Appeal No. 18-CF-582

Regular Calendar: November 18, 2020

DISTRICT OF COLUMBIA COURT OF APPEALS

DAVON L. PEYTON,

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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I. THE TRIAL JUDGE REVERSIBLY ERRED IN GIVING INSTRUCTION 9.504 ON FORFEITURE OF SELF-DEFENSE BY PROVOCATION AND FIRST AGGRESSION.

Mr. Peyton responded to middle-of-the-night banging on his daughter's window by coming to the door with a gun in his hand. An uninvited and heavily intoxicated Mr. Harrison climbed the building steps and punched Mr. Peyton. Mr. Peyton's defense was that as he fended off blows and tried to extricate himself from Mr. Harrison's grasp, his gun accidentally discharged. In his opening brief, Mr. Peyton argued that the judge reversibly erred in giving Instruction 9.504 on forfeiture of the right to act in self-defense. The instruction that he forfeited his right to self-defense if he "deliberately put[] himself in a position where he ha[d] reason to believe his presence [would] provoke trouble"—derived from *Laney v. United States*, 294 F. 412 (D.C. 1923), to penalize those who merely negligently fail to avoid becoming the target of another's unlawful attack—is categorically inapplicable to claims of self-defense in the home. This Court has never extended this harsh outlier rule to the home, and doing so would contravene *Beard v. United States*, 158 U.S. 550 (1895), and jurisprudence recognizing the home as a sanctuary where the right to self-defense is at its apex. The judge also erred in giving the first aggressor instruction after she had found insufficient evidence of aggression.

The government contends that Mr. Peyton's claim is reviewable only for plain error, that *Laney* applies in the home, and that the first aggressor instruction was appropriate. These arguments lack merit.

A. MR. PEYTON PRESERVED HIS CLAIM.

The government's contention that Mr. Peyton's claim is reviewable only for plain error because defense counsel did not argue that a "different, and more stringent, legal standard applies to the doctrine of provocation when a defendant's conduct occurs in the home," Gov't Br. at 43, misapprehends Mr. Peyton's claim. Mr. Peyton does not quarrel with the language of the instruction delivered. Rather, just as he did below, he argues that the government's request for Instruction 9.504 should have been denied altogether because that instruction did not apply to a self-defense claim in the home. He amply preserved this claim when he argued that "[t]aking a gun in self-defense to your own door is not provocation," 2/13/18 at 163; that the instruction is about "entirely difference circumstances," such as where a defendant returns to the scene of a prior altercation with a gun, *id.*; "when someone is banging on [the person's] window" in the middle of the night, "[i]t cannot be that th[e] person answering their own door is provoking," *id.* at 166; and the facts of the case "d[id]n't fit within the instruction," *id.* at 163. "Once a claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below." *West v. United States*, 710 A.2d 866, 868 n.3 (D.C. 1998) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *Randolph v. United States*, 882 A.2d 210, 217-18 (D.C. 2005) (same). Here, counsel "fairly apprised [the judge] as to the question[] on which she was being asked to rule," *Tindle v. United States*, 778 A.2d 1077, 1082 (D.C. 2001) (citation omitted), preserving the claim.[1]

[1] Mr. Peyton's discussion on appeal of the circumstances under which someone

B. THE RULE OF *LANEY* DOES NOT APPLY BECAUSE THE SELF-DEFENSE CLAIM AROSE IN THE HOME.

While the government argues that *Laney* applies to claims of self-defense in the home, it does not cite a single case so holding. It maintains that *Beard* is not controlling; that *Laney* makes no distinction between inside and outside the home; and that prior precedents applying *Laney* to locations outside the home mandate the same rule in the home. Gov't Br. at 43-45. These arguments lack merit.

Beard is controlling and makes clear that a person (other than the initial aggressor) forfeits self-defense in the home only if he acts with a "purpose" to provoke his adversary into attacking him first. *Beard*, 158 U.S. at 558; *Laney*, 294 F. at 415 (citing *Beard* as authority on the common law of self-defense). Around the turn of the twentieth century, the Supreme Court decided a series of cases dubbed "the Self-Defense Cases," which remain "precedents for any court which must consider common law self-defense issues." David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted A Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 Am. J. Crim. L. 293, 298–99, 325 (2000). These cases were largely reversals of one federal judge whose "arbitrariness" prompted Congress to mandate direct appeal in capital cases from that one district court to the Supreme Court. *Id.* at 297-98.

