Appeal No. 18-CF-582

DISTRICT OF COLUMBIA COURT OF APPEALS

DAVON PEYTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

BRIEF FOR APPELLANT

SAMIA FAM

*STEFANIE SCHNEIDER

PUBLIC DEFENDER SERVICE
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200
Fax: (202) 824-2784

*Counsel for Oral Argument

DISCLOSURE STATEMENT

Appellant Davon Peyton was represented at trial by Matthew Davies and Joseph Wong of the Public Defender Service for the District of Columbia (PDS). The government was represented by Katherine Earnest and Jennifer Fischer. The Honorable Danya Dayson presided over the trial. On appeal, Mr. Peyton is represented by Samia Fam and Stefanie Schneider of PDS.

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ISSUES PRESENTED

1. Whether the trial court reversibly erred in instructing the jury that accident is not a defense to involuntary manslaughter, where Mr. Peyton's defense theory was that he was lawfully acting in self-defense when his gun accidentally discharged, as in *Clark v. United States*, 593 A.2d 186 (D.C. 1991).
2. Whether the trial court reversibly erred in giving Instruction 9.504 and instructing the jury that Mr. Peyton could not claim self-defense if he deliberately put himself in a position where he had "reason to believe his presence" would "provoke trouble," where Mr. Peyton responded to middle-of-the-night banging on a window *in his home* by coming to the door with a gun in his hand.

STATEMENT OF THE CASE AND JURISDICTION

On August 17, 2016, a grand jury charged Appellant Davon Peyton with second-degree murder while armed, in violation of D.C. Code §§ 22-2103, -4502 (2001 ed.); possession of a firearm during a crime of violence (PFCV), in violation of D.C. Code § 22-4504(b) (2001 ed.); and unlawful possession of a firearm (prior conviction), in violation of D.C. Code § 22-4503(a)(1) (2001 ed.). R. 28. A jury trial commenced on February 6, 2018, before the Honorable Danya Dayson. On February 16, 2018, the jury acquitted Mr. Peyton of second-degree murder and voluntary manslaughter but convicted him of involuntary manslaughter while armed, PFCV, and unlawful possession of a firearm. 2/16/18 at 4-5 at 5. On May 11, 2018, Judge Dayson sentenced Mr. Peyton to 102 months incarceration, followed by five years of supervised release. 5/11/18 at 36-37; R. 90.[1] Mr. Peyton filed a timely notice of appeal on May 24, 2018. R. 91. This Court has jurisdiction over the final order pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF FACTS

I. Overview

It was undisputed that at approximately 2:30 a.m., Ray Harrison went uninvited to Mr. Peyton's apartment and banged on the bedroom window where Mr. Peyton's daughter was sleeping. Mr. Peyton testified that he thought someone was trying to break in. Fearing for his safety and that of his family, he grabbed a

[1] The judge sentenced Mr. Peyton to 84 months for involuntary manslaughter and 84 months for PFCV, to run concurrently to one another, and 18 months for unlawful possession of a firearm, to run consecutively to the sentences for the other counts. R. 90; 5/11/18 at 36-37.

loaded gun, took off the safety lock, and went to the door. With the gun pointed down at his side, Mr. Peyton called out, "Who is it?" When Mr. Harrison identified himself, Mr. Peyton expressed frustration that Mr. Harrison was banging on his window in the middle of the night. Mr. Harrison, in turn, asked Mr. Peyton why he had not answered his calls earlier that evening: "Why you carrying me like that?" When Mr. Peyton told him they were "not friends like that," Mr. Harrison, who had a blood alcohol level of .16, punched Mr. Peyton.

It was undisputed that Mr. Harrison threw the first blow and struck Mr. Peyton. The judge found that Mr. Peyton neither pointed the gun at Mr. Harrison nor threatened him prior to the blow. 2/13/18 at 165, 169-70. A.W., the government's sole eyewitness to the scuffle, testified that the gun discharged as Mr. Peyton fended off multiple punches. Mr. Peyton explained that he was trying to push Mr. Harrison off of him when the gun fired unintentionally. Mr. Harrison was fatally wounded by a single bullet. After the gun discharged, Mr. Peyton apologized profusely, repeatedly asked, "Why did he have to come at me?", and attempted to help Mr. Harrison.

Although the court gave a defense theory instruction pursuant to *Clark v. United States*, 593 A.2d 186 (D.C. 1991), that told the jury that the government had "the[] burden of proving beyond a reasonable doubt that the firearm did not go off by accident while Mr. Peyton was acting in self-defense," 2/15/18 at 580-81, it made two instructional errors that seriously undermined this theory and prejudiced Mr. Peyton's defense. First, the court erroneously conveyed to the jury that the accident-during-the-course-of-self-defense instruction did not apply to involuntary

manslaughter. Second, the court erred in instructing the jury that Mr. Peyton forfeited his right to self-defense if the jury found he had "reason to believe" that his mere "presence" may provoke "trouble" because this rule categorically does not apply to self-defense *in the home*, where an *intent to provoke* violence is required for forfeiture of self-defense. The jury acquitted Mr. Peyton of second-degree murder and voluntary manslaughter, but convicted him of the lesser-included offense of involuntary manslaughter.

II. The Government's Case

a. The Eyewitnesses

The government called three eye and ear witnesses: N.G., Mr. Harrison's girlfriend; D.L., N.G.'s friend; and A.W., Mr. Peyton's girlfriend. D.L. and N.G. were in a parked car when the gun fired and did not see what happened. A.W., who was in the doorway, described an incident in which Mr. Harrison attacked Mr. Peyton, and Mr. Peyton's gun accidentally discharged during the ensuing scuffle.

i. D.L. and N.G.

On November 15, 2015, D.L. surprised her friend N.G. with a visit from Texas. 2/7/18 at 24-27. The women went to IHOP to celebrate, but Mr. Harrison did not have enough money to join them. *Id.* at 54. Instead, he stayed home drinking. *Id.* at 58-59. When the women returned, Mr. Harrison suggested going to Mr. Peyton's house to get marijuana. *Id.* at 56, 116-17.

N.G. and Mr. Harrison met Mr. Peyton three months earlier, and he became their "weed man." *Id.* at 62-63. Around that same time, N.G. and Mr. Harrison started driving Mr. Peyton. *Id.* at 62. Mr. Peyton would call two to three times a

week for rides and pay in cash or marijuana. *Id.* at 62-63. In the early morning hours on November 13, 2015, Mr. Harrison called Mr. Peyton twice but was unable to reach him. *Id.* at 56-57. Despite not having talked to Mr. Peyton or been invited to his home, Mr. Harrison, N.G., and D.L. drove to Mr. Peyton's apartment to get marijuana. *Id.* at 56, 71.[2] N.G. did not think it would be a problem, but acknowledged that she and Mr. Harrison had always made plans with Mr. Peyton in advance of going to his apartment late at night. *Id.* at 56, 117. Mr. Harrison parked, got out of the car, and knocked on Mr. Peyton's window. *Id.* at 31, 73, 118.[3] The women waited in the car, with the windows open. *Id.* at 129.

According to N.G., Mr. Peyton appeared upset when he opened the door. *Id.* at 74-75. She could hear some, but not all, of their conversation. *Id.* at 76. She could not see Mr. Peyton's body or hands because Mr. Harrison was blocking her view. *Id.* at 119. She heard Mr. Peyton say, "[I]t's 3 o'clock in the morning . . . what are you doing knocking on my door at 3 o'clock in the morning[?]" *Id.* at 119. She testified that Mr. Harrison told Mr. Peyton to "calm down" and pointed to the women in the car. *Id.* at 75. Concluding that they were not going to get any marijuana, N.G. looked away. *Id.* at 76. A few seconds later, she heard a gunshot and saw Mr. Harrison stumble down the front steps and collapse. *Id.* at 77. N.G. did not witness the physical altercation between the men and never saw the gun.

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[2] N.G. and D.L. described Mr. Harrison as happy and excited as he drove them to Mr. Peyton's apartment. *Id.* at 30, 72.

[3] N.G. testified that because Mr. Peyton lived on the first floor of a small apartment building, Mr. Harrison typically knocked on his window rather than on the building door, *id.* at 73, a claim Mr. Peyton disputed, 2/14/18 at 412.

Id. at 119-20, 129.

D.L. likewise did not see what happened because she was playing on her phone. *Id.* at 31, 44. She heard "some sort of words" in a muffled tone and sensed "a little bit of tension." *Id.* at 31, 33-34. When D.L. heard the gunshot, she lay down on the floor of the car. *Id.* at 31, 34. When she got up, Mr. Harrison was stumbling down the steps and holding his chest. *Id.* at 35.

