a retrial for murder based on both

shootings, but no retrial at all for any murder charge.[8]

The fundamental problem with the government's position can also be seen by applying it to the lesser-included offense of attempted murder. While the government disputes that there are distinct offense of *murder* of K.B., it concedes that there are genuinely distinct offenses of AWIK, and by extension *attempted* murder, of K.B. arising from each shooting. And in voluntarily abandoning the murder charge arising from the Alabama Avenue shooting, the government also abandoned the very real—and concededly distinct—lesser-included offense of attempted murder of K.B. Because that amounts to an implicit acquittal, the Double Jeopardy Clause would bar the government from retrying Mr. McClam for attempted murder of K.B. on Alabama Avenue. That much is not in dispute. But an implicit acquittal of a lesser-included offense also necessarily bars retrial of the greater offense of completed murder. *See Brown v. Ohio*, 432 U.S. 161, 168-69 (1977). So, if there is only one charge of completed murder, as the government contends, then that charge is jeopardy barred by the implicit acquittal on attempted murder. From any angle, the government's position is internally contradictory and illogical.

It is telling that when pressed to supply precedent, the government relies on

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[8] It does not matter that the jury hung on second-degree murder for the Naylor Road shooting. The double-jeopardy bar established by an *acquittal* cannot be undermined by the jury's mere failure to reach a verdict, which is a "nonevent" for double jeopardy purposes. *Yeager v. United States*, 557 U.S. 110, 120 (2009); *see also Turner v. United States*, 459 A.2d 1054, 1057 (D.C.) (double jeopardy barred retrial where jury acquitted on one second-degree murder charge but hung on a different count of second-degree murder of the same decedent), *adhered to on reh'g*, 474 A.2d 1293 (D.C. 1984).

cases involving different *means* of committing a single homicide.[9] It is certainly true that allegations of different means by which an offense was committed do not transform that offense into multiple crimes. But that is not something unique to murder—it applies to assaults as well. *See, e.g.*, *Hargrove v. United States*, 55 A.3d 852, 857-58 (D.C. 2012) (no special-unanimity instruction required where ADW encompassed three arguably separate acts that "bore the earmarks of a single continuous course of action"). And here, the government has already conceded that the Naylor Road and Alabama Avenue shootings give rise to different *offenses*—two factually distinct assaults. That precludes any claim that they are merely different means of committing a single offense.

The government identifies no case—and research reveals none—where a court held that two incidents were separate completed assaults, but merely different means of committing a single homicide. Instead, the government relies on cases where, unlike this case, courts held that there was only a single unbroken incident, not two factually distinct criminal episodes separated by a fork in the road.

In *Commonwealth v. Cyr*, 744 N.E.2d 1082 (Mass. 2001), where the defendant both stabbed and burned the decedent, the court acknowledged the general principal that "where a defendant is accused of committing a number of acts, alleged to have

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[9] The government cites *United States v. Newell*, 658 F.3d 1 (1st Cir. 2011), for the proposition that "we count murder, for instance, by counting bodies." Br. for Appellee 26 (quoting *Newell*, 658 F.3d at 24). But *Newell* dealt with how to identify separate violations of a financial-crimes statute. It did not involve homicide and therefore did not consider the situations in which multiple homicide charges are appropriate for a single death.

occurred at different times or places, each of which could support a conviction, a specific unanimity instruction is required to assure agreement as to which particular act the defendant had committed." *Id.* at 1085. But it rejected the defendant's claim that he "engaged in two distinct acts," instead finding that there was "really one transaction." *Id.* at 1086, 1087 n.7 (quoting *Thabo Meli v. Regina,* 1 All E.R. 373 (1954)). Because the stabbing and the burning were "part of the *same transaction*," *id.* at 1087 (quoting Smith & Hogan, *Criminal Law* 320 (6th ed. 1988)) (emphasis added), it made no difference which means actually caused the death. *Id. Cyr* did not reject the notion that there could be distinct homicide offenses; it simply held that the facts before it involved a single unbroken incident.

The similar hypothetical in Justice Scalia's concurrence in *Schad v. Arizona*, 501 U.S. 624 (1991), (a strangling and a burning) also involves alternative *means* of killing during one criminal episode—what Justice Scalia called different "mode[s] of commission"— rather than separate criminal acts. *Id.* at 649 (Scalia, J., concurring in part and concurring in the judgment). As *Schad* acknowledged, in the context of a murder case, at some point the "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating . . . *separate offenses*." *Id.* at 633 (plurality) (emphasis added).

