BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-362

TONY MCCLAM, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2019-CF1-9634

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ISSUES PRESENTED

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II. Whether, as the government concedes, this Court should vacate the portion of the trial court's double-jeopardy ruling related to McClam's assault-with-intent-to-kill (AWIK) charges, where the government has disclaimed any further challenge to the trial court's ruling from the first trial that each AWIK charge encompassed two distinct assaults, and the government agrees that it will be limited at McClam's retrial to prosecuting the AWIK charges based on McClam's second set of gunshots.

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COUNTERSTATEMENT OF THE CASE

By indictment filed on December 9, 2019, appellant Tony McClam was charged with one count of first-degree murder while armed for the killing of K.B., a minor; two counts of assault with intent to kill (AWIK) while armed, against victims Kamaal Porter-Greene and Rodre Holloway; three counts of possession of a firearm during the commission of a crime of violence (PFCOV); and one count of carrying a pistol without a license

(CPWL) (Record on Appeal (R.) 191-93 (Indictment)).[1] On December 6, 2021, a jury trial commenced before the Honorable Neal Kravitz (12/6/21 Tr. 33). On January 12, 2022, the jury found McClam not guilty of first-degree murder and guilty of CPWL (R.2631-35 (Verdict Form)). The jury hung on the remaining charges, including second-degree murder while armed as a lesser-included offense, and the trial court declared a mistrial as to those counts (*id.*; 1/12/22 Tr. 36-41).

On November 10, 2023, McClam filed a motion asserting, among other claims, that it would violate the Double Jeopardy Clause for his retrial to include certain "charges" he contended the government had "voluntarily abandoned" in the first trial (R.4176-91 (Def. Opp.)). On November 14, 2023, the government filed an opposition (R.4197-207 (Gov. Reply)). At a hearing on March 15, 2024, the Honorable Michael O'Keefe denied McClam's motion, ruling that double jeopardy did not preclude the government from arguing, at McClam's retrial, that "the homicide occurred on Alabama Avenue and the AWIK offense[s] occurred

[1] All page references to the record are to the PDF page numbers.

[o]n Naylor Road" (3/15/24 Tr. 14-15). On April 10, 2024, McClam timely appealed (R.4469-70 (Notice)).

On April 22, 2024, the government filed an emergency motion in this Court to dismiss McClam's interlocutory appeal for lack of jurisdiction, contending that McClam sought only to limit the arguments and theories the government could rely upon at retrial, and interlocutory jurisdiction for a double-jeopardy claim exists only where the claim, if successful, would require the dismissal of a charged count. See Mot. to Dismiss (4/22/24). On May 1, 2024, McClam filed an opposition, arguing that the indicted murder and AWIK charges were both duplicitous, and that he sought the dismissal of "distinct offenses" encompassed by each of those charges. See Opp. (5/1/24). On May 3, 2024, the government filed a reply. See Reply (5/3/24). On May 8, 2024, this Court denied the government's motion to dismiss. See Order (5/8/24). The Court refrained from deciding at that stage whether the collateral-order exception provided jurisdiction for McClam's interlocutory claims, concluding that full briefing was warranted because "the jurisdictional question is closely related to the merits" of McClam's duplicity-based double-jeopardy claims. *Id.* at 1.

The Trial

The Government's Evidence

The charges in this case all relate to events on July 18, 2019, when Tony McClam fired six shots from a handgun at a car occupied by three people: an adult driver (Kamaal Porter-Greene), an adult front-seat passenger (Rodre Holloway), and an 11-year-old boy (K.B.) in the back seat (12/6/21 Tr. 47-59). Neither of the adults were hit by McClam's gunfire (12/13/21 Tr. 188-89). K.B., however, was struck and killed by one of the bullets (12/15/21 Tr. 92-93).

In the days before the shooting, McClam's stepson and two stepsons of Raymond Taylor, McClam's neighbor, were involved in multiple fights with a group of children from their neighborhood (12/8/21 Tr. 64-84). McClam's stepson told his mother (McClam's girlfriend)[2] and McClam that the other children had "bull[ied]" him and Taylor's stepsons (*id.*). McClam and his girlfriend confronted the other group of children about these incidents on July 16, 2019, and July 17, 2019 (*id.*).

[2] McClam referred to his girlfriend's son as his "stepson" (12/6/21 Tr. 48; 12/16/21 Tr. 28). For consistency and clarity, we use the same term.

On July 18, 2019, McClam, his stepson, Taylor, and Taylor's stepsons confronted the bullying children near a BP gas station bordered by Naylor Road, Good Hope Road, and Alabama Avenue in Southeast D.C. (1/4/22 Tr. 76-79).[3] The bullying children scattered (*id.*). McClam's group, including both adults and the three children, walked to the parking lot of a nearby McDonald's on Good Hope Road, where they encountered K.B. and his brother (12/13/21 Tr. 151-54). Although K.B. was not part of the group of bullying children, the encounter grew hostile, and one or more members of McClam's group punched K.B. (12/8/21 Tr. 76, 84; 12/13/21 Tr. 154). K.B. ran away from McClam's group on Naylor Road (12/13/21 Tr. 157).

The confrontation in the McDonald's parking lot was witnessed by Kamaal Porter-Greene as he drove by in a Nissan Sentra, with his friend Rodre Holloway in the front passenger seat (12/13/21 Tr. 147, 151-54). Porter-Greene and Holloway were on their way to the BP gas station to buy cigarettes (*id.* at 147). Although Porter-Greene did not recognize K.B.

[3] The gas station was bordered to the west by Naylor Road, to the north by Good Hope Road, and to the east by Alabama Avenue (R.2686 (trial exhibit map)). In 2023, Good Hope Road was renamed Marion Barry Avenue. *See* https://www.washingtonpost.com/dc-md-va/2023/11/18/marion-barry-good-hope-dc-anacostia/ (last accessed Sept. 17, 2024).

or anyone in McClam's group, he was concerned for K.B.'s well-being and pulled up beside him on Naylor Road (*id*. at 156-58). When Porter-Greene asked out the car window if K.B. was okay, K.B. ran over and asked if Porter-Greene could give him a ride home (*id*. at 160-62). Porter-Greene agreed, and K.B. got into the back seat of the Sentra (*id*. at 162-63).