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could forfeit by provocation the right to self-defense in his home—i.e., through purposeful provocation—is *argument* to explain the distinction between inside and outside the home under D.C. law. Below, there was no reason for the defense to propose alternative language to the instruction the government sought because there was no factual predicate for an intent-based provocation instruction. *See* Appellant's Br. at 44 n.29; 2/13/18 at 164. If the government believed there was, *it*, not Mr. Peyton, should have sought proper instruction.

These Supreme Court rulings are binding precedent on the common law of self-defense in the District of Columbia. Although the Self-Defense Cases arose from murders in Indian country within the Oklahoma territory, *id.* at 296, the crime of murder in both Indian country and the District of Columbia was governed by the same federal law. *See* Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 112, 113 (codified as amended at Rev. Stat. § 5339 (2d ed. 1873-74)); *see also* Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733 (codified as amended at Rev. Stat. § 2145) (federal crimes apply to Indian country); *Donnelly v. United States*, 228 U.S. 243, 254 (1913) (Rev. Stat. § 5339 governed murder in Indian country); *Johnson v. United States*, 225 U.S. 405, 412 (1912) (§ 5339 governed murder in the District of Columbia before the 1901 Code). Thus, in construing the scope of the common-law of self-defense as a defense to the federal crime of murder, the Supreme Court was necessarily deciding the common-law of self-defense in the District of Columbia under the identical statute. That common law was incorporated into the contemporaneous 1901 D.C. Criminal Code. *See Parker v. United States*, 155 A.3d 835, 839 (D.C. 2017). The 1901 Code expressly preserved the common law then in force unless "inconsistent with, or . . . replaced by" a Code provision. Act of Mar. 3, 1901, ch. 854, § 1, 31 Stat. 1189, 1189 (codified at D.C. Code § 45-401(a)). As the law of self-defense was not altered by the Code, the Self-Defense Cases "remain in force." *Id.*

Beard addressed an analogous claim of self-defense in the home. Beard, armed with a shotgun, approached three men at his orchard fence, one of whom had previously threatened to kill him. 158 U.S. at 552. The Court held it was error to have instructed the jury on provocation because "[t]here was no evidence tending to

show that Beard went from his dwelling house to the orchard fence for the *purpose* of provoking a difficulty, or with the *intent* of having an affray." *Id.* at 558 (emphases added). *Beard* makes clear that in such circumstances, a person forfeits the right to use self-defense by provocation only if he has a purpose to provoke violence. Six years later in *Wallace v. United States*, 18 App. D.C. 152 (1901), a case addressing a claimed instructional error, the Court of Appeals of the District of Columbia (a predecessor court to the D.C. Circuit) held that "if there was testimony tending to show an *intention* to provoke a quarrel, it was not error to give the instruction in question." 18 App. D.C. at 161 (emphasis added). The court concluded that under the facts of the case, the jury could properly draw an inference "of *homicidal purpose* in provoking a quarrel and in the course of such quarrel a deadly encounter. The law is that he, who has provoked a quarrel, which is *calculated* to lead to homicide, and which in fact does lead to homicide, cannot thereafter claim as an excuse for the homicide that he acted in self-defense." *Id.* at 161-62 (emphases added). Though *Wallace* did not cite *Beard*, it recognized its same rule of purposeful provocation.

Laney, in turn, similarly respected the rule of *Beard* and described it as controlling authority on "the law of self-defense" and the rights of a "person assaulted" "*on his own premises, defending his property*." *Laney*, 294 F. at 415 (emphasis added). It explained that *Beard* held there was no provocation because "[t]here was no evidence tending to show that Beard went *from his dwelling house to the orchard fence for the purpose of provoking a difficulty*, or with the intent of having an affray. . ." *Id.* (emphasis added). It recognized that "a different rule would apply" if Beard "had gone out to provoke an affray." *Id.* The Court distinguished

Laney on the ground that he was *not* at home but rather on a public street: "In the present case the defendant *was neither acting in defense of his property . . .*" *Id.* (emphasis added). The Court's statement that "when [the defendant] stepped out into the areaway, he had every reason to believe that his presence there would provoke trouble," *id.* at 414, must be understood in this context, against the backdrop of *Beard*. *Laney* recognized that *Beard* compelled a standard of purposeful provocation for forfeiture of self-defense in the home, and the decision is limited to claims of self-defense *outside* the home.