Likewise, in *State v. Severson*, 215 P.3d 414 (Idaho 2009), the court referred to the acts of suffocation and poisoning as the "the specific *means*" of killing, and held that the jury need not "unanimously agree on the *means* by which Severson

killed his wife." *Id.* at 430, 432 (emphases added).[10]

In all these cases, the conclusion that there were different means rather than different offenses was not based on anything unique about murder. Had the victims in *Cyr* or *Severson* (or the hypothetical victim in the *Schad* concurrence) survived, then the logic of those opinions would apply in the exact same way: the defendant in each case could be charged with only one count of attempted murder or assault, and the jury would not need to unanimously agree on which means (stabbing, strangling, burning, etc.) constituted that one offense. Each act would be merely a different means of committing a single attempted murder/assault.

For all these reasons, the government's concession that the shootings are factually distinct *assaults* logically compels the conclusion that they are also separate homicide offenses. The double jeopardy bar, conceded for the AWIKs, must apply in equal measure.

II. THE GOVERNMENT'S CONCESSION THAT THE HOMICIDES ARE LEGALLY DISTINCT REQUIRES REVERSAL.

There is a second route to reversal. The government now concedes that a special-unanimity instruction is required for the homicide charge. Br. for Appellee 31 & n.8. It contends that this instruction is required because the homicide charges are *legally* distinct rather than *factually* distinct. *Id.* at 31-32. But even if the charges

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[10] The government cites two other cases, which also do not support its position. In *Robinson v. Commonwealth*, 325 S.W.3d 368 (Ky. 2010), the "*only* claim of error [was] that there was *insufficient evidence*" for one of two "alternative theories" of murder. *Id.* at 369-70 (emphases added). In *Tabish v. State*, 72 P.3d 584 (Nev. 2003), the court addressed whether the jury must agree "on a single theory of criminal agency." *Id.* at 597.

are distinct only legally, the government's voluntary abandonment of the Alabama Avenue homicide still precludes any retrial of that (now undisputedly) distinct offense.

As noted above (at 7), it is only "[w]hen the 'distinct incidents' amount to '*different crimes*,' [that] jury unanimity on the particular incident supporting the verdict is mandated by the Sixth Amendment." *Williams v. United States*, 981 A.2d 1224, 1229 (D.C. 2009); *accord Hagood v. United States*, 93 A.3d 210, 217 (D.C. 2014). *Scarborough* held that incidents may be either factually *or legally* separate. *See* 522 A.2d at 873. Either way, the net result is the same.

The entire point of the en banc decision in *Scarborough* was to erase the distinction between factual and legal separability. Before *Scarborough*, this Court held that a count could contain "two separable and distinct offenses" only if they were *factually* distinct, i.e., "separated by time or by intervening incidents." *Barkley v. United States*, 455 A.2d 412, 415 (D.C.1983). Judge Ferren partially dissented in *Barkley*, reasoning that the distinction between factually separate and "legally . . . 'separate incidents'"—incidents that are "conceptually severable" due to "separate defenses"—was "a *distinction without a difference*." *Barkley*, 455 A.2d at 417 (Ferren, J., concurring in part and dissenting in part) (emphasis added).

In *Scarborough*, the en banc Court, in an opinion by Judge Ferren, overruled *Barkley* and adopted the rationale of Judge Ferren's *Barkley* dissent. *See Scarborough*, 522 A.2d at 873. A special-unanimity instruction is constitutionally required "whenever there is evidence tending to show *legally* separate incidents (as in *Barkley* and in this case), not just factually separate incidents." *Id.* (emphasis in

original). There is "no principled basis" to treat factual and legal separability differently. *Id.* (citing *Barkley*, 455 A.2d at 417 (Ferren, J.)). In either case, a single count encompasses multiple acts, each of which is really "a separately cognizable incident." *Id.*

As this Court later explained, "*Scarborough*'s requirement of a special unanimity instruction reflects the generally accepted view of what the Sixth Amendment requires when proof of two or more *separate offenses* is offered to establish a defendant's guilt of a single charge." *Williams*, 981 A.2d at 1228 (emphasis added). When the Court speaks of either factually separate or legally separate incidents requiring a special-unanimity instruction, it is necessarily speaking of conceptually distinct offenses.

The government cites *Brown v. United States*, 542 A.2d 1231 (D.C. 1988), for the proposition that a special-unanimity instruction may be required, even in the absence of a duplicitous count, where a defendant "is charged with committing a single crime by more than one factual *means*, and different legal defenses are implicated for each of those means." Br. for Appellee 31-32 (emphasis added). But the government's assertion is contrary to binding precedent: as noted above, a special-unanimity instruction should be given only "when 'distinct incidents go from being different *means* of committing the same crime[] to being *different crimes*.'" *Hagood*, 93 A.3d at 217 (alteration in original) (citation omitted); *see also Williams*, 981 A.2d at 1228-29. By necessity then, a holding that a special-unanimity instruction is constitutionally required is a holding that there are not just different "means" at issue, but different offenses. And *Scarborough* holds that those different

offenses may exist due to either factual or legal distinctions. *See* 522 A.2d at 873.