Porter-Greene drove the Sentra north on Naylor Road, toward the intersection with Good Hope Road (12/13/21 Tr. 171). When he neared the BP gas station, Porter-Greene paused in the road to discuss with Holloway whether they should still buy cigarettes (*id*.). Meanwhile, McClam, Taylor, and their stepsons walked as a group from the McDonald's toward Naylor Road, where they converged with the Sentra (*id*. at 175-76). Porter-Greene drove away from the group, and McClam raised a handgun and fired two shots at the back of the car (12/6/21 Tr. 78; 12/9/21 Tr. 183; 12/13/21 Tr. 177-78).

When Porter-Greene realized that someone was shooting at the car, he quickly turned right onto Good Hope Road, sped to the next intersection, then turned right again onto Alabama Avenue, effectively circling the BP gas station (12/13/21 Tr. 178-81). Meanwhile, after McClam fired the first two shots, he ran through the gas station toward

Alabama Avenue, still holding the gun, where he converged again with the path of the Sentra (1/4/22 Tr. 82-83). As the Sentra drove past McClam on Alabama Avenue, then turned left into a shopping area, McClam fired four more shots at the car (12/9/21 Tr. 190-91; 12/13/21 Tr. 185).[4]

Two of the six bullets McClam fired hit the rear of the Sentra and penetrated through the back seat (12/14/21 Tr. 142, 151-52). One of the bullets struck K.B. in the back and exited through his chest (12/15/21 Tr. 82). When Porter-Greene and Holloway realized that K.B. had been hit by a bullet, they sped to a firehouse in Capitol Heights, Maryland, to seek medical assistance (12/13/21 Tr. 188-92). Holloway called 9-1-1 while Porter-Greene drove (*id.* at 189). Although K.B. received medical treatment at the firehouse and later a hospital, he died from the gunshot wound later that day (12/15/21 Tr. 77-79, 92-93).

The Defense Evidence

McClam did not contest at trial that he fired six shots at the Sentra, nor that one of those shots struck and killed K.B. (12/6/21 Tr. 59-72;

[4] Video evidence admitted at trial showed that McClam's second set of shots occurred about 23 seconds after the first set of shots, at a distance of about 168 feet away (R.4010 (Gov. Mot. p. 4)).

1/4/22 Tr. 97-104; 1/5/22 Tr. 12-80). McClam instead argued that his actions were justified by self-defense and the defense of others (*id.*).

McClam testified that one of Taylor's stepsons mistook K.B. and K.B.'s brother as being part of the group of children who engaged in the bullying incidents (12/16/21 Tr. 58). McClam acknowledged that during his group's confrontation with K.B. in the McDonald's parking lot, one of Taylor's stepsons punched K.B. in the face, causing K.B. and his brother to run in different directions (*id.* at 64). According to McClam, he did not see where K.B. went, and he was not aware that K.B. had gotten into the Sentra driven by Porter-Greene (*id.* at 27, 65).

McClam testified that he, Taylor, and their stepsons were heading home when they walked from the McDonald's to Naylor Road (12/16/21 Tr. 66). According to McClam, the Sentra stopped in the road, blocking their path, and the driver yelled something like, "[Y]ou all like to put you all hands on F'ing kids or you all like to put you all hand[s] on my nephew" (*id.* at 68). McClam denied putting his hands on any children, and Taylor said, "[T]hey shouldn't have put their hand[s] on our F'ing kids" (*id.* at 69-70). The driver "started reaching down," and McClam "thought he was about to grab a gun" (*id.* at 70). McClam reacted by drawing his own gun

and firing at the Sentra as it drove away from his group (*id*. at 72). McClam denied that he saw K.B. in the back seat (*id*. at 77).[5]

McClam further testified that he was continuing to head home when he ran through the BP gas station toward Alabama Avenue (12/16/21 Tr. 86). McClam claimed that he fired the second set of four shots at the Sentra because, when he saw the car on Alabama Avenue, he believed the driver planned to run into him and his group, or the front-seat passenger planned to shoot at them through the car's window (*id*. at 26-27, 87-88). According to McClam, he remained unaware that K.B. was inside the Sentra when he fired the second set of shots (*id*. at 27).

The Special Unanimity Instructions

On December 16, 2021, while the defense case was ongoing, defense counsel requested that the jury instructions include a special unanimity instruction about the location of the gunshot that caused K.B.'s fatal injury (12/16/21 Tr. 212-17). On December 17, 2021, defense counsel argued that

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[5] Porter-Greene testified that he did not exchange words with anyone in McClam's group before McClam started shooting, and neither he nor Holloway had any weapons in the Sentra (12/13/21 Tr. 177, 210). The crime-scene forensic scientist who processed the Sentra did not find any evidence related to firearms, other than the two bullets fired from McClam's handgun (12/14/21 Tr. 121-52).

McClam's two sets of shots were separate incidents, and "the jury has to agree to what killed [K.B.]. It is like if someone had shot a person and then later poisoned them, they are separate offenses." (12/17/21 Tr. 23, 27-28.) The defense further argued that, although the indictment did not distinguish between the two sets of shots, the government's filings and arguments suggested the grand jury had indicted McClam based solely on the Naylor Road shots, and a verdict based on the Alabama Avenue shots would be an impermissible constructive amendment (*id.* at 4-6, 18, 42). In the alternative, defense counsel argued that if the indictment encompassed both sets of shots, the charges were duplicitous, and the government had "elected" to proceed only on the Naylor Road shots through its pretrial filings and trial arguments (*id.* at 5-6).