This Court has never applied *Laney* to claims of self-defense in the home. The cases cited by the government all address conduct *outside* the home. *See* Gov't Br. at 44; *Andrews v. United States*, 125 A.3d 316 (D.C. 2015) (appellant went to the front yard of his girlfriend's home, where he was unwelcome); *Mitchell v. United States*, 399 A.2d 866 (D.C. 1979) (appellant followed decedent into the street after a fight at a friend's apartment). These cases do not stand for the proposition that self-defense in the home is on equal footing with self-defense outside the home given *Beard* and *Wallace*'s requirement of purposeful provocation, and *Laney*'s explicit differentiation from *Beard* on the ground that the defendant was *not* "on his own premises, defending his property." 294 F. at 415.

Even if *Beard* is not strictly binding, the Court should still decline to vastly expand the scope of *Laney*—a disfavored negligence standard out of sync with the law of self-defense of every other jurisdiction in this country as well as the Model

Penal Code,[2] and with troubling racist undertones.[3] As Mr. Peyton explained in his opening brief, the home has historically enjoyed special status as a sanctuary where individual rights are at their zenith. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Payton v. New York*, 445 U.S. 573 (1980). Consistent with those cases, this Court should draw a bright line around the home and limit *Laney*.

Finally, this Court should reject the government's fleeting suggestion that the rule of *Beard* does not apply because Mr. Peyton was "outside of his home when he shot Harrison," having "left the safety of his double-locked apartment." Gov't Br. at 47. The same was true in *Beard*. Beard could have, but chose not to, locked himself inside his home. Instead, he walked 50 to 60 yards to investigate what the decedent was doing at the orchard fence, and the Supreme Court held that purposeful provocation was required for forfeiture of the right to self-defense. Mr. Peyton's connection to his home is far more compelling than Beard's as it is undisputed that Mr. Peyton was inside his home when Mr. Harrison began banging on his daughter's window at 2 a.m.—an objectively scary experience. Mr. Peyton was not required to

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[2] *See* Appellant's Br. at 39 n.24 & 40 n.25 (fifty-state survey); *see also* Model Penal Code § 3.04(2)(b)(i) (self-defense is unavailable to a person who, "with the *purpose* of causing death or serious bodily injury, provoked the use of force against himself in the same encounter" (emphasis added)).

[3] *Laney* arose during the race riots of 1919, and numerous legal scholars have concluded that pernicious racial stereotypes influenced its outcome. *See, e.g.*, José Felipé Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. Balt. L. Rev. 313, 318 (2006) (noting "obvious racial overtones of [*Laney*]"); Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 Ohio St. L.J. 287, 307 (2010) (describing *Laney*'s "racist views of autonomy, dignity and privilege").

wait for a potential intruder to break into his daughter's room but was entitled to investigate the threat, which in this case required opening the building door to discover the source of the knocking. All three eyewitnesses testified that Mr. Peyton was standing in the "doorway" or "threshold" of the building, mere feet from his apartment unit, when Harrison climbed the steps and attacked him. 2/7/18 at 76; 2/8/18 at 88; 2/14/18 at 408. Whether Mr. Peyton ended up on the front steps during the scuffle is of no legal significance, just as it was of no legal significance that Beard walked 50 to 60 yards.