Both D.L. and N.G. described Mr. Peyton as apologetic after the gun went off. *Id.* at 43, 78, 113. D.L. testified that Mr. Peyton ran to Mr. Harrison, who had collapsed on the sidewalk, and said he was sorry. *Id.* at 43. He repeatedly asked, "[W]hy did you have to come at me[?]" *Id.* at 32. N.G. similarly recalled Mr. Peyton asking, "[W]hy did you do that . . . why did you come at me?" *Id.* at 81. She described Mr. Peyton as looking genuinely upset about what had happened. *Id.* at 113. She testified that Mr. Peyton tried to help by holding Mr. Peyton's head and talking to him to keep him awake. *Id.* at 81, 124-25. He also yelled for someone to call 911, *id.* at 81-82, 124, which D.L. ultimately did, *id.* at 38.[4] Mr. Peyton left before the ambulance arrived. *Id.* at 94. N.G. testified that she had not previously seen Mr. Peyton and Mr. Harrison fight or exchange threatening words. *Id.* at 64-65.[5]

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[4] N.G. initially provided the address [address], but Mr. Peyton told her to use [address]—the address of the building across the street. *Id.* at 86, 91.

[5] The government attempted to develop a theory that on the night of the incident Mr. Peyton was upset with Mr. Harrison for stealing his cell phone—a claim Mr. Peyton denied, explaining that the phone had been returned. 2/14/18 at 395-96. N.G. testified that approximately one week prior to the incident, Mr. Peyton left a cell phone in her car. 2/7/18 at 67. When she returned the phone the following day, Mr. Peyton seemed "[k]ind of agitated like he needed [the phone]," and said

ii. A.W.

A.W. was the sole government witness who saw the physical altercation.[6] Because her memory had faded, she was refreshed periodically with her videotaped statement to detectives, which she had adopted at the grand jury. 2/8/18 at 57-58. A.W. testified that on November 13, 2015, she was living with Mr. Peyton and their daughter at [address]. *Id.* at 54-55.[7] Mr. Peyton arrived home shortly before midnight. *Id.* at 70. A.W. was watching television in the living room, and their daughter was asleep in the front bedroom. *Id.* at 69-70. Mr. Peyton received several calls, but did not answer calls from Mr. Harrison. *Id.* at 72.

In her videotaped statement,[8] A.W. told the detectives that at approximately 2:23 a.m., *id.* at 69, Mr. Peyton entered the living room and told her someone was knocking on their daughter's window, *id.* at 78-79 (ref'g to W. Tr. at 18, lines 8-9). At first A.W. did not believe him. *Id.* at 79, 118 (ref'g to W. Tr. at 18, lines 8-9).

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he had already purchased a new one. *Id.* at 70. However, "[i]t didn't seem like a big deal" to N.G., and she gave Mr. Peyton a ride immediately after returning the phone. *Id.* at 123. A.W. likewise described an incident in which she initially thought Mr. Harrison had taken Mr. Peyton's phone, but it was ultimately returned. 2/8/18 at 67-68, 69.

[6] A.W. testified under subpoena and immunity order. 2/8/18 at 43-44.

[7] [Address] is a two-story apartment building with two units per floor and a staircase in the middle. *Id.* at 157.

[8] The government played several clips from A.W.'s videotaped statement at trial and identified them by citing to a government-created transcript of the police interview. Mr. Peyton has filed an unopposed motion to supplement the record with the relevant excerpts from this transcript, which are hereinafter referred to as "W. Tr."

However, Mr. Peyton insisted: "No for real, stop playing. Somebody's at the window." *Id.* at 78-79 (ref'g to W. Tr. at 18, lines 10-11). A.W. described Mr. Peyton as nervous and looking like he had no idea who was at the window. *Id.* at 120. A.W. was also nervous and wanted to know what was going on. *Id.* at 120-21. It startled her that someone would bang on her daughter's window in the middle of the night. *Id.* A.W. testified that she looked out the window and Mr. Peyton grabbed his gun. *Id.* at 78-79 (ref'g to W. Tr. at 18, line 11); *id.* at 83. They then exited their apartment and walked two steps to the building door. *Id.* at 83-84, 87, 123-24. A.W. opened the door, and Mr. Peyton yelled, "Who is it? Who is it?" from the doorway. *Id.* at 84-85, 87-88, 124-25 (ref'g to W. Tr. at 18, lines 17-19).

A.W. told the detectives that Mr. Harrison answered, "It's Ray," and walked up the stairs from the mailbox area.[9] *Id.* at 84-85, 87-88, 125-26. Mr. Peyton responded, "Ray, my nigger, what's up? Why is you coming to my house and why is you banging on my daughter's window at 1:00 in the morning?" *Id.* at 85 (ref'g to W. Tr. at 18 lines 20-24); *id.* at 127. Mr. Harrison, answered, "Why you carrying me like that? Why is you carrying me like that?" and continued approaching. *Id.* at 85-86 (ref'g to to W. Tr. at 18 lines 24-25); *id.* at 128.[10] Mr. Peyton answered, "Son, you're just our Uber driver. We're not friends like that." *Id.* at 129 (ref'g to W. Tr. at 20 lines 2-4). In response, Mr. Harrison said, "Oh

[9] The mailboxes for the building were to the left of the front door, directly under Mr. Peyton's daughter's window. *Id.* at 145; 2/12/18 at 20.

[10] A.W. testified that she understood Mr. Harrison to be asking why Mr. Peyton did not pick up the phone. *Id.* at 87.

we're not friends?" and punched Mr. Peyton. *Id.* at 130 (ref'g to W. Tr. at 20 at 4-6). A.W. testified that Mr. Harrison hit Mr. Peyton multiple times. *Id.* at 92, 130. She tried to intervene, but Mr. Harrison pushed her aside. *Id.* at 131. As the men tussled, the gun went off. *Id.* at 134.

Immediately after after the gun fired, A.W. heard Mr. Peyton yell for someone to call 911. *Id.* at 141. A.W. ran inside to check on her daughter. *Id.* When she came back outside, Mr. Peyton was cradling Mr. Harrison and trying to lift him up. *Id.* at 142. When the detectives told A.W. that Mr. Harrison had died, she told them it was an accident. *Id.* at 140. Similarly, when asked on the scene if Mr. Peyton shot Mr. Harrison, A.W.'s immediate response was that he "didn't mean to." *Id.* at 111.

b. <u>The Investigation and Forensic Evidence</u>

The police responded to [address] and discovered Mr. Harrison suffering from a gunshot wound. 2/13/18 at 225. Mr. Harrison was taken to Medstar Washington Hospital and pronounced dead at 2:55 a.m. *Id.* Based on the eyewitness accounts, the police arrested Mr. Peyton one week later at [address]. 2/12/18 at 129-30. Pursuant to a warrant, the police searched the apartment and recovered a loaded Smith & Wesson 9mm semi-automatic pistol which matched the 9mm bullet and cartridge case that were recovered from the scene. 2/7/18 at 144-47, 153-55, 168.

Dr. M.K. performed an autopsy and concluded that Mr. Harrison died of a single gunshot wound. 2/13/18 at 193, 198-99, 213. The bullet entered Mr. Harrison's mid-chest and exited through his back. *Id.* at 199, 204. The bullet had

a downward trajectory, from front to back and left to right. *Id.* at 206. Dr. M.K. was unable to estimate the range of fire because of the wound's "mixed features." *Id.* at 202-03. Dr. R.A.M. reviewed the autopsy report and photographs two years later, 2/8/18 at 28-29, and reached different conclusions. Unlike Dr. M.K., Dr. R.A.M. opined on the range of fire and hypothesized that Mr. Harrison sustained a contact or near-contact gunshot wound, meaning that the barrel of the weapon was up against his chest. *Id.* at 23. Both Dr. M.K. and Dr. R.A.M. testified that Mr. Harrison had abrasions on the back of his left ring and pinky fingers, which were consistent with punching an individual around the time of his death. 2/13/18 at 211-12; 2/8/18 at 35-36.

J.S., a custodian of records at T-Mobile, testified that on the day preceding the incident, Mr. Peyton's phone received two incoming calls from [telephone number], the number associated with Mr. Harrison. 2/12/18 at 93-95, 111, 113. The first call, at 11:16 a.m., was sent to voicemail. *Id.* at 111. The second call, at 4:57 p.m., lasted 26 seconds. *Id.* at 113. In the early morning hours on November 13, 2015, Mr. Peyton's phone received four additional calls from the number associated with Mr. Harrison—at 12:58:16 a.m., 12:58:56 a.m., 1:52 a.m., and 1:54 a.m. *Id.* at 116-17. All four calls were sent to voicemail. *Id.* at 114-17, 121.