The government responded that the indicted charges encompassed both sets of shots, and the government's factual theory that one of the Naylor Road shots struck and killed K.B. did not require a special unanimity instruction as to the location of the fatal shot (12/17/21 Tr. 6-7, 19-20). To the extent that any "unanimity problem" was presented by McClam's claim that he acted in self-defense and the defense of others, the government suggested that "as long as [the jury is] satisfied that at neither

point was there self-defense . . . [and] at both points the defendant was acting with the right state of mind[,] that should be enough" (*id.* at 37).

On December 19, 2021, McClam filed a brief elaborating on the arguments he had presented in court and setting forth a specific requested unanimity instruction (R.2499-519 (Def. Mem.)). McClam argued that the two sets of shots were "factually and legally distinct" incidents (R.2514-17 (pp. 16-19)). The government filed a brief on the same day, arguing that the two sets of shots comprised only one "incident" because all six shots were part of a continuing course of conduct (R.2519-28 (Gov. Mem.)).

On December 20, 2021, Judge Kravitz ruled that the two sets of shots were "factually separate incidents" because McClam "was on his way home" after the Naylor Road shots, and the four later shots were "motivated by a fresh impulse" when McClam saw the Sentra driving down Alabama Avenue (12/20/21 Tr. 89-90). The court described the issue as "a very close call" (*id.* at 90). Judge Kravitz declined to rule whether the two "incidents" were also "legally separate," but he noted that it was possible based on the "different nuances of the defenses of self-defense and defense of another in the two locations" (*id.*).

At the same hearing, Judge Kravitz expressed concern about the defense's position regarding the consequence of the shots comprising "separate incidents" (12/20/21 Tr. 18-19). The court noted that "all 12 jurors will almost certainly conclude beyond a reasonable doubt that Mr. McClam fired the fatal shot in one of those two locations," but "they all may say that that they can't find beyond a reasonable doubt that it happened in any one location" (*id*. at 18). Judge Kravitz stated that it "doesn't feel correct to me" that such an outcome would "require[ ] an acquittal" on McClam's murder charge, which the court viewed as "a bizarre result" (*id.* at 18-20).

Judge Kravitz nevertheless ruled that he would give special unanimity instructions requiring the jury to agree "that it was the shooting on Naylor Road or the shooting on Alabama Avenue" for every count except CPWL (12/20/21 Tr. 91-92). After this ruling, government counsel stated that he "intend[ed] to argue that the AWIKs happened on Alabama Avenue in the second group of shots" because he believed that set of shots provided a stronger argument for "concurrent intent" (*id*. at 107). Government counsel further indicated that, as he "always intended," he would argue that the fatal shot was "one of the two fired on Naylor Road" (*id*. at 115-16).

Although the government had planned to argue in the alternative that the fatal shot may have been fired on Alabama Avenue, government counsel indicated that he longer planned to do so because of the court's special unanimity instructions (12/20/21 Tr. 115-16). Government counsel recognized that he would be "permitted" to make such an alternative argument, but the jury would still "all have to agree" about the location of the fatal shot in order to convict on the murder charge (*id*. at 116-17). Near the end of the hearing, Judge Kravitz noted that a duplicitous indictment could be remedied by either a special unanimity instruction or an election by the government (*id*. at 124-25). The court understood that "in response to my unanimity decision or my decision that this is a duplicitous indictment," the government had "ma[d]e the election . . . and [would] argue that the murder happened on Naylor Road and that the AWIKs happened on Alabama Avenue" (*id*.).

On December 22, 2021, the court addressed McClam's claim that any verdict based on the Alabama Avenue shots would be an impermissible constructive amendment to the indictment (12/22/21 Tr. 3-15). Government counsel indicated he would try to obtain transcripts of the grand-jury instructions for the court (*id*. at 16-17). At the same hearing, government

counsel clarified that he had not yet "precluded the possibility" of making an alternative argument that the fatal shot may have been fired on Alabama Avenue (*id.* at 14). Judge Kravitz confirmed that such an argument would be "permissible" under his earlier ruling, but he expressed concern about its implications for the constructive-amendment issue, which remained unresolved at that time (*id.* at 15).

When the trial resumed on January 3, 2022, after a break caused by the defendant falling ill from COVID-19, the government had been unable to procure transcripts of the grand-jury instructions (1/3/22 Tr. 16-21). While addressing the constructive-amendment issue, government counsel reiterated that he wanted to "reserve [t]he possibility for [r]ebuttal" that the fatal shot may have happened on Alabama Avenue (*id.* at 23-24). When the court rejected the government's argument that McClam had waived his constructive-amendment claim, however, government counsel revised that position and indicated he would not make that alternative argument (*id.* at 26-28). Judge Kravitz postponed a final ruling on the constructive-amendment claim until after the verdict (*id.* at 29-30).

On January 4, 2022, the court delivered its final instructions to the jury (1/4/22 Tr. 31-73). With respect to McClam's murder charge, the

court instructed that "all 12 of you must find beyond a reasonable doubt . . . that Mr. McClam fired the fatal shot on Naylor Road" (*id*. at 58). With respect to each AWIK charge, the court instructed that "all 12 of you must find beyond a reasonable doubt . . . that Mr. McClam committed the assault on or very close to Alabama Avenue" (*id*. at 62).

Proceedings Pending McClam's Retrial

On January 12, 2022, the jury found McClam not guilty of first-degree murder and guilty of CPWL (R.2631-35 (Verdict Form)). The jury hung on the remaining charges, including second-degree murder while armed as a lesser-included offense, and Judge Kravitz declared a mistrial as to those counts (*id*.; 1/12/22 Tr. 36-41). On March 1, 2023, the case was reassigned from Judge Kravitz to Judge O'Keefe (R.100 (Docket p. 100)).

On September 5, 2023, the government filed a motion seeking reconsideration of Judge Kravitz's ruling requiring a special unanimity instruction for the location of the fatal gunshot (R.4007-25 (Gov. Mot.)). The government indicated it did not seek reconsideration of Judge Kravitz's rulings as to the AWIK charges (R.4007, R.4017, R.4024 (pp. 1, 11, 18)). The government argued that the "very nature" of murder meant there was only one murder "incident" in this case (R.4017-24 (pp. 11-18)). It was thus

unnecessary for the jury to unanimously agree on the specific factual means by which K.B. was killed, so long as there was unanimity on all elements of the murder charge, including "disproving the defenses" (*id.*).