C. THE JUDGE'S FORFEITURE INSTRUCTION CONTRADICTED HER FINDING ON AGGRESSION.

Instruction 9.504 identifies two legal theories under which a defendant forfeits the right to self-defense: (1) if he is "the aggressor," or (2) if he "deliberately puts himself in a position where he has reason to believe his presence will provoke trouble." Redbook Instruction 9.504 (2017 ed.); Comments to Redbook Instruction 9.504 (explaining that "aggression and provocation are two distinct legal theories under D.C. law"). Defense counsel objected on both grounds. 2/13/18 at 162-63. The judge found no evidence that Mr. Peyton was the aggressor, 2/13/18 at 165, but concluded it was a jury question whether he provoked the danger, *id.* at 165-66. Mr. Peyton has argued that the judge erred in mechanically including the first aggressor language, without tailoring Instruction 9.504 to reflect her contrary finding of insufficient evidence of aggression.

The government blurs the distinction between aggression and provocation and asserts that the entirety of Instruction 9.504 was consistent with the judge's ruling.

It argues that the judge's statement—"I don't think there's evidence of first aggressor rather than provocation," 2/13/18 at 165—was preliminary and that she later found that "the question of whether the evidence established that appellant was the aggressor was 'a question for the jury,'" Gov't Br. at 49 (quoting 2/13/18 at 165-66). However, the transcript pages the government cites were entirely dedicated to the *provocation* portion of the instruction, not aggression:

> [I]t's for the jury to decide *whether he in fact provoked* imminent danger of bodily harm upon himself. I think it's a jury question whether and that there's sufficient evidence in the record, given the fact that he came to the door, given the fact that there was evidence in the record about whether or not—or about the fact that he was upset with the decedent, and *whether or not he in fact provoked imminent danger* of bodily harm to himself is a *question for the jury*.

2/13/18 at 165-66 (emphases added). The judge did not revisit the issue of aggression, let alone alter her prior ruling of insufficient evidence. Accordingly, the first aggressor instruction was erroneous.

D. THERE IS NO MEANINGFUL DISPUTE ON HARM.

In his opening brief, Mr. Peyton set forth in detail why the instructional error was not harmless. *See* Appellant's Br. at 47-50. The government does not offer any contrary argument. It merely asserts, in passing, that "any error was not prejudicial" because Mr. Peyton was "outside of his home when he shot Harrison" and "[a]s such, the jury was properly instructed on the law with respect to self-defense and provocation under the facts of the case." Gov't Br. at 47-48. In a footnote, it states that "[f]or the same reason . . . any error was harmless beyond a reasonable doubt." *Id.* at 48 n.28. The government's argument about where Mr. Peyton was when the need for self-defense arose is directed to error (and refuted above), not harm. The

government offers no independent argument to explain why error in giving either portion of Instruction 9.504 was harmless beyond a reasonable doubt, and it makes no attempt to rebut Mr. Peyton's arguments on these points.[4] Accordingly, the government has waived any argument that the error was harmless. *Randolph*, 882 A.2d at 222-23; *Rose v. United States*, 629 A.2d 526, 535-37 (D.C. 1993).

II. THE INSTRUCTIONS ERRONEOUSLY CONVEYED TO THE JURY THAT MR. PEYTON'S DEFENSE DID NOT APPLY TO INVOLUNTARY MANSLAUGHTER.

Mr. Peyton testified he came to the door with a gun to investigate knocking on his daughter's window at 2 a.m. When a highly intoxicated Mr. Harrison charged Mr. Peyton, punched him repeatedly, and grabbed him by the hair, Mr. Peyton responded instinctively and pushed Mr. Harrison of off him. During this lawful act of self-defense—i.e., pushing Mr. Harrison away—the gun in his hand accidentally discharged a single time and killed Mr. Harrison. If the jury credited Mr. Peyton's account and had a reasonable doubt that Mr. Peyton was merely trying to repel and extricate himself from Mr. Harrison when his gun unintentionally fired, it was required to acquit Mr. Peyton of all counts. *Clark v. United States*, 593 A.2d 186, 195 (D.C. 1991); *Valentine v. Commonwealth*, 48 S.E.2d 264, 267-68 (Va. 1948).

Mr. Peyton contended that the judge reversibly erred when she conveyed to the jury that his defense of accident during lawful self-defense did not apply to involuntary manslaughter. The government agrees that the instructions were

[4] The government concedes that the standard of review set forth in *Chapman v. California*, 386 U.S. 18 (1967) applies if Mr. Peyton preserved his claim. Gov't Br. at 48 n.28 (citing "harmless beyond a reasonable doubt" standard).