III. The Defense Case

The defense called two witnesses in support of Mr. Peyton's defense that his gun accidentally discharged while he was lawfully acting in self-defense.

a. L.Z.

L.Z., the chief toxicologist at the Office of the Chief Medical Examiner, testified that he screened Mr. Harrison's blood and detected a femoral blood alcohol level of .16 grams per 100 milliliters of blood. 2/13/18 at 234, 244. Ms. Harrison's blood was also presumptively positive for cannabinoids. *Id.* at 244, 257. L.Z. estimated that a typical person would have to consume the equivalent of eight beers in an hour to have a blood alcohol level of .16. *Id.* at 246-47. He testified that someone with a blood alcohol level of .16 is likely to be in an "excited to confused stage," which is often marked by exaggerated emotions and impairments in perception. *Id.* at 252. L.Z. testified that the combination of alcohol and cannabinoids can have an additive effect. *Id.* at 260-61.

b. Mr. Peyton

Mr. Peyton testified that he had a business relationship with Mr. Harrison in which he called Mr. Harrison for rides twice a week and paid with marijuana. 2/13/18 at 294-95. Typically, N.G. drove and Mr. Harrison rode in the passenger seat. *Id.* On the afternoon before the incident, Mr. Harrison called Mr. Peyton and asked why he had not requested rides the previous week. *Id.* at 295, 298. Mr. Peyton explained that he had gotten a new phone and that Mr. Harrison's number had not transferred. *Id.* at 298. Mr. Peyton confirmed that they were "good," and agreed to call if he needed future rides. *Id.* There was no discussion of meeting up later. *Id.* at 299. Mr. Peyton did not invite Mr. Harrison to his home, and Mr. Harrison did not suggest coming over. *Id.*

Mr. Peyton testified that he arrived home shortly after midnight on November 13, 2015, put on his long johns and tank top, and got ready to go to bed.

Id. at 299-300. Mr. Harrison called twice, but Mr. Peyton did not answer because he was tired and did not feel like talking to Mr. Harrison. *Id.*; 2/14/18 at 394. Mr. Peyton fell asleep on a couch in the back room but was awakened by a loud and consistent banging on his daughter's window. 2/13/18 at 300. He testified that he was afraid someone was trying to break into his home. *Id.* at 300-01. Mr. Peyton explained that the metal security gate on the window was broken and could be opened easily. *Id.* at 301-02. Mr. Peyton told A.W. that someone was outside their daughter's window, grabbed his gun, and proceeded to the window. *Id.* at 302. Mr. Peyton acknowledged that guns are dangerous, 2/14/18 at 407, but explained that he felt unsafe in a first-floor apartment in a rough neighborhood where police do not always respond quickly, *id.* at 428-29, 431. He believed it was his responsibility to protect his family. *Id.* at 429. Mr. Peyton testified that he took the safety off the gun and cocked it so that he would be prepared to fire if the intruder tried to come through the window. 2/13/18 at 303. When Mr. Peyton looked out the window, he saw a car with glaring headlights. *Id.*

Mr. Peyton went with A.W. to the front door of the apartment building and called out, "[W]ho is it?" *Id.* at 304. Mr. Peyton testified that Mr. Harrison answered, "Ray," climbed the front steps to the landing, and positioned himself in front of the building door. *Id.* at 304-05; 2/14/18 at 410-11. Initially he was relieved to see it was Mr. Harrison. 2/13/18 at 305; 2/14/18 at 412. However, he soon became confused because Mr. Harrison had been inside his home only once before and had never banged on his window. 2/13/18 at 305; 2/14/18 at 412. He asked Mr. Harrison, "[W]hy you knocking on my daughter's window at two-

something in the morning[?]" 2/13/18 at 305. Mr. Harrison responded, "[W]hy you trying to carry me?" *Id.* Mr. Peyton replied, "[Y]ou my Uber driver. Like, it's 2:00 in the morning." *Id.*

Mr. Peyton testified that Mr. Harrison responded to this perceived slight by punching him in the face. *Id.* at 306. Mr. Peyton's head snapped back and he saw black. *Id.* He described "ball[ing] up" and hunching over. *Id.* at 307; 2/14/18 at 418. Mr. Peyton explained that when he answered the door, his gun had been in his right hand, pointed at the ground. 2/13/18 at 307; 2/14/18 at 413.[11] However, after the blow, Mr. Peyton put his arms in front of his face to protect himself. 2/13/18 at 307. A.W. tried to get between the men and yelled at Mr. Harrison to stop. *Id.* at 307-08. However, Mr. Harrison pushed her aside. *Id.* at 308. Mr. Peyton explained that Mr. Harrison held him by the hair and continued to punch him. *Id.* at 309. Mr. Peyton pushed Mr. Harrison to get Mr. Harrison to release him. *Id.* As he pushed Mr. Harrison, the gun, which was still in his hand, discharged. *Id.* Mr. Peyton testified that the physical interaction lasted a few seconds and that he never crossed the threshold of the apartment building during the incident. *Id.* at 322; 2/14/18 at 409, 414.

Mr. Peyton testified that the gun discharged accidentally. He did not intend to shoot Mr. Harrison, and he never aimed the gun at him. 2/13/18 at 309. After the gun went off, Mr. Peyton fell backwards, dropped the gun, and tried to regain his senses. *Id.* at 309. He then saw Mr. Harrison staggering down the steps and realized that the gun had gone off. *Id.* at 309-10.

[11] The parties stipulated that Mr. Peyton is right handed. 2/13/18 at 228.

Mr. Peyton testified that he was worried about Mr. Harrison, who had collapsed by his car. *Id.* at 311. Mr. Peyton ran to him, cradled his head and repeatedly said, "[G]et up, get up." *Id.* at 311. Mr. Peyton explained that he tried to get Mr. Harrison to talk to him, and screamed, "[S]omebody call 911." *Id.* at 311-12. He apologized to N.G. and unsuccessfully tried to help her get Mr. Harrison into the car. *Id.* at 312; 2/14/18 at 420. He then went into his apartment, got his phone, and left. 2/14/18 at 421-22. Mr. Peyton explained that he left before the police arrived because he was worried he would get in trouble. *Id.* at 428. Mr. Peyton emphasized that he felt horrible about Mr. Harrison's death and "didn't mean for him to die." 2/13/18 at 322-23.[12]

IV. Jury Instructions and Verdict

a. The Provocation Instruction

The government requested Red Book Instruction 9.504(a) that Mr. Peyton forfeited his right to self-defense if he "was the aggressor" or "deliberately put[] himself in a position where he ha[d] reason to believe that his presence [would] provoke trouble." 2/13/18 at 160-61; Criminal Jury Instructions for the District of Columbia, No. 9.504. Defense counsel objected, arguing that the government put on "no evidence that Mr. Peyton was the aggressor" and had "put on a case that shows quite the opposite." 2/13/18 at 162. He maintained that the provocation instruction is about "entirely different circumstances" and does not apply to someone coming to the door of his home with a gun in response to banging on his

[12] The parties stipulated that Mr. Peyton had previously been convicted of a crime punishable for a term exceeding a year. 2/13/18 at 228.

window in the middle of the night. *Id.* at 163. Rather, it addresses cases "where the decedent and the defendant are arguing" and "the defendant goes home and comes back to the scene of the argument with a gun." *Id.*

The prosecutor contended that "[t]he instruction itself fits squarely within the facts of the case." *Id.* at 164. She argued that evidence "that the defendant was angry, why he was angry, why he took the action he did, the words that he said, his tone and demeanor" showed aggression. *Id.* at 165. With respect to provocation, she maintained that "the fact that [Mr. Peyton] went to the door with a loaded gun, his mere presence and the words that he said did provoke this interaction." *Id.* at 165. *See also id.* at 164 (arguing that instruction was appropriate because Mr. Peyton, "in response to the knocking and/or banging on the window, goes to the door, opens that door with a loaded gun, and there's no evidence that he withdraws from that fight").