On November 10, 2023, McClam filed an opposition and a cross-motion to preclude retrial on certain "charges" based on double jeopardy (R.4176-91 (Def. Opp.)). McClam argued that the government could no longer prosecute him for murder based on the Alabama Avenue shots or AWIK based on the Naylor Road shots because the government had "voluntarily abandoned" those "charges" at the first trial (R.4176 (p. 1)). McClam also reasserted his constructive-amendment claim (R.4189-90 (pp. 14-15)). On November 14, 2023, the government filed a reply and opposition to McClam's cross-motion (R.4197-207 (Gov. Reply)).

At a hearing on November 15, 2023, the government argued that Judge Kravitz erred by ruling that even if the jury unanimously found "the government had disproved self-defense, [and] disproved defense of others, wherever the fatal shot was fired," and also "had proved all the other elements" of the murder charge, the jury would have to acquit "if they weren't unanimous as to where the fatal shot was fired" (11/15/23 Tr. 36). Judge O'Keefe agreed "[t]hat doesn't make any sense" because "only one

bullet hit[ ] the victim," and "[t]here's only one homicide" (*id.* at 36, 46). The court added, "I don't know why the government should be compelled to pick which of the six bullets . . . kill[ed] the decedent, when they don't know[,] [a]nd there's no way of knowing" (*id.* at 49).

In response to the defense's argument that different factors affected the analysis of self-defense and the defense of others on Naylor Road and Alabama Avenue, Judge O'Keefe proposed that the jury "would need to find there was no right to self-defense in both [locations], if they don't know where the shot took place" (11/15/23 Tr. 11, 30). Although the government initially gave conflicting responses to this proposal, it ultimately agreed it was an appropriate solution (*id.* at 18-19, 30). Government counsel also expressly disclaimed any further challenge to Judge Kravitz's ruling that each AWIK charge encompassed two distinct assaults and "conceded" that this duplicity required an "election" by the government (*id.* at 29-30).

Judge O'Keefe ruled on the parties' respective motions at a hearing on March 15, 2024 (3/15/24 Tr. 3-17). The court denied McClam's double-jeopardy motion, concluding that the homicide charge was not duplicitous, and that double jeopardy "would not bar the government from arguing the fatal shot occurred on Alabama Avenue . . . [and] the AWIKs occurred on

Naylor Road" (*id.* at 14-15). The court read a proposed special unanimity instruction for McClam's murder charge, which would allow the jury to find McClam guilty if all other elements had been proved and (i) the jury unanimously found the fatal bullet was fired on either Naylor Road or Alabama Avenue and McClam had not acted in self-defense or the defense of others at the corresponding location, or (ii) if the jury was unable to determine which bullet caused the fatal injury, but the jurors unanimously agreed that McClam was not acting in self-defense or the defense of others at either location (*id.* at 7-8). Judge O'Keefe noted that this was merely a "draft" instruction, since the final instructions would be finalized "when the evidence closes" and would depend on the evidence and theories presented at trial (*id.* at 4-5). Judge O'Keefe also explained that he had reviewed the transcripts of the grand-jury instructions that had been unavailable during McClam's first trial, and, on that basis, he denied McClam's constructive-amendment claim (*id.* at 16-17).

SUMMARY OF ARGUMENT

McClam's claim challenging the trial court's double-jeopardy ruling as to his murder charge is not subject to interlocutory review because it would not result in the dismissal of any charged offense. McClam is

charged with only one murder, based upon his killing of K.B. by inflicting a fatal gunshot wound with one of the six bullets he fired at the Nissan Sentra on July 18, 2019. McClam's contention that he is charged with two distinct murders of K.B. is legally erroneous and defies common sense. As this Court and many others have recognized, the killing of one person constitutes only one murder charge, even where that charge is based on multiple factual theories as to how the victim was killed.

To the extent McClam maintains that the erroneous rulings at his first trial, and the government's resulting strategic decisions, have some preclusive effect on the factual theories and arguments the government can present at his retrial, his claim sounds in collateral estoppel. Although collateral-estoppel claims are rooted in the Double Jeopardy Clause, they do not give rise to jurisdiction for an interlocutory appeal when they would only affect the course of the trial and would not bar the ordeal of retrial for a charged offense. Since it is undisputed that McClam can face retrial on his charge of second-degree murder, this Court lacks jurisdiction to address his claim at this stage.

Finally, we concede that this Court should vacate the portion of the trial court's ruling related to McClam's AWIK charges. In the trial-court

proceedings pending retrial, the government expressly disclaimed any further challenge to Judge Kravitz's ruling that each AWIK charge encompassed two distinct assaults and conceded that an election would be needed to cure this duplicity. Interlocutory jurisdiction thus exists as to this aspect of McClam's appeal. Furthermore, we concede that the government can be understood to have voluntarily abandoned the AWIK charges based on the Naylor Road shots at McClam's first trial after jeopardy attached, and we agree that the government will be limited at McClam's retrial to prosecuting the AWIK charges based on the second set of shots.

ARGUMENT

I. McClam's Claim Related to His Murder Charge Is Not Subject to Interlocutory Review Because It Would Not Result in the Dismissal of Any Charged Offense.

A. Standard of Review and Legal Principles

1. The Double Jeopardy Clause

The denial of a motion to dismiss based on double jeopardy is reviewed de novo. *See Lee-Thomas v. United States*, 921 A.2d 773, 775 (D.C. 2007).

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V. This Clause "prohibits a second prosecution for a single crime and protects against multiple punishments for the same offense." *Chew v. United States*, 314 A.3d 80, 88 (D.C. 2024) (cleaned up). There are exceptions to this prohibition when the trial court declares a mistrial in the first prosecution. *See Davidson v. United States*, 48 A.3d 194, 200 (D.C. 2012). The "classic example" of when a retrial is permitted is "a mistrial because the jury is unable to agree" on a verdict. *Id.* (cleaned up).