"intentionally designed (in language and structure) to convey to the jury" that Mr. Peyton's defense did not apply to involuntary manslaughter, Gov't Br. at 25, and defends those instructions as a correct statement of the law. It also argues that Mr. Peyton's claim is subject to plain error review. These arguments lack merit.

A. MR. PEYTON PRESERVED HIS CLAIM.

The government's assertion that defense counsel "affirmatively agreed to [the] proposed instructions," and "did not request that the jury be instructed on accident in the context of self-defense below," *id*. at 25-26, is unfounded and ignores the context in which the instructions were adopted. Discussions relating to jury instructions spanned four days. From the outset, defense counsel were clear that Mr. Peyton's defense was accidental discharge of his weapon while lawfully acting in self-defense and that Mr. Peyton was entitled to instructions on this defense pursuant to *Clark*, 593 A.2d 186. 2/12/18 at 148 ("I think there is . . . evidence warranted to support an accident instruction in conjunction with self-defense, I think it has to be tailored in some way to reflect that."). Counsel specifically requested an "accident" instruction that would have told the jury that "defendant is not guilty of murder or manslaughter if he killed someone *as a result of an accident while acting in self-defense*." Mot. Supp., Attach. 1 (email to Chambers) (emphasis added). Additionally, counsel requested a defense theory instruction. *Id.*, Attach. 4.

Counsel did not put forth accident as a "stand-alone defense," Gov't Br. at 26. Rather, he made clear that the defense was an "amalgamation" of the two. 2/13/18 at 186. He explained that "for the defense of accident, the jury would have to find that *the accident took place while Mr. Peyton was acting in self-defense*." *Id.*

(emphasis added). In other words, "Mr. Peyton was acting in a limited form of self-defense when an accident took place that caused the death of Mr. Harrison." *Id.* at 187. The court, in turn, understood that when counsel said "accident," he was referring to this amalgamated defense. *See, e.g.*, 2/14/18 at 457 (commenting that the defense "lays out very, I think, explicitly the theory that there was self-defense and in the course of the self-defense there was an accident"). It was in this context that the government requested involuntary manslaughter as a lesser included offense in an attempt to circumvent Mr. Peyton's defense. The government argued that accident was not a defense to involuntary manslaughter, and its proposed changes to the instructions were ultimately adopted. *Id.* at 354-58.

The following day, after reviewing the amended instructions in written form, defense counsel objected that they erroneously conveyed to the jury that accident is *never* a defense to involuntary manslaughter—even when it occurs during a lawful act of self-defense. 2/15/18 at 534. Defense counsel argued that it was "a misstatement of the law" to "just say that [accident is] a defense to two offenses and not the third," and maintained that the instructions should be "tailored to the particular facts" of the case. *Id.* at 542-43. He argued that where, as here, the decedent is the cause of the chain of events culminating in an unintentional discharge of a weapon—i.e., by putting Mr. Peyton in a position where he needed to use self-defense to repel an attack—accident is an essential part of the defense. Given the extensive prior discussions about the availability of accident during lawful self-defense, defense counsel's objections were sufficient to preserve his claim, and Mr. Peyton is entitled to refine his argument on appeal. *See Randolph*, 882 A.2d at 217-

18 ("Once a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below.") (quoting *Yee*, 503 U.S. at 534). Finally, as discussed *infra* p. 20, even if the Court were to apply a plain error standard, reversal is required.