The judge agreed with the defense that there was no evidence that Mr. Peyton was the first aggressor but concluded that it was a jury question whether there was provocation. *Id.* at 165 ("I don't think there's evidence of first aggressor rather than provocation."); *id.* at 169 (finding no evidence that Mr. Peyton "brandished the weapon" or "did anything with respect to the weapon" before Mr. Harrison hit him); *id.* at 170 (emphasizing that the gun "was not pointed at anyone"). She reasoned that "the fact that [Mr. Peyton] 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" was a sufficient factual basis for the provocation instruction. *Id.* at 165. Defense counsel argued that "it cannot be the

case" that where a person comes "unannounced to the home" and is "banging on the window," "the person *answering their own door is provoking*." *Id.* at 166 (emphasis added). The judge stated that it could be provocation if the jurors concluded that Mr. Peyton "was aware of who was outside based on the phone calls that were coming in and what they credit from [A.W.]'s testimony." *Id.* at 167. She suggested A.W. had "sa[id] two different things": "that [Mr. Peyton] was aware of who it was outside" and that "[he] was not." *Id.* at 166.

Defense counsel countered that he did not "recall [A.W.] saying that Mr. Peyton said that he knew who was outside." *Id.* at 167. The judge was unable to pinpoint specific testimony, stating only that she "thought there was something" and would "look back." *Id.* The prosecutor likewise was unable to identify testimony that Mr. Peyton knew who was outside, but argued that "because he's calling him beforehand and because [Mr. Peyton's] familiar with the victim and the victim does come over to his house late at night, he probably had a good idea of who was banging on the door." *Id.* at 167-68. The judge was unwilling to say that Mr. Peyton "probably did or probably didn't" know it was Mr. Peyton, but concluded provocation was a question of fact for the jury. *Id.* at 168.

After the judge instructed the jury on the general principles of self-defense, she added the following language taken from Instruction 9.504 of the Red Book:

> If you find that Mr. Davon Peyton was the aggressor or provoked imminent danger of bodily harm upon himself, he cannot rely upon the right of self-defense to justify his use of force. *One who deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble cannot claim self-defense.* Mere words without more by Mr. Peyton, however, do not constitute aggression or provocation.

2/15/18 at 575 (emphasis added).

b. The Accident Instruction

Mr. Peyton's defense was that he was lawfully acting in self-defense in his home when his gun accidentally discharged. 2/13/18 at 186. *See also* 2/6/18 at 205-08; 2/14/18 at 485-86. Defense counsel asked the judge to instruct the jury on both self-defense and accident, and cited *Clark v. United States*, 593 A.2d 186 (D.C. 1991), in support of an amalgamated defense. Email from Matthew Davies to Chambers and Attachment (Feb. 12, 2018, 5:59 p.m.)[13]; 2/13/18 at 186.[14] Additionally, defense counsel requested the following defense theory instruction to illuminate how the principles of self-defense and accident interact:

> The Defense contends that Mr. Peyton did not intentionally shoot Mr. Harrison. Mr. Harrison was assaulting Mr. Peyton at the time of the gunshot and Mr. Peyton was acting in self-defense when the firearm accidentally went off. The Government has not satisfied their burden of proving beyond a reasonable doubt that the firearm did not go off by accident while Mr. Peyton was acting in self-defense.

Email from Joseph Wong to Chambers (Feb. 13, 2018, 10:56 p.m.).

Initially, the government argued that *Clark* did not apply, and that Mr. Peyton could not "avail himself to the instruction on self-defense and accident" because "he had no right to possess the firearm" and therefore was "not engaged in

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[13] Counsel has filed an unopposed motion to supplement the record with four emails submitted by the parties to the trial judge that discuss jury instructions.

[14] Defense counsel explained that Mr. Peyton's defense was an "amalgamation" of self-defense and accident. 2/13/18 at 186. In other words, "the jury would have to find that the accident took place while Mr. Peyton was acting in self-defense." *Id.* *See also id.* at 187 (explaining defense theory that Mr. Peyton was "acting in . . . self-defense when an accident took place that caused the death of Mr. Harrison").

a lawful act." Email from Katherine Earnest to Chambers (Feb. 12, 2018, 10:01 p.m.). *See also* 2/13/18 at 171-72. The judge rejected the notion that if someone is in unlawful possession of a firearm, he is not entitled to claim self-defense. *Id.* at 172. *See also id.* at 173 ("I don't think that there's anything in *Clark* that stands for the proposition that is being advanced by the Government."). The judge ruled that she would instruct the jury on both self-defense and accident. *Id.* ("I am inclined to give them both.").

On the eve of closing arguments, the government requested Instruction 4.24(B) on the lesser-included offense of "Involuntary, Criminal-Negligence Manslaughter While Armed," reversing its earlier representation that it only sought a lesser-included offense instruction for voluntary manslaughter. Email from Jennier Fischer to Chambers (Feb. 13, 2018, 8:05 p.m.). The prosecutor argued that accident was never a defense to involuntary manslaughter and asked the judge to instruct the jury on accident *only* with respect to second-degree murder and voluntary manslaughter. 2/14/18 at 355. The government cited *Comber v. United States*, 584 A.2d 26 (D.C. 1990) (en banc), *Morris v. United States*, 648 A.2d 958 (D.C. 1994), and *Hebron v. United States*, 625 A.2d 884 (D.C. 1993)—none of which involved an amalgamated defense of accident during the lawful exercise of self-defense. *Id.* at 355-58.

Defense counsel objected to the jury being instructed that accident is never a defense to involuntary manslaughter. 2/15/18 at 534. He argued that "[accident] is potentially a defense" to involuntary manslaughter, depending on the circumstances. *Id.* at 542. He suggested 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 banging on the window in the middle of the night and punching Mr. Peyton—accident *is* a defense. *Id.*; *see also* 2/14/18 at 520. He argued that it would be "a misstatement of the law" to "just say that it's a defense to two offenses and not the third," and maintained that the instructions should be tailored to the facts of the case." 2/15/18 at 542-43.

The judge instructed the jury on accident with respect to second-degree murder and voluntary manslaughter only. For each of those offenses, she told the jury that an element the "[g]overnment must prove beyond a reasonable doubt" is that "Mr. Peyton did not act in self-defense *or by accident*." *Id.* at 571, 572-73 (emphasis added). After instructing on second-degree murder and voluntary manslaughter, the judge gave a stand-alone instruction on accident, reiterating that the "the prosecution has the burden of proving beyond a reasonable doubt that Mr. Peyton did not shoot Mr. Harrison by accident." *Id.* at 573.

The judge then instructed the jury on involuntary manslaughter, and did not mention accident. She told the jury that the only defense the government had to disprove beyond a reasonable doubt was self-defense: "[T]he government must prove beyond a reasonable doubt. . . that . . . Mr. Peyton did not act in self-defense." *Id.* at 573. Finally, the judge instructed the jury on the principles of self-defense and made clear that this defense, unlike accident, applied to *involuntary manslaughter*: "Self-defense is a defense to the charge of second-degree murder while armed, voluntary manslaughter while armed *and involuntary manslaughter while armed*." *Id.* at 577 (emphasis added).

The judge gave the requested defense theory instruction:

> The defense contends that Mr. Peyton did not intentionally shoot Mr. Harrison. The defense contends that Mr. Harrison was assaulting Mr. Peyton at the time of the gunshot and that Mr. Peyton was acting in self-defense when the firearm accidentally went off. The defense contends that the Government has not satisfied their burden of proving beyond a reasonable doubt that the firearm did not go off by accident while Mr. Peyton was acting in self-defense.

Id. at 580-81.

c. The Verdict

The jury acquitted Mr. Peyton of second-degree murder and voluntary manslaughter, but convicted him of involuntary manslaughter while armed, PFCV, and unlawful possession of a firearm. 2/16/18 at 4-5.

SUMMARY OF ARGUMENT

Mr. Peyton had a compelling defense that he was lawfully acting in self-defense when his gun accidentally discharged—a defense recognized by this Court in *Clark v. United States*, 593 A.2d 186 (D.C. 1991). However, the judge made two instructional errors that greatly undermined this defense. First, she erroneously communicated to the jury that accident is a defense to only second-degree murder and voluntary manslaughter, and does not apply to involuntary manslaughter—the offense for which Mr. Peyton was convicted. Contrary to the judge's instructions, accidental discharge of a weapon during a lawful act of self-defense is a complete defense to all grades of homicide, including involuntary manslaughter. *Id.* at 195; *Valentine v. Commonwealth*, 48 S.E.2d 264, 267-68 (Va. 1948).

Second, the judge reversibly erred in instructing the jury that Mr. Peyton

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," where Mr. Peyton responded to middle-of-the-night banging on his window by coming to the door with a gun. This jury instruction, which originated in an entirely different context, categorically does not apply to claims of self-defense *in the home*, where the Supreme Court has held that intent to provoke violence is required for forfeiture of the right to self-defense. *Beard v. United States*, 158 U.S. 550, 558 (1895). By authorizing the jury to dismiss self-defense on the ground that Mr. Peyton had reason to believe he would provoke trouble by arming himself and going to his front door to investigate a potential intruder, the judge's instruction contravened *Beard*, infringed Mr. Peyton's "inherent right of self-defense" in his home, *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), and is at odds with centuries of American jurisprudence recognizing the home as a sanctuary where the right to defend oneself is at its apex.