Brown did not, and could not, hold otherwise. *Brown* involved a single count charging possession of marijuana in a cigarette and tinfoil packets. Because the defendant claimed the cigarette contained no marijuana (but belonged to him) and the tinfoil packets were not his, the Court held that there were separate defenses giving rise to *legally* distinct incidents for which a special-unanimity instruction was constitutionally required. *See Brown*, 542 A.2d at 1233-34.

That sufficed to resolve the case. But *Brown* went on to say that "the government could not have charged Brown with more than one count of possession of marijuana because the simultaneous possession of the marijuana in the cigarette and the marijuana in the tinfoil packets constitutes only a single criminal offense." *Id.* at 1234. And it asserted that, because there was only one offense, the jury would not have needed to agree that Brown possessed the marijuana in the cigarette or tinfoil packets (or both) in a hypothetical case *without* distinct defenses. *Id.*

Those statements, commenting on hypothetical situations not before the Court, were classic dicta. Brown *was* charged with only one possession count (not two), and a special-unanimity instruction *was* required because there *were* distinct defenses. These additional statements did not speak to any live issue before the Court.

Not only were these statements dicta, they were based on a misreading of precedent.[11] Such dicta cannot undermine the clear *holdings* of this Court in

[11] As *Brown* acknowledged, even before *Scarborough* recognized the concept of a legally separate offense, this Court "held that a special unanimity instruction *is*

Scarborough, *Williams*, and *Hagood*, that a special-unanimity instruction is required only "when proof of two or more *separate offenses* is offered to establish a defendant's guilt of a single charge." *Williams*, 981 A.2d at 1228 (emphasis added).

But ultimately, the government's acknowledgment that there were legally separate offenses (based on different defenses), really extends to the shootings' *factual* separateness. As the government argued below, R. 2526 (Gov. Mem. Re Unanimity Instr. p. 8), the defense for both shootings is nominally the same—defense of self and others. The reason why these defenses are different is because of the *factual* separation of the two shootings. It is only because of the break in time and place between the two shootings that a jury could rationally find self-defense/defense of others satisfied for one shooting but not the other. The *legal* separateness of these offenses arises from their *factual* separateness.

Moreover, as noted above, unlike in *Brown* where any separate convictions

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required when a defendant is charged in a single count with possessing different batches of a single controlled substance at the same time." *Brown*, 542 A.2d at 1233 (citing *Davis v. United States*, 448 A.2d 242, 244 (D.C. 1982), and *Hack v. United States*, 445 A.2d 634, 641 (D.C. 1982)) (emphasis added); *see also id.* at 1235 n.4 ("Both *Hack* and *Davis* hold that where two batches of drugs are involved in one count, it is error not to instruct the jury that they must be unanimous as to one batch or the other (or both)." (citations omitted)). While *Brown* relied on *Briscoe v. United States*, 528 A.2d 1243 (D.C. 1987), to support its dicta, *Briscoe* did not overrule *Hack* or *Davis*. *Briscoe* held only that where a defendant *is* charged with two possession counts for separate batches of a drug, the convictions merge because the legislature did not intend multiple punishments. *See id.* at 1246. *Briscoe* did *not*, however, hold that it was error either to charge two possession counts or to require the jury to be unanimous on each count. *Briscoe* could not have overruled the earlier holdings of *Hack* and *Davis* that the separate batches are separate criminal incidents for which a special-unanimity instruction is constitutionally required. *See Thomas v. United States*, 731 A.2d 415, 420 n.6 (D.C. 1999).

would merge, the government could have charged Mr. McClam with murder for the Naylor Road shooting and the Alabama Avenue shooting in separate counts and obtained non-merging convictions on *both*: completed murder on one and the lesser-included offense of attempted murder (or AWIK) on the other. The two homicide charges in this case thus are, and would have remained at all times, distinct offenses. The voluntary dismissal of one distinct homicide offense bars any retrial of that homicide charge under the Double Jeopardy Clause.[12]

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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[12] Because Mr. McClam's claim on appeal is that retrial is barred for distinct offenses—not a claim that the government is precluded from asserting particular theories or arguments—there is no need to respond to the government's arguments in section I.C. of its brief about the appealability of collateral-estoppel rulings.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply 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 18th day of October, 2024.

/s Daniel Gonen
Daniel Gonen