B. ACCIDENTAL DISCHARGE OF A WEAPON DURING LAWFUL SELF-DEFENSE IS A DEFENSE TO INVOLUNTARY MANSLAUGHTER.

Mr. Peyton's defense of accident during lawful self-defense is an established defense to involuntary manslaughter. *Clark*, 593 A.2d at 195; *Valentine*, 48 S.E.2d at 267-68. The government misconstrues the binding authority of *Clark* and cites no contrary authority. It merely argues that the accidental discharge of a weapon during lawful self-defense is not a defense to involuntary manslaughter because involuntary manslaughter is, by nature, an accidental killing. Gov't Br. at 27-28. The obvious flaw in this logic is that not all accidental killings constitute involuntary manslaughter—only those where the accident results from conduct that constitutes a "gross deviation from a reasonable standard of care." *Comber v. United States*, 584 A.2d 26, 48 (D.C. 1990) (en banc). As held in the seminal involuntary manslaughter case whose reasoning this Court adopted in *Clark*, it is precisely the fact that the defendant was engaged in lawful self-defense that rebuts the notion that his conduct was grossly negligent. *Valentine*, 48 S.E.2d at 269 (where defendant acted in self-defense to repel the decedent's sudden fisted attack but unintentionally inflicted fatal wounds because she forgot she was holding a knife, "[t]he evidence fail[ed] to establish negligence or recklessness"). *See also Lienau v. Commonwealth*, 818

S.E.2d 58, 67-68 (Va. Ct. App. 2018) (reversing involuntary manslaughter conviction for failure to instruct on *both* self-defense and accident because defendant was not guilty if he was "acting lawfully in self-defense" to scare away the home intruder with his gun when it "accidentally" discharged). Mr. Peyton "was entitled to an instruction," "which would have explicated his defense of accident in the context of his right of self-defense." *Clark*, 593 A.2d at 194.

Clark is controlling and the government's contrary position is unsound.[5] It claims that accidental discharge of a weapon during self-defense was held to be a defense in *Clark* only because it negated the *mens rea* for second-degree murder, but such defense is unavailable for involuntary manslaughter, which "by definition applies to accidental homicides." Gov't Br. at 30. This makes no sense not only because *Clark*'s holding is founded on *Valentine*, an involuntary manslaughter case, but also because second-degree murder, like involuntary manslaughter, encompasses "accidental" killings. *Thomas v. United States*, 419 F.2d 1203, 1205 (D.C. Cir. 1969) ("an *accidental killing may be second degree murder*, manslaughter, or no crime at all, depending on the degree of recklessness involved") (emphasis added); *Logan v. United States*, 411 F.2d 679, 681 n.9 (D.C. Cir. 1968) ("Even an *accidental* or unintentional killing will constitute murder in the *second degree* if accompanied by malice.) (emphases added). An accidental killing is

[5] Contrary to the government's suggestion (at 30 n.7), *Clark* had two holdings of instructional error: (1) that the instruction erroneously shifted the burden of proof, *and* (2) that he was entitled to an instruction of accident during lawful self-defense. 593 A.3d at 194 ("We also agree with Clark that he was entitled to an instruction as to his theory of the case along the general lines that he proposed at trial.").

second-degree murder if the defendant "was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless." *Comber*, 584 A.2d at 39. The difference between second-degree murder and involuntary manslaughter lies in whether the actor was aware of the risk—not, as the government claims, whether the actor *intended* the result. *United States v. Bradford*, 344 A.2d 208, 215 n.22 (D.C. 1975). The government cites cases (at 28) that merely define involuntary manslaughter as an "accidental" or "unintentional" killing that is not justified or excused—an unremarkable point—but which say nothing about whether accident during self-defense is a legal excuse. *Valentine* and *Clark* are the relevant authorities on that subset of legal excuse.[6]

After taking the untenable position that an unintended killing resulting from lawful self-defense is never excused, the government retreats and posits that accidental killings may be excused, depending "on the standard of care [the defendant] exhibited when engaging in self-defense." Gov't Br. at 32 & n.19 (claiming that "negligent" self-defense is not a defense to involuntary manslaughter). This concession requires reversal because Mr. Peyton's jury was not given the opportunity to determine whether he exhibited a lawful "standard of care"

[6] Citing a footnote in *Comber*, the government suggests that self-defense is the sole defense to involuntary manslaughter. Gov't Br. at 29. Yet, this was not a holding, and the judicial mind was not asked to decide whether accident during self-defense is a recognized excuse. "The rule of *stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994) (citation omitted). Moreover, the Court explicitly left open the possibility of other "rare forms of excuse," *Comber*, 584 A.2d at 48 n.31, such as here.

while defending against the decedent's unprovoked attack when the gun accidentally discharged. Instead, at the government's urging, the judge categorically rejected accident during lawful self-defense as a defense to involuntary manslaughter.