ARGUMENT

I. THE TRIAL COURT PREJUDICED MR. PEYTON'S DEFENSE OF ACCIDENTAL DISCHARGE OF A WEAPON WHILE ACTING IN LAWFUL SELF-DEFENSE WHEN IT ERRONEOUSLY CONVEYED TO THE JURY THAT ACCIDENT IS *NEVER* A DEFENSE TO INVOLUNTARY MANSLAUGHTER.

Mr. Peyton's defense was that he was lawfully acting in self-defense when his gun accidentally discharged. It was neither a pure self-defense theory nor a pure accident defense theory, but a hybrid of the two, as described in *Clark v. United States*, 593 A.2d 186 (D.C. 1991). Mr. Peyton testified that he was awakened at 2 a.m. by banging on his daughter's bedroom window and came to the door with a gun to investigate a possible burglary. Mr. Harrison, who was heavily intoxicated, attacked Mr. Peyton on his doorstep when Mr. Peyton expressed frustration about the late hour. As Mr. Peyton tried to fend off blows and extricate himself from Mr. Harrison's grip, his gun discharged. If the jury credited Mr. Peyton's account and had a reasonable doubt that he was lawfully acting in self-defense to push Mr. Harrison off of him when his gun unintentionally fired, the jury was required to acquit him of homicide. An "[a]ccused is entitled to an acquittal where he was lawfully acting in self-defense and the death of his assailant resulted from accident or misadventure." *Clark*, 593 A.2d at 195 (citation omitted).[15]

[15] An individual maintains the right to use a firearm in self-defense even if possession of the firearm is illegal. *See, e.g.*, *Stewart v. United States*, 687 A.2d 576, 579 (D.C. 1996); *Blades v. United States*, 200 A.3d 230, 243 (D.C. 2019). Thus, Mr. Peyton's status as a felon in possession is irrelevant to the question of whether he was lawfully acting in self-defense.

The judge found that there was sufficient evidence that Mr. Peyton was lawfully defending himself from an attack when his gun accidentally discharged and agreed to instruct the jury on Mr. Peyton's defense theory. Mistakenly believing that accident is *never* a defense to involuntary manslaughter, however, she erroneously communicated to the jury that Mr. Peyton's defense theory excused only second-degree murder and voluntary manslaughter, and did not apply to the lesser-included offense of involuntary manslaughter. Specifically, the judge told the jury that second-degree murder and voluntary manslaughter both required the government to "prove beyond a reasonable doubt" that "Mr. Peyton did not act in self-defense *or by accident*." 2/15/18 at 571, 572-73 (emphasis added). With respect to involuntary manslaughter, in contrast, the judge omitted that the government had to disprove accident, telling the jury that the only defense the government had to disprove beyond a reasonable doubt was self-defense. *Id.* at 573. The judge also limited her description of "accident" to second-degree murder and involuntary manslaughter. *Id.* This stood in sharp contrast to her subsequent statement that that self-defense is a complete defense to all three types of homicide. *Id.* at 574. Collectively, the instructions communicated to the jury that accident is not a defense to involuntary manslaughter and that Mr. Peyton's amalgamated defense theory instruction—accident during the course of a lawful act of self-defense—did not excuse involuntary manslaughter. Mr. Peyton was acquitted of second-degree murder and voluntary manslaughter but convicted of involuntary manslaughter.

The judge's instructions were erroneous because accidental discharge of a

weapon during a lawful act of self-defense is a complete defense to all grades of homicide, including involuntary manslaughter while armed. *Clark*, 593 A.2d at 195; *Valentine v. Commonwealth*, 48 S.E.2d 264, 267-68 (Va. 1948). In other words, if the jury had a reasonable doubt that Mr. Peyton was lawfully acting in self-defense when he pushed Mr. Harrison, and that his gun accidentally discharged in the process, it was required to acquit Mr. Peyton of second-degree murder, voluntary manslaughter, *and* involuntary manslaughter—not just the greater offenses. Because the government cannot show beyond a reasonable doubt that the erroneous instructions did not affect the verdict, this Court must reverse. *Chapman v. California*, 386 U.S. 18, 24 (1967).

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

It is well-established that accidental discharge of a weapon during a lawful act of self-defense is a complete defense to homicide. *Clark*, 593 A.2d at 194-95. *See also* 40 C.J.S. *Homicide* § 180 ("Homicide is excusable on the ground of accident if it appears that the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun.") (citation omitted); *State v. Goodson*, 440 S.E.2d 370, 372 (S.C. 1994) (same); *State v. Sprague*, 394 A.2d 253, 257-58 (Me. 1978) (similar); *Braxton v. Commonwealth*, 77 S.E.2d 840, 841-42 (Va. 1953) (similar); *Valentine*, 48 S.E.2d at 267-68 (similar); *Curry v. State*, 97 S.E. 529, 530-31 (Ga. 1918) (similar). Moreover, where this defense is raised, the "prosecution ha[s] the burden of proving beyond a reasonable doubt that the killing was not accidental." *Clark*, 593

A.2d at 194.

In *Clark*, this Court explicitly recognized that accidental discharge of a weapon during a lawful act of self-defense excuses a homicide. In that case, the defendant testified that his highly intoxicated girlfriend pointed a gun at him. 593 A.2d at 188. As the defendant attempted to disarm her, the gun accidentally discharged, fatally wounding her with a single bullet. *Id.* Although the judge offered to give the standard instruction on self-defense, it declined to give an instruction which "would have explicated his defense of accident in the context of his right of self-defense." *Id.* at 194. This was instructional error. *Id.* Citing cases from Virginia, which in turn relied on black letter law principles developed at common law, this Court held that where an accident occurs while a defendant is lawfully acting in self-defense, the defendant must be acquitted:

> *Accused is entitled to an acquittal where he was lawfully acting in self-defense and the death of his assailant resulted from accident or misadventure,* as where in falling he struck or overturned an object and thereby received injuries resulting in his death, or where in a struggle over the possession of a weapon it *was accidentally discharged.*

Id. at 195 (quoting *Braxton*, 77 S.E.2d at 841-42 (quoting *Valentine*, 48 S.E.2d at 267-68 (quoting 40 C.J.S. *Homicide* § 112c, at 981) (emphases added))). The Court explained that where "the defense of excusable homicide by misadventure is relied on, the principles of self-defense may be involved, not for the purpose of establishing defense of self, but for the purpose of determining whether accused was or was not at the time engaged in a lawful act" at the time the accident occurred. *Id.* *Clark* thus explicitly recognized Mr. Peyton's defense theory.

Contrary to the judge's instructions, the defense of accident during a lawful

act of self-defense applies equally to involuntary manslaughter. Indeed, *Valentine*, the seminal case cited in *Clark*, reversed a conviction for involuntary manslaughter on a very similar fact pattern, holding that the killing was excusable as "homicide by misadventure in lawful self-defense from an unwarranted attack." 48 S.E.2d at 269. In that case, the undisputed evidence was that the defendant was cutting flowers with a knife when a woman she knew threatened her and began hitting her on the head. *Id.* at 265-66. At first, the defendant attempted to shield herself from the blows by raising her arms. *Id.* at 266. When the attack continued, she struck back with clenched fists, forgetting that she had a knife in her hand. *Id.* The defendant stopped striking when the decedent ceased attacking her, and went home. *Id.* The decedent sustained six wounds, including a fatal one to the heart. *Id.* Because the defendant was acquitted of all grades of homicide other than involuntary manslaughter, the sole question on appeal was whether the evidence was sufficient to sustain a conviction for involuntary manslaughter. *Id.* at 267.[16] The Supreme Court of Appeals of Virginia held that it was not. *Id.* at 269.