2. Interlocutory Jurisdiction

Generally, "[t]his [C]ourt's jurisdiction is limited to appeals from 'final orders and judgments of the Superior Court.'" *Meyers v. United States*, 730 A.2d 155, 157 (D.C. 1999) (quoting D.C. Code § 11-721(a)(1)). The final-order rule is "particularly important in the criminal context," *id.*, because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law," *Abney v. United States,* 431 U.S. 651, 657 (1977) (cleaned up). Thus, "exceptions to the final judgment rule in criminal cases are rare." *Flanagan v. United States*, 465 U.S. 259, 270 (1984).

The collateral-order doctrine is a "narrow exception" that permits interlocutory appeals of orders that "fully dispose of a disputed issue which is separate from the merits of the action and involves an important right which will be irretrievably lost unless an immediate appeal is allowed." *Meyers*, 730 A.2d at 157 (cleaned up). This exception is applied "with the utmost strictness" in criminal cases. *Flanagan*, 465 U.S. at 265. *Cf. Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("[T]he 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered[.]").

In *Abney,* the Supreme Court held that an interlocutory appeal from the denial of a pretrial motion to dismiss an indictment on double-jeopardy grounds qualified for the narrow collateral-order exception. 431 U.S. at 659. The Court explained that the protections of the Double Jeopardy Clause would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double-jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. *Id.* at 661-62. Thus, "the

rights conferred . . . by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id*. at 660.

In light of the purpose of *Abney* appeals, interlocutory jurisdiction for double-jeopardy claims is limited to cases where the "claim, if successful, would require dismissal of the indictment as a whole, or, at a minimum, dismissal of any single count." *United States v. Wright*, 776 F.3d 134, 142 (3d Cir. 2015) (collecting cases and observing that no federal court of appeals or federal district court "appear[s] to have taken a contrary view"). By contrast, when a defendant claims the government is precluded by double jeopardy from "the introduction of any given argument or piece of evidence" at retrial, the denial of such a claim is not subject to interlocutory review. *United States v. Auzenne*, 30 F.4th 458, 464 (5th Cir. 2022). As this Court has explained, "where a conviction of the charged offense is still possible even if the defendant succeeds on the collateral estoppel claim, collateral estoppel is not grounds for an immediate appeal." *Jones v. United States*, 669 A.2d 724, 729 (D.C. 1995).

B. McClam Is Charged with Only One Murder.

McClam is charged with only one murder, based upon his killing of K.B. by inflicting a fatal gunshot wound with one of the six bullets he fired at the Nissan Sentra on July 18, 2019. Since the jury at McClam's first trial hung on the charge of second-degree murder while armed, it is undisputed that McClam can face retrial on that charge. *See Davidson*, 48 A.3d at 200. This alone defeats interlocutory jurisdiction for McClam's instant appellate claim about his murder charge. *See Jones*, 669 A.2d at 729.

McClam attempts to escape this jurisdictional limitation by arguing that he is charged with *two* distinct murders: one murder of K.B. for the shots he fired on Naylor Road and a separate murder of K.B. for the shots he fired on Alabama Avenue. Not only is this contention legally erroneous, as discussed below, it defies common sense. *See Womack v. United States*, 673 A.2d 603, 614 (D.C. 1996) ("Black robes are not supposed to eviscerate our common sense."). As Judge O'Keefe recognized in the Superior Court proceedings, regardless of which bullet struck and killed K.B., "[t]here's only one homicide" in this case because only one victim was killed (11/15/23 Tr. 46, 49). "[T]he killing of one person is but one offense of [ ] murder." *Byrd*

v. United States, 500 A.2d 1376, 1377 (D.C. 1985), *analysis adopted by Byrd v. United States*, 510 A.2d 1035, 1036 (D.C. 1985) (en banc).

McClam's dispute with this seemingly obvious principle rests on his flawed duplicity analysis. An indictment is impermissibly duplicitous when it "combines two or more distinct crimes into one count." *United States v. Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001); *see also (James) Johnson v. United States*, 398 A.2d 354, 369 (D.C. 1979). A duplicitous indictment may be remedied either by a special unanimity instruction or an election by the government to proceed on only one of the crimes charged within the duplicitous count. *See Roberts v. United States*, 752 A.2d 583, 588 n.13 (D.C. 2000).

A count is not duplicitous, however, merely because it encompasses "the commission of any one offense in several ways." *United States v. Miller*, 471 U.S. 130, 136 (1985). *See also Barker v. United States* 373 A.2d 1215, 1219 n.5 (D.C. 1977) (finding no duplicity where "only one charge of assault [was] made in the indictment . . . although the government's evidence disclosed assault based on two separate theories"). "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified

means." *Schad v. Arizona*, 501 U.S. 624, 631 (1991) (quoting Fed. R. Crim. P. 7(c)(1)). In general, juror unanimity is not required as to the means by which a crime is committed, and "different jurors may be persuaded by different pieces of evidence" so long as "they agree upon the bottom line." *Id*. (quotation marks omitted).