This argument is also erroneous because it misstates the law. First, the gravamen of involuntary manslaughter is not simple "negligence," Gov't Br. at 32 n.19, but criminal negligence—a *gross* deviation from the norm. Second, the "standard of care" for lawful self-defense does not change depending on the degree of homicide. The notion of a criminally negligent instance of lawful self-defense is an oxymoron. The essence of self-defense, no matter the charge, is reasonableness under the circumstances as they appeared to the defendant at the time of attack. A defendant under attack does not forfeit his right to self-defense because he fails to act with "detached reflection." *Parker*, 155 A.3d at 846 n.21. "[T]he claim of self-defense is not necessarily defeated if, for example, more knife blows than would have seemed necessary in cold blood are struck in the heat of passion generated by the unsought altercation. A belief which may be unreasonable in cold blood may be actually and reasonably entertained in the heat of passion." *Inge v. United States*, 356 F.2d 345, 348 (D.C. Cir. 1966). Juries are instructed that they may not use hindsight to assess whether the use or degree of force was necessary, but must consider "the circumstances as they appeared to [the defendant] at the time of the incident." Redbook Instructions, No. 9.500; *see also id.*, 9.501. Self-defense is inherently a lawful act done in a lawful manner, defeating a charge of involuntary manslaughter though a death unintentionally results.

Valentine refutes the government's assertion that involuntary manslaughter

cases demand an especially cautious exercise of self-defense. As in this case, the decedent began the fight "by striking the accused on the head with her fists." 48 S.E. 2d at 266. Valentine, who was holding a knife to cut flowers, responded to the non-deadly attack by "instinctively and in self-defense str[ikng] her assailant without being aware or conscious of the fact that the small knife was still in her hand." *Id.* at 269. She stabbed her assailant six times and inflicted a wound to the chest that penetrated the decedent's heart. *Id.* at 266. The court held that "the unfortunate result does not constitute the commission of any crime, but is homicide by misadventure in lawful self-defense from unwarranted attack." *Id.* at 269. Because Valentine's self-defense reaction—including her lack of presence of mind to put down the knife—"was normal and instinctive," "[t]he evidence fail[ed] to establish negligence or recklessness." *Id*. Far from requiring an elevated standard of care in exercising self-defense, the court applied the normal reasonableness under the duress of the moment. Here too, the jury was entitled to conclude that Mr. Peyton "instinctively and in self-defense struck [his] assailant without being aware or conscious of the fact that the [gun] was still in [his] hand," excusing the homicide. *Id.*

For the same reason, the argument that "even if appellant was acting in lawful self-defense by using nondeadly force by pushing Harrison away, appellant did so in a negligent manner, i.e., while holding a loaded cocked pistol in his hand," Gov't Br. at 33 n.19, fails. If the jury found that the government had failed to prove the absence of lawful self-defense when the gun unintentionally discharged, then by definition he was not criminally negligent and it should have acquitted. But the jury was not given that opportunity because the trial court erroneously ruled that the

Clark-Valentine defense categorically did not apply to involuntary manslaughter.

The instruction on the elements of involuntary manslaughter—i.e., that the conduct must be a "gross deviation from a reasonable standard of care," 2/15/18 at 573—did not sufficiently convey Mr. Peyton's defense theory as a complete defense to involuntary manslaughter. Mr. Peyton "was entitled to an instruction as to his theory of the case," to "explicate[] his defense of accident in the context of his right of self-defense." *Clark*, 593 A.2d at 194. *See also Stack v. United States*, 519 A.2d 147 (D.C. 1986) (reversing because instruction inadequately expressed defense of "independent cause" notwithstanding instruction on elements of causation). The jury was led to believe, however, that his defense theory did not apply to involuntary manslaughter, and thus would not have understood that a lawful act of self-defense defeats the element of "gross deviation from a reasonable standard of care."