Central to *Valentine*'s holding was the same black letter law principle that animated *Clark*: where an individual is entitled to use force in self-defense, but not deadly force, and accidentally kills his assailant during the course of lawful self-defense, the killing is excused. *Id.* at 268 ("[W]here a man, lawfully defending himself, unintentionally kills his assailant, the circumstances not authorizing a killing in self-defense, it is nevertheless deemed excusable homicide.") (quotations

[16] The Court defined involuntary manslaughter as "the killing of one accidentally . . . in the improper performance of a lawful act." *Id.* at 267 (quotations omitted).

omitted). The Court explained that "[h]omicide by misfortune or misadventure" is "when a man doing a lawful act, and using proper precaution to prevent danger, unfortunately happens to kill another." *Id.* at 267 (quotations omitted). A "lawful act," in turn, encompasses the lawful exercise of self-defense: "[I]n merely undertaking to repel the deceased's attack, [the defendant] was engaged in a lawful act." *Id.* Because the defendant "instinctively and in self-defense struck her assailant without being aware or conscious of the fact that the small knife was still in her hand," her actions did "not constitute the commission of *any* crime." *Id.* at 269 (emphasis added).[17]

Valentine is on all fours with this case. At the time Mr. Peyton was attacked, he was holding a gun in his hand, just as Valentine held a knife. Like Valentine, Mr. Peyton testified that he initially raised his hands to protect himself from the oncoming blows. His response to the continued attack mirrored Valentine's: he "instinctively and in self-defense" pushed Mr. Harrison away while holding his weapon. 48 S.E.2d at 269. During this act of self-defense, his gun unintentionally discharged, killing Mr. Harrison. Just as Valentine never intended to stab the decedent, Mr. Peyton testified that he did not intend to shoot Mr. Harrison.

Below, the government misread *Comber* to argue that accident is never a defense to involuntary manslaughter. *See* 2/14/18 at 355-57. In *Comber*, the en

[17] *Cf. Gunn v. State*, 365 N.E.2d 1234, 1239-40 (Ind. Ct. App. 1977) (reversing conviction for involuntary manslaughter where court denied defendant the opportunity to fully present defense of accident during a lawful act of self-defense).

banc Court traced the common law history of second-degree murder, voluntary manslaughter, and involuntary manslaughter, and explained the difference between these grades of homicide.[18] Contrary to the government's argument however, *Comber*'s description of involuntary manslaughter as an "unintentional or accidental killing" does not preclude the defense of accident in cases such as this, where the defendant is lawfully acting in self-defense when the killing occurs accidentally. *Comber* explicitly recognizes that an accidental killing may be justified or excused, depending on the attendant circumstances:

> [S]uch an unintentional or accidental killing is unlawful, and [] constitutes involuntary manslaughter,[19] *unless it is justifiable or excusable*. Indeed, it is the absence of circumstances of justification or excuse which renders a non malicious killing "unlawful." Accordingly, one key to distinguishing those unintentional killings which are unlawful, and hence manslaughter, from those to which no homicide liability attaches is *determining the circumstances under which a killing will be legally excused*.

584 A.2d at 47-48 (emphases added). The Court continued that "where a person

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[18] Second-degree murder and manslaughter both require malice—*i.e.*, a specific intent to kill, a specific intent to inflict serious bodily harm or a "wanton and willful disregard of an unreasonable human risk." *Comber*, 584 A.2d at 38. The difference between voluntary manslaughter and second-degree murder is that voluntary manslaughter is less culpable because of the presence of mitigating circumstances such as imperfect self-defense. *Id.* at 47. Involuntary manslaughter, in contrast, does not require malice. It can be subdivided into (1) criminal-negligence involuntary manslaughter, which requires a "gross deviation from a reasonable standard of care," *id.* at 48 (citation omitted), and (2) misdemeanor involuntary manslaughter, in which the "intentional commission of a misdemeanor supplies the culpability required to impose homicide liability," *id.* at 49.

[19] Criminal negligence involuntary manslaughter, the type charged here, is an unintentional or accidental killing caused by criminally negligent conduct that "both creates extreme danger to life or of serious bodily injury and amounts to a gross deviation from a reasonable standard of care." 584 A.2d at 48 (quotation omitted).

kills another in doing a lawful act in a lawful manner," the homicide is excused. *Id.* at 48 (quotation omitted). This same principle is at the heart of *Valentine*. *Comber* is thus entirely consistent with *Valentine*, *Clark*, and Mr. Peyton's defense of accident during a lawful act of self-defense.[20]

In giving a self-defense instruction, the judge recognized that a jury could reasonably find that coming to the door with a gun in response to a perceived burglary and responding to a physical attack by pushing the attacker away is lawful self-defense. Because lawful self-defense constitutes a "lawful act in a lawful manner" for purposes of involuntary manslaughter, if the jury had a reasonable doubt that the gun accidentally discharged and killed Mr. Harrison under these circumstances, the killing was excused.

B. THE ERRONEOUS INSTRUCTIONS WERE NOT HARMLESS.

The judge's erroneous instructions were prejudicial error mandating reversal of Mr. Peyton's involuntary manslaughter and PFCV convictions because they deprived him of his defense theory with respect to these charges. The omission of an instruction on accident as a defense to involuntary manslaughter was an error of constitutional magnitude because it alleviated the government's burden of proving

[20] *Hebron v. United States*, 625 A.2d 884 (D.C. 1993) and *Morris v. United States*, 648 A.2d 958 (D.C. 1994), the other cases cited by the government, *see* 2/14/18 at 357-58, are similarly inapposite. The cases merely quote *Comber* for the definition of involuntary manslaughter and do not purport to opine on what defenses would excuse involuntary manslaughter. *Hebron*, 625 A.2d at 886 (holding that trial court did not err in refusing to give an instruction on assault with a dangerous weapon as a lesser-included offense of involuntary manslaughter); *Morris*, 648 A.2d at 961 (holding that "while armed" sentencing enhancement applies to involuntary manslaughter).

beyond a reasonable doubt that his gun did not discharge accidentally, as Mr. Peyton claimed. *See Clark*, 593 A.2d at 194 (holding that the "prosecution ha[s] the burden of proving beyond a reasonable doubt that the killing was not accidental"); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (explaining that due process and the Sixth Amendment right to trial by jury "[t]aken together . . . indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged" (quotation omitted)); *Wilson-Bey v. United States*, 903 A.2d 818, 822 (D.C. 2006) (en banc) (holding that omission of *mens rea* element of the charged offense was an "error of constitutional magnitude"). Therefore, this Court should review the error under *Chapman v. California*, 386 U.S. 18, 24 (1967), asking whether the government can "prove beyond a reasonable doubt" that the error "did not contribute to the verdict." Here, the government cannot meet this heavy burden.

The erroneous instructions permitted the jury to find Mr. Peyton guilty of involuntary manslaughter even if it credited his testimony and had a reasonable doubt that the he was lawfully acting in self-defense when the gun accidentally discharged. The instructions communicated to the jury that Mr. Peyton had a defense to only the greater offenses and that in testifying that the shooting was accidental, he was conceding the involuntary manslaughter charge. The jury verdict acquitting Mr. Peyton of second-degree murder and voluntary manslaughter but convicting him of involuntary manslaughter was consistent with a mistaken understanding that accident is never a defense to involuntary manslaughter.

To a properly instructed jury, Mr. Peyton's defense of accidental discharge of a weapon during a lawful act of self-defense would have been a compelling defense to involuntary manslaughter. Indeed, much of the government's evidence corroborated Mr. Peyton's testimony that his gun accidentally fired while he was trying to extricate himself from Mr. Harrison's grasp by pushing him away. It was undisputed that Mr. Harrison came over uninvited at 2 a.m. and knocked on Mr. Peyton's window. A.W. testified that when Mr. Peyton reported that someone was banging on the window, he looked nervous and like he did not know who was outside. She told the detectives that he yelled, "Who is it?" from the door. The judge found that Mr. Harrison was the first aggressor and punched Mr. Peyton. A.W., the only eyewitness who saw the physical altercation, corroborated Mr. Peyton's testimony that Mr. Harrison punched him multiple times, which was consistent with the scrapes on Mr. Harrison's knuckles.

Mr. Peyton, in turn, testified that the gun discharged as he attempted to push Mr. Harrison off of him and that he never intended to shoot Mr. Harrison. That only a single bullet was fired corroborated this account. Mr. Peyton's statements immediately following the shooting were likewise consistent with the accidental discharge of a weapon. N.G., D.L. and A.W. all testified that Mr. Peyton apologized profusely and repeatedly asked, "Why did you have to come at me?"—indicia that the shooting was both unintended and distressing. In the face of this tragedy, Mr. Peyton took concrete steps to help Mr. Harrison such as cradling his head, talking to him to keep him awake, helping N.G. move him, and calling for someone to dial 911.

The verdict reflected the jury's doubts about the government's case. Although the prosecutor argued that Mr. Peyton intended to shoot Mr. Harrison, the jury unambiguously rejected this theory when it acquitted Mr. Peyton of second-degree murder and involuntary manslaughter. Because the government cannot show beyond a reasonable doubt that a properly instructed jury that understood that Mr. Peyton's defense theory applied equally to involuntary manslaughter would not have also acquitted Mr. Peyton of that charge (and the corresponding PFCV charge), this Court must reverse.