Contrary to the premise of McClam's duplicity argument, there is no one-size-fits-all test (e.g., the "fork-in-the-road" test) that applies in all circumstances for all types of crimes when determining whether means are sufficiently factually or legally distinct to be considered separate and discrete crimes. Indeed, the Supreme Court has emphasized that it is "impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses." *Schad*, 501 U.S. at 643. For some types of offenses, "determining how many crimes were committed" for purposes of duplicity "is no easy matter." *United States v. Newell*, 658 F.3d 1, 23-24 (1st Cir. 2011). On the other hand, "[i]n some cases the standard for individuating crimes is obvious — we count murder, for instance, by counting bodies." *Id*. McClam's

reliance (at 31-35) on cases addressing various other types of crimes to support his duplicity claim for his murder charge is therefore misplaced.[6]

It is well-established that, given the nature of the crime of murder, one murder charge can encompass multiple means that could otherwise be charged as discrete crimes. *See Schad*, 501 U.S. at 631 (noting that the Supreme Court has "sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that death occurred through both shooting and drowning") (citing *Andersen v. United States*, 170 U.S. 481 (1898)). In an influential concurring opinion in *Schad*, Justice Scalia expounded on this principle with a vividly described hypothetical:

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[6] McClam does cite three homicide cases in a footnote (at 43 n.19). They do not, however, support his claim (at 43) that juror unanimity is required as to the "specific act" that caused a murder decedent's death in order to avoid duplicity. Two of the cited cases involved state statutes that imposed criminal liability only where one or more elements were proved in addition to the wrongful killing of another person. *See State v. Crane*, 804 P.2d 10, 17 (Wash. 1991) (where defendant was convicted under state's second-degree felony-murder law, unanimity was required as to the felony that caused the victim's death); *State v. Lotches*, 17 P.3d 1045, 1056-57 (Or. 2000) (requiring unanimity as to the "facts required by a particular subsection" of the state's "aggravated murder" statute). The third citation is to a dissenting opinion (albeit in a decision where a dissenting judge announced the ruling of the court) from a 1937 involuntary manslaughter case. *See State v. Rasmussen*, 68 P.2d 176, 182-83 (Utah 1937).

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

Id. at 650 (Scalia, J., concurring). Although this hypothetical runs afoul of McClam's contention (at 43) that juror unanimity is required as to the "specific act" that a murder defendant committed to cause the decedent's death, Justice Scalia recognized that such a rule would lead to an "absurd" result and found it "perfectly obvious" that the proper outcome would be the defendant's conviction on a single charge of murder. *Id.*

Multiple courts have applied this reasoning to real-world murder charges involving similar or analogous facts. In *Commonwealth v. Cyr*, 433 Mass. 617 (2001), the evidence showed the defendant forced his way into the victim's home, stabbed her repeatedly with a knife, then used gasoline to set her house on fire. *See id.* at 619. The court rejected the defendant's claim that the jury should have been instructed it must unanimously agree that the defendant committed the murder either by stabbing or burning, concluding that the jurors "were not required to find unanimously that the

defendant killed the victim by a particular method." *Id*. at 620-23 (citing *Schad*, 501 U.S. at 649-50) (Scalia, J., concurring).[7]

In *State v. Severson*, 147 Idaho 694 (2009), the defendant claimed that a special unanimity instruction should have been given to require the jury to unanimously agree that he killed his wife by suffocating her or overdosing with her sleeping pills, since there was evidence to support both possibilities. *See id*. at 710. In rejecting this claim, the court recognized that "[t]he very nature of the crime of murder" affects the analysis for distinguishing between different means of committing the same crime and separate instances of discrete crimes. *Id*. at 711-12. The court explained, for

[7] Justice Scalia's *Schad* hypothetical and the facts of *Cyr* are strikingly similar to *Wint v. United States*, 285 A.3d 1270 (D.C. 2022), in which the bodies of four family members were found after their house burned down. *See id*. at 1273. Evidence showed the victims "were subjected to various forms of violence, including being beaten, stabbed, [ ] asphyxiated, [and] doused with gasoline" over the course of two days before the house was burned with them inside. *Id*. at 1274. The defendant was convicted of four counts of murder, each corresponding to one victim. *See id*. at 1273. Based on McClam's position, the jury should have been required to unanimously agree on which of the defendant's violent acts caused each victim's death in order to cure the "duplicity" arising from each charge encompassing multiple murder "incidents." In the absence of proof beyond a reasonable doubt as to which specific act caused each victim to die, an acquittal would have been required. As Justice Scalia observed in *Schad*, such a result would be "absurd." 501 U.S. at 640.

example, that where a defendant was charged with one count of improper sexual contact with a minor encompassing six different occasions, "the prosecutor could have charged the defendant for each of the six instances," and thus jury unanimity was required as to at least one specific incident. *Id*. By contrast, even though the government had presented multiple factual theories as to how Severson committed the murder, he "was charged with the single act of murdering his wife." *Id*. at 712. *See also Robinson v. Com.*, 325 S.W.3d 368, 369-72 (Ky. 2010) (finding no "unanimity violation" where defendant was convicted of murder despite conflicting evidence as to whether he killed his 23-month-old stepdaughter by fracturing her skull or giving her lethal doses of medication); *Tabish v. State*, 72 P.3d 584, 596-97 (Nev. 2003) (same, where there was conflicting evidence that the defendant caused the victim's death by suffocating him or poisoning him).

McClam's claim (at 18-19) that determining he is charged with only one murder "would permit a murder conviction even where the jury cannot unanimously agree that [he] committed any criminal act at all" is incorrect. According to McClam (at 43-44), in the absence of a duplicity ruling, he could be convicted of murder even if the jury could not unanimously agree on the location of the fatal shot and "half [the jurors]

find self-defense on Naylor Road, and the other half find self-defense on Alabama Avenue." The special unanimity instruction proposed by Judge O'Keefe, however, would preclude this outcome, since it would require the jury to agree unanimously that McClam was not acting in self-defense or the defense of others at either location if the jurors could not all agree on the location of the fatal shot (3/15/24 Tr. 7-8).[8]

McClam does not acknowledge this remedy, instead suggesting (at 46 n.21) that Judge O'Keefe's plan to use any special unanimity instruction represents an implicit acknowledgement that the murder charge is, in fact, duplicitous. McClam appears to conflate the (accurate) principle that duplicity can be cured by a special unanimity instruction with the (erroneous) notion that special unanimity instructions can be given only to cure duplicitous charges. To the contrary, unanimity instructions may be appropriate where a defendant, like McClam, is charged with committing a single crime by more than one factual means,

[8] While the government initially gave conflicting responses to this proposed special unanimity instruction, it ultimately agreed that it was appropriate (11/15/23 Tr. 18-19, 30; 3/15/24 Tr. 6). Although McClam criticizes Judge O'Keefe's proposed instruction, he does not (and cannot) suggest this Court has jurisdiction to assess a trial court's pretrial draft jury instruction on interlocutory review.

and different legal defenses are implicated for each of those means. In *Brown v. United States*, 542 A.2d 1231 (D.C. 1998), for example, this Court held that the trial court should have given a special unanimity instruction on a single charge of possession of marijuana, where the defendant asserted different defenses for his possession of a marijuana cigarette and marijuana in tin foils packets. *See id*. at 1232. This was so even in the absence of duplicity; the Court recognized that "the government could not have charged [the defendant] with more than one count of possession of marijuana" because his possession of the two different quantities was "only a single criminal offense." *Id*.