C. REVERSAL IS REQUIRED.

The error requires reversal regardless of whether this Court applies *Chapman* or plain error review.[7] Mr. Peyton's testimony that his gun discharged accidentally as he attempted to push Mr. Harrison off him was powerfully corroborated by undisputed evidence: the government's sole eyewitness to the altercation testified that Mr. Harrison threw the first punch; the judge found that Mr. Harrison was the first aggressor; Mr. Harrison was struck by a single bullet; Mr. Peyton apologized profusely and exclaimed, "Why did you have to come at me"; and Mr. Peyton

[7] The government contends that the error was harmless under any standard. Gov't Br. at 35. It does not dispute, and therefore concedes, that if Mr. Peyton's claim was preserved, review under *Chapman*, 386 U.S. at 24, applies.

attempted to help Mr. Harrison in the aftermath of the shooting. A jury that credited Mr. Peyton's account but erroneously believed that accident during lawful self-defense was a defense to murder and voluntary manslaughter but not involuntary manslaughter, would have acquitted Mr. Peyton of the greater offenses and convicted him of involuntary manslaughter. That is precisely what happened here.

The government's contention that any error was harmless because "the jury rejected appellant's claim of lawful self-defense, and would therefore have rejected appellant's proposed defense of accident during the use of lawful self-defense," Gov't Br. at 35, misapprehends the defense. The pure self-defense instruction could not mitigate the harm because the gun's accidental discharge amounted to deadly force when it killed Mr. Harrison. The jury was instructed that Mr. Peyton could only "use deadly force in self-defense if he . . . actually and reasonably believes at the time of the incident that he is in imminent danger of death or serious bodily harm from which he can save himself only by using deadly force against his assailant." 2/15/18 at 576. However, Mr. Peyton did not testify that he believed it was necessary to use deadly force. Nor did he intend to kill Mr. Harrison. Rather, he testified that he was merely trying to push Mr. Harrison off him. Under these circumstances, a jury considering pure self-defense would naturally find that shooting Mr. Harrison was excessive force. A properly instructed jury, however, could have readily found that instinctively pushing someone away (even while holding a gun) in response to being pushed and grabbed by the hair, was a lawful act of self-defense, just as striking someone while holding a knife was in *Valentine*.

The defense theory instruction did not mitigate the erroneous instructions

because the jury was told that unlike second-degree murder and voluntary manslaughter, self-defense was the *only* defense to involuntary manslaughter. The jury would have understood Mr. Peyton's defense theory to excuse second-degree murder and voluntary manslaughter but not involuntary manslaughter. Indeed, this was the prosecutor's position when advocating for the revised instructions. Accordingly, the government cannot show "beyond a reasonable doubt" that the erroneous instructions did not "contribute to the verdict." *Chapman*, 386 U.S. at 24.

Finally, even if the Court applies a plain error standard, reversal is required.[8] The defense theory invoked is black-letter law under *Clark* and the venerable, century's old common law authorities and treatises cited therein. The government's attempt to discount *Clark* as limited to second-degree murder does not withstand scrutiny because *Clark* expressly relied for its holding on *Valentine*, an involuntary manslaughter case. Thus, the error is "plain under current law," *Conley v. United States*, 79 A.3d 270, 276, 289 (D.C. 2013). The error affected Mr. Peyton's "substantial rights," *id.* at 290, because it wholly deprived him of his only and complete defense to involuntary manslaughter, which was strong. Failure to correct the error is acutely "detrimental to the fairness and integrity of the judicial proceedings," *id.*, because Mr. Peyton is serving 8.5 years in prison for conduct that the jury would likely have concluded was not a crime had it been properly instructed. Where the error so directly affects factual innocence, correcting it is imperative.

[8] On plain error review, the appellant must show (1) an error, (2) "that is plain under current law"; (3) "that affected his substantial rights"; and (4) that seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Conley v. United States*, 79 A.3d 270, 276 (D.C. 2013) (quotation omitted).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been served upon Elizabeth Trosman, Chief, Appellate Division, Office of the United States Attorney, using this Court's e-filing system, and upon Michael McGovern, AUSA, Michael.McGovern@usdoj.gov, by electronic mail, this 30th day of October, 2020.

s/Stefanie Schneider
Stefanie Schneider