II. THE JUDGE REVERSIBLY ERRED IN INSTRUCTING THE JURY THAT MR. PEYTON FORFEITED HIS RIGHT TO SELF-DEFENSE IF "HE PUT HIMSELF IN A POSITION WHERE HE HAD REASON TO BELIEVE HIS PRESENCE WOULD PROVOKE TROUBLE" WHERE HIS SELF-DEFENSE CLAIM AROSE IN THE HOME.

Mr. Peyton's defense was accident during the course of a lawful act of self-defense. *See* Part I. The government requested an instruction that Mr. Peyton forfeited his right to self-defense if he "was the aggressor" or "deliberately put[] himself in a position where he ha[d] reason to believe that his presence [would] provoke trouble." 2/13/18 at 160-62; Criminal Jury Instructions for the District of Columbia, No. 9.504. Defense counsel objected, arguing that (1) the government had put on "no evidence that Mr. Peyton was the aggressor," 2/13/18 at 162, and (2) the provocation portion of Instruction 9.504 is about "entirely different circumstances" and does not apply in the home, *id.* at 163. With respect to provocation, defense counsel explained that Instruction 9.504 applies to cases outside the home, such as where there is an "earlier incident" and the "defendant goes home and comes back to the scene of the argument with a gun." *Id.* In

contrast, where someone is banging on the defendant'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 (emphasis added). *See also id.* at 163 ("But that's not provocation when someone is banging on your window . . . Taking a gun in self-defense to your own door is not provocation.").

The judge agreed with the defense that there was no evidence that Mr. Peyton was the first aggressor, *id.* at 165, but concluded that it was a jury question whether there was provocation, *id.* at 166-67. She ruled that if the jury found that Mr. Peyton "was aware of who was outside," there was a sufficient basis to find provocation. *Id.* The judge ultimately read Instruction 9.504 to the jury in its entirety, explaining that one who is the "aggressor" or "deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble cannot claim self-defense." 2/15/18 at 575. This was error.

A homeowner does not forfeit his right to self-defense by arming himself to investigate middle-of-the-night banging on his window, a situation that reasonably urgently calls for forceful defensive measures. Yet the instruction wrongly borrowed from wholly inapposite circumstances denuded the fundamental right of self-defense by authorizing the jury to dismiss self-defense altogether on the ground that an armed homeowner "provoked trouble" by—as in this case—angering the would-be intruder, who then resorted to violence against the home defender. To avoid such an absurd result, the law holds that an individual does not forfeit his right to self-defense *in the home* unless he has the purpose to provoke violence. *Beard v. United States*, 158 U.S. 550, 558 (1895); *Wallace v. United*

States, 18 App. D.C. 152, 161-62 (1901). *Laney v. United States*, 294 F. 412, 415 (D.C. 1923), the case from which the language of Instruction 9.504 is derived, involved a public shooting where the defendant had purportedly reached a place of safety and then returned to his attackers. There, the Court explicitly distinguished *Beard*'s intent requirement for forfeiture of self-defense on the ground that the defendant in *Beard* was on his own property. This Court has never extended Instruction 9.504 to situations, like here, where the defendant faces a potential intruder *at his home*. Nor can it. Not only would such a rule contravene *Beard*, it would infringe on the "inherent right of self-defense" described by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), and be at odds with centuries of American jurisprudence recognizing the home as a sanctuary where the right to defend oneself is at its zenith.

In addition, even aside from the trial court's fundamental error abrogating the right of self-defense, it also erred under its own rationale by giving the instruction in its entirety, without tailoring it, even though it had ruled that there was insufficient evidence that Mr. Peyton was the "aggressor," and that provocation required a jury finding that Mr. Peyton knew Mr. Harrison was at the window. Because the government cannot show that the erroneous instruction on forfeiture of self-defense was harmless beyond a reasonable doubt, this Court must reverse Mr. Peyton's conviction for involuntary manslaughter and PFCV.

A. INSTRUCTION 9.504 DOES NOT APPLY TO CLAIMS OF SELF-DEFENSE IN THE HOME.

The trial judge erred in instructing the jury that it could find Mr. Peyton forfeited his right to self-defense if he "had reason to believe that his presence

[would] provoke trouble," 2/15/18 at 575, because this instruction does not apply to claims of self-defense in the home. Forfeiture of self-defense *in the home* requires an *intent* to provoke violence, not mere negligence, as Instruction 9.504 suggests. In *Beard*, the Supreme Court held that an individual does not forfeit self-defense in his home or on his premises unless he provokes violence *intentionally*. 158 U.S. at 558. *Beard* involved an ongoing dispute over the ownership of a cow on Beard's property. The decedent had previously attempted to take the cow, but Beard directed him to go to court to settle the dispute. *Id.* at 551-52. The decedent then publically threatened to kill Beard, who in turn warned the decedent not to return for the cow without an officer of the law. *Id.* at 552. When Beard subsequently saw the decedent at his orchard fence attempting to remove the cow, he "went at once from his dwelling into the lot called the 'orchard lot,' a distance of about 50 or 60 yards from his house" and ordered the decedent to leave his premises. *Id.* Beard was carrying a shotgun. *Id*. When the decedent advanced angrily towards Beard and made a movement with his hand as if to draw a pistol, Beard struck him over the head with his gun, killing him. *Id.* at 552-53.

The Supreme Court held that the defendant was entitled to claim self-defense 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* with the [decedent]." *Id.* at 558 (emphasis added). Emphasizing that throughout the controversy Beard "evinced a purpose to avoid a difficulty or an affray," the Supreme Court held that it was error to instruct the jury on forfeiture of self-defense by provocation. *Id. Beard* thus made clear

that forfeiture by provocation in the home requires an intent to provoke an affray. The rule of *Beard* is controlling. *See Wallace v. United States*, 18 App. D.C. 152, 161-62 (1901) (holding, in case where claim of self-defense arose in defendant and decedent's shared home, that "intention to provoke a quarrel" was required for forfeiture of self-defense); *Laney*, 294 F. at 415 (describing *Beard* as the lead authority on self-defense).[21]

The text of the provocation instruction given in this case (Instruction 9.504) originates in *Laney*, 294 F. 412, a case in which the fatal encounter occurred *outside the home*, and which the court distinguished from *Beard* on this ground. *Laney* arose in a disturbing historical context. During the race riots of the infamous "Red Summer" of 1919,[22] an angry white mob chased and threatened to kill Laney, an African American man. *Id.* at 413. Though Laney escaped into a safe area between two houses and could have remained there, avoiding further confrontation with the mob, he instead returned to the street, aware that the mob was still present. *Id.* at 414. The mob attacked him again, yelling, "Let's kill the nigger," and shooting at him. *Id.* at 413. Laney fired several shots into the crowd and killed one person. *Id.* at 413-14. In upholding Laney's conviction, the Court held that Laney forfeited his right to a self-defense instruction because he returned to the scene where the need for deadly force would likely arise. *Id.* at 414. The

[21] Both *Wallace* and *Laney* were decided by the Court of Appeals of the District of Columbia, the predecessor court to the D.C. Circuit.

[22] For four days in July 1919, mobs of up to 2,000 white men, inflamed by news articles about black men attacking white women, roamed the streets of the District of Columbia attacking any black person they came across, while police stood idly by. *See* Delia Cunningham Mellis, *The Monsters We Defy* 161, 172 (2008).

Court observed that "when he . . . stepped out into the areaway, he had every reason to believe that his presence there would provoke trouble." *Id.* The challenged instruction is taken directly from this language. *Sams v. United States*, 721 A.2d 945, 952 (D.C. 1998).

In distinguishing *Beard*, the *Laney* court reasoned that voluntarily returning to a *public* street where violence was likely to erupt was fundamentally different from a situation where defendant confronted a trespasser on his property. *Laney*, 294 F. at 415 (emphasizing that Beard was "assaulted. . . *on his own premises*, defending his property" (emphasis added)). *Laney* explained that Beard did not forfeit the right to self-defense because there 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 415 (emphases added). *Laney* thus recognized that where one is threatened in his home or on his premises, a "purpose" or "intent" to provoke an affray is required for forfeiture of the right to act in self-defense. The defendant in *Laney*, in contrast, was not on his premises "acting in defense of his property." *Id.* Accordingly, he "had no right to go" back to the street where the angry mob was waiting "if by so doing it would invite an affray, which would almost inevitably result in the taking of life." *Id.* Under those very different circumstances, the court held that Laney forfeited his right to self-defense.