McClam's imaginative hypothetical (at 18, 40-41) about a supposed murder victim who is not truly dead, and a defendant wrongfully charged with his murder who has "license to commit murder with total immunity" after the victim reemerges, does not warrant a different result. First, no similar concerns are implicated in this case. McClam does not contest the fact that K.B. tragically died on July 18, 2019, as a direct result of being struck by one of the bullets McClam fired. Second, the principle that "[t]he killing of one person is but one offense of [ ] murder," *Byrd*, 500 A.2d at 1377, does not logically lead to the outcome that McClam proposes. In

McClam's hypothetical, the initial murder charge was erroneously based on a "killing" that never occurred. Outside the strained reasoning of a Hollywood script, the later (actual) murder of the victim could not be considered based on the same "killing," even if it involved the same victim.[9]

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[9] McClam's hypothetical arises from a unique aspect of the crime of murder, which, in all its variants, has as an essential element that the defendant caused the death of the victim. *See Fleming v. United States*, 224 A.3d 213, 220 (D.C. 2020) (en banc). A victim's death cannot occur more than once, but it is possible (however unlikely) that a jury could erroneously conclude the victim's death occurred even when it had not. *See, e.g.,* Paul S. Gillies, The Trials of Jesse and Stephen Boorn, 38-SUM Vt. B.J. 8 (2012) (describing infamous case of brothers convicted in 1819 of murdering a man who had disappeared but, after the brothers' trials, was later found alive in another state). The criminal process cannot entirely foreclose the possibility of such error. *Cf. Speiser v. Randall*, 357 U.S. 513, 525 (1958) ("There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account."). If that error were discovered, however, the logical result would not be to treat the actual subsequent killing of the victim as if it were the same "killing" prosecuted in the earlier proceeding. If the first proceeding resulted in a conviction, that conviction should be vacated or otherwise treated as a legal nullity after the victim is discovered alive.

By contrast, because the causation of death is not an element of AWIK or attempted murder, there is no limit to the number of times those crimes may be committed against the same victim. Only the final, successful attempt to kill the victim, however, would merge with the offense of murder. It may be difficult as a factual matter to prove how many distinct assaults were committed against a victim found dead, and thus it often is the case that a defendant will stand convicted of one homicide charge and not multiple AWIKs. But it does not follow that, as McClam argues (at 39), it must be possible to bring multiple separate murder charges as to the same victim in order for the law to allow multiple assault charges.

Finally, McClam's argument (at 46-50) that Judge Kravitz's erroneous duplicity ruling is binding on this Court should be rejected. Regardless of the terminology Judge Kravitz used in issuing his ruling, its effect was to limit the factual theories the government could present, and the jury could consider, with respect to McClam's single charge of murder. Therefore, unlike the cases McClam relies upon involving directed verdicts and judgments of acquittal, it was not a binding "substantive ruling" as to McClam's "guilt or innocence" on a charged offense. McClam's reliance (at 41 n.17) on *Evans v. Michigan*, 568 U.S. 313 (2013), to argue that it does not matter that the murder "charge" on which his interlocutory claim is based does "not really exist as a separate murder" is misplaced. *Evans* held that "[a] mistaken acquittal is an acquittal nonetheless" for purposes of double jeopardy, *id*. at 318, even where it is based on the trial court's erroneous imposition of an "imaginary element," *id*. at 330 (Alito, J., dissenting). In *Evans*, unlike this case, there was no question that the erroneous acquittal led to the dismissal of a real (not imaginary) charged offense; indeed, it resulted in the dismissal of the entire criminal case. Here, as discussed, there is no dispute that McClam remains charged with second-degree murder and can face retrial on that charge.

C. The Collateral-Order Doctrine Does Not Provide Jurisdiction for an Interlocutory Appeal Seeking to Limit the Arguments and Theories Permitted at a Retrial.

To the extent McClam maintains that Judge Kravitz's erroneous rulings at his first trial, and the government's resulting strategic decisions, have some preclusive effect on the factual theories and arguments the government can present to the jury at his retrial, his claim sounds in collateral estoppel. *See Auzenne*, 30 F.4th at 462 (collateral estoppel prohibits "the introduction or argumentation of facts necessarily decided in the prior proceeding"). This Court lacks jurisdiction to address such a claim on interlocutory review. Although collateral-estoppel claims are rooted in the Double Jeopardy Clause, *see id.*, they do not give rise to jurisdiction for an interlocutory appeal when they would only "affect the course of the trial" and would not "bar[ ] the ordeal of retrial" for a charged offense, *United States v. Powell*, 632 F.2d 754, 758 (9th Cir. 1980). *See also Auzenne*, 30 F.4th at 464 (when a defendant claims the government is precluded based on double jeopardy from "the introduction of any given argument or piece of evidence" at a retrial, the denial of such a claim is not subject to interlocutory review).

That is not to say that, in the event McClam is ultimately convicted at retrial of second-degree murder (or a lesser-included offense), he will have no recourse to challenge his conviction on the basis that the government relied on a factual theory he believes should have been precluded by double jeopardy. Such a claim, however, is properly addressed on direct appeal after final judgment, where "its reach and run [can] be charted with the aid of a complete record." *United States v. Mock*, 604 F.2d 336, 339 (5th Cir. 1979). *Cf. Thomas v. United States*, 79 A.3d 306 (D.C. 2013) (reviewing defendant's claim that collateral estoppel barred admittance of the evidence of an assault in his second trial only after the jury convicted at the retrial). As the Eleventh Circuit explained in *United States v. Gulledge*, 739 F.2d 582 (11th Cir. 1984):

> If [the appellant] believes that the introduction of certain evidence at his second trial will constitute double jeopardy or violate any other rights, he may press the claim in the district court and on appeal after final judgment has been entered against him. Unlike the defendant in *Abney*, [he] will undergo a second trial regardless of our ruling on his motion[.]

Id. at 586. Here, there is no dispute that, regardless of the outcome of McClam's instant claim, he will face retrial on the charge of second-degree murder for his killing of K.B. Furthermore, McClam's retrial will indisputably include the presentation of evidence relating to the shots he

fired on Naylor Road and the shots he fired on Alabama Avenue — including any facts that could support his claims of self-defense and the defense of others at both locations. In short, even if successful, McClam's instant claim could only impact the arguments and theories available to the government to prove the murder charge against him.

McClam's assertion (at 2 & n.1) that jurisdiction exists for his interlocutory claim so long as it is at least "colorable" should be accorded no weight. Notwithstanding this Court's apparent determination at the motion-to-dismiss stage that McClam's claims were "colorably meritorious," Order (5/28/24) at 1, interlocutory review is not available. A "colorable" double-jeopardy claim gives rise to interlocutory jurisdiction only if it could result in the "dismissal of the indictment as a whole, or, at a minimum, dismissal of any single count." *Wright*, 776 F.3d at 140-43; *Abney*, 431 U.S. at 662-63. In denying the government's motion to dismiss, this Court refrained from deciding whether the collateral-order exception provided jurisdiction because "the jurisdictional question is closely related to the merits." Order (5/28/24) at 1. As discussed, supra, McClam's duplicity claim is meritless with respect to his murder charge, and a conviction on that charge would still be possible even if McClam

were able to preclude the government from arguing that the fatal shot may have been fired on Alabama Avenue. *See Jones*, 669 A.2d at 729. Where a successful interlocutory appeal on a double-jeopardy claim "could only lessen and not wholly remove the possibility of conviction and lesser associated hazards of being again tried, no constitutional, as opposed to legal, right is at stake in such a claim." *United States v. Head*, 697 F.2d 1200, 1205 (4th Cir. 1982) (citation omitted).

The government, to be clear, disputes McClam's position that there is any preclusive effect from Judge Kravitz's erroneous ruling on the special unanimity instruction as to the location of the fatal shot, or the factual theories that the government chose to present (or not present) to the jury in the wake of that ruling. For all the reasons set forth above, however, McClam's claim that the government should be estopped from arguing at retrial that the fatal shot may have been fired on Alabama Avenue is not the proper subject of an interlocutory appeal. *See United States v. Ginyard*, 511 F.3d 203, 211-12 (D.C. Cir. 2008) (dismissing double-jeopardy appeal for lack of jurisdiction where appellant did "not dispute that he may be retried for the crime that is expressly charged in [the indictment]" but contended only that "the government may not retry

him on a particular theory of liability for that offense"). McClam's interlocutory appellate claim based on his murder charge should accordingly be dismissed as premature.

II. The Government Agrees That the Trial Court's Double-Jeopardy Order Related to McClam's AWIK Charges Should be Vacated.[10]

During the trial-court proceedings pending McClam's retrial, the government expressly disclaimed any further challenge to Judge Kravitz's ruling that each AWIK charge encompassed two distinct assaults and conceded that this duplicity required an election by the government

[10] We acknowledge that in our emergency motion to dismiss, which was prepared on an expedited basis, we initially argued that this portion of the trial court's ruling was also not subject to interlocutory review. See Mot. to Dismiss (4/22/24). After further review of the record and consultation with the trial prosecutors, however, we agree that this aspect of the trial court's order was erroneous, and that this Court can properly vacate this part of the trial court's ruling on McClam's interlocutory appeal.

We note that our concession that the AWIK charges are duplicitous, and that McClam's claim concerning them is thus subject to interlocutory review, does not change the jurisdictional analysis with respect to McClam's claim about his murder charge. *See Abney*, 431 U.S. at 663 (the scope of an *Abney* appeal does not extend beyond the appellant's double-jeopardy claim that satisfies the collateral-order doctrine).

(11/15/23 Tr. 29-30; R.4007, R.4017, R.4024 (Gov. Mot. pp 1, 11, 18)).[11] Accordingly, McClam's challenge to Judge O'Keefe's ruling that double jeopardy does not "bar the government from arguing . . . the AWIKs occurred on Naylor Road" (3/15/24 Tr. 14-15) implicates the dismissal of two charged offenses — i.e., one AWIK charge related to Kamaal Porter-Greene based on the Naylor Road shots and one AWIK charge related to Rodre Holloway based on the Naylor Road shots. This Court therefore has interlocutory jurisdiction to address that aspect of McClam's appeal. *See Wright*, 776 F.3d at 142. Furthermore, based on the particular facts of this case and the course of proceedings at McClam's first trial, we concede that the government can be understood to have voluntarily abandoned those two AWIK charges after jeopardy attached. We therefore agree that the government will be limited at McClam's retrial to prosecuting the AWIK charges based on the second set of shots.[12]

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[11] As discussed supra at 33 n.9, AWIK may be committed more than once against the same victim because the causation of a unique event (i.e., death) is not an element of that offense.

[12] The government reserves the right at the retrial to rely on the first set of shots in connection with the AWIK charges as evidence of uncharged conduct pursuant to *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964), and (*William) Johnson v. United States*, 683 A.2d 1087 (D.C. 1996).

CONCLUSION

WHEREFORE, the government respectfully submits that McClam's claim as to his murder charge should be dismissed for lack of interlocutory jurisdiction, and the trial court's double-jeopardy ruling as to the AWIK charges should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Daniel Gonen, Esq., Public Defender Service, dgonen@pdsdc.org, on this 17th day of September, 2024.

/s/
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