Appellant is aware of no case in which this Court has applied the rule of *Laney* to self-defense in the home, nor could it consistent with *Beard*. Rather, as defense counsel argued, 2/13/18 at 163, this Court's precedents on forfeiture of

self-defense by provocation overwhelmingly involve "situations in which defendants had a violent or threatening encounter with specific individuals and then shortly thereafter sought out those same individuals again" in a manner likely to rekindle the violence. *Tibbs v. United States*, 106 A.3d 1080, 1085 (D.C. 2015).[23] In such circumstances, this Court has suggested that an individual forfeits his right to self-defense, even if the jury concludes that his intent in going to a particular location was "benign" or "benevolent," so long as he should have known that his "presence" was likely to "provoke trouble." *Sams*, 721 A.2d at 953. Instruction 9.504, with its "reason to know" language, communicates to the jury that the *mens rea* for forfeiture is mere negligence.

The District is an "outlier in not requiring proof of intent to incite violence as a component of its provocation doctrine" in self-defense claims outside the home, *Andrews*, 125 A.3d at 322 n.13, and this status is yet another reason to avoid extending the doctrine to claims of self-defense in the home. The overwhelming

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[23] *See also Sams*, 721 A.2d at 948 (instruction appropriate where there was evidence that the defendant was threatened by decedent with a knife, fled the scene to summon a group of armed friends, and returned to confront the decedent); *Andrews v. United States*, 125 A.3d 316, 318, 323 (D.C. 2015) (instruction appropriate where defendant chose to go to his girlfriend's house notwithstanding her brother's prior death threat and warning that he would be waiting at the house); *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995) (self-defense unavailable to defendants, who, after confrontation with decedent, "armed themselves with a considerable amount of firepower" and went looking for decedent later that same day because the "degree of initiative appellant had taken in creating the confrontation precluded a claim of self-defense"); *Brown v. United States*, 619 A.2d 1180, 1182-83 (D.C. 1992) (self-defense unavailable because defendant, after being followed by decedent under suspicious circumstances, "directed the co-defendant to enter a house, obtain an Uzi pistol and return to the street where the [decedent] was parked inside his auto").

majority of states—at least 44—categorically require an intent to provoke a violent confrontation before the right to self-defense is forfeited.[24] The remaining states, instead of requiring intent, require a higher degree of wrongful, affirmative conduct

[24] These are: Alabama (Ala. Code § 13A-3-23(c)(1)); Alaska (Alaska Stat. Ann. § 11.81.330(a)(2)); Arizona (*State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963) (en banc)); Arkansas (Ark. Code Ann. § 5-2-606(b)(1)); California (Cal. Crim. Jury Instruction 3472); Colorado (Colo. Rev. Stat. Ann. § 18-1-704(3)(a)); Connecticut (Conn. Gen. Stat. Ann. § 53a-19(c)(1)); Delaware (Del. Code Ann. tit. 11, § 464(e)(1)); Florida (*Barnes v. State*, 93 So. 2d 863, 864 (Fla. 1957)); Georgia (Ga. Code Ann. § 16-3-21(b)(1)); Hawaii (Haw. Rev. Stat. Ann. § 703-304(5)(a)); Idaho (*State v. Livesay*, 233 P.2d 432, 435 (Idaho 1951)); Illinois (Ill. Pattern Jury Instructions-Crim. 24-25.11); Indiana (Ind. Code Ann. § 35-41-3-2(g)(2)); Iowa (Iowa Code Ann. § 704.6(2)); Kansas (Kan. Pattern Instructions Crim. 52.240); Kentucky (Ky. Rev. Stat. Ann. § 503.060(2)); Louisiana (*State v. Short*, 46 So. 1003, 1006 (La. 1908)); Maine (Me. Rev. Stat. Ann. tit. 17-a, § 108(2)(C)(1)); Maryland (*Gunther v. State*, 179 A.2d 880, 882 (Md. 1962)); Mississippi (*Patrick v. State*, 285 So. 2d 165, 169 (Miss. 1973)); Missouri (*State v. Evans*, 28 S.W. 8, 11 (Mo. 1894)); Montana (Mont. Code Ann. § 45-3-105(2)); Nebraska (Neb. Rev. Stat. § 28-1409(4)(a)); Nevada (*Johnson v. State*, 551 P.2d 241, 242 (Nev. 1976) (per curiam)); New Hampshire (N.H. Rev. Stat. Ann. § 627:4(III)(c)); New Jersey (N.J. Stat. Ann. § 2C:3-4(b)(2)(a)); New Mexico (*State v. Cochran*, 430 P.2d 863, 864–65 (N.M. 1967)); New York (N.Y. Penal Law § 35.15(1)(a)); North Carolina (*State v. Sanders*, 281 S.E.2d 7, 14–15 (N.C. 1981)); North Dakota (N.D. Cent. Code Ann. § 12.1-05-03(2)(a)); Ohio (*State v. Melchior*, 381 N.E.2d 195, 200 (Ohio 1978)); Oklahoma (Okla. Uniform Jury Instructions-Crim. 8-50); Oregon (Or. Rev. Stat. Ann. § 161.215(1)); Pennsylvania (18 Pa. Stat. and Cons. Stat. Ann. § 505(b)(2)(i)); Rhode Island (*State v. Hanes*, 783 A.2d 920, 926 (R.I. 2001)); South Dakota (*State v. Means*, 276 N.W.2d 699, 701–02 (S.D. 1979)); Tennessee (*Floyd v. State*, 430 S.W.2d 888, 890 (Tenn. Crim. App. 1968)); Texas (*Smith v. State*, 965 S.W.2d 509, 513–14 (Tex. Crim. App. 1998) (en banc)); Utah (Utah Code Ann. § 76-2-402(2)(a)(i)); Washington (*State v. Wasson*, 772 P.2d 1039, 1040 (Wash. Ct. App. 1989)); West Virginia (*State v. Bowyer*, 101 S.E.2d 243, 249 (W. Va. 1957)); Wisconsin (Wis. Stat. Ann. § 939.48(2)(c)); and Wyoming (*State v. Bristol*, 84 P.2d 757, 763–64 (Wyo. 1938)). Many states require an affirmative provocative act in addition to the intent to provoke. *See, e.g.*, *Livesay*, 233 P.2d at 435 ("Bare intent and purpose to provoke a difficulty does not deprive one of the right of self-defense."); *Smith*, 965 S.W.2d at 513–14; *Turnbull v. State*, 128 P. 743, 745 (Okla. Crim. App. 1912).

(such as forcibly entering a home or committing a robbery), beyond mere presence.[25] In light of the unanimous rejection of the *Laney* rule, this Court should read it as narrowly as possible.

Requiring an intent to provoke violence as a prerequisite for forfeiture of self-defense in the home, notwithstanding this Court's endorsement of a lower *mens rea* in other contexts, is also consistent with *Heller* and the well-established principle that the home is a sanctuary that is afforded maximum protection under the law. The maxim that "a man's house is his castle" dates back to English common law and continues to inform contemporary jurisprudence. *See, e.g.*, 3 William Blackstone, Commentaries on the Laws of England 288 (1768) ("[E]very man's house is looked upon by the law to be his castle."); *Payton v. New York*, 445 U.S. 573, 596–97 (1980) ("The zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." (citation omitted)); *United States v. Peterson*, 483 F.2d 1222, 1236 (D.C. Cir. 1973) ("The oft-repeated expression that 'a man's home is his castle' reflected the belief in olden days that there were few if any safer sanctuaries than the home.") (citations omitted); *People v. Jones*, 821 N.E.2d 955,

[25] These are: Massachusetts (*Com. v. Chambers*, 989 N.E.2d 483, 489–90 (Mass. 2013)); Michigan (*People v. Bailey*, 777 N.W.2d 424, 425–26 (Mich. 2010)); Minnesota (*State v. Edwards*, 717 N.W.2d 405, 412 (Minn. 2006) (en banc) (plurality opinion)); *State v. Gardner*, 104 N.W. 971, 975 (Minn. 1905)); South Carolina (*State v. Williams*, 733 S.E.2d 605, 609 (S.C. Ct. App. 2012)); Vermont (Vt. Model Crim. Jury Instruction CR07-091) and Virginia (*Bausell v. Com.*, 181 S.E. 453, 461–62 (Va. 1935)).

957 n.3 (N.Y. 2004) ("[T]he law of England has so particular and tender a regard for the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity." (quoting 4 William Blackstone, Commentaries on the Laws of England at 223 (1769)).

Because of the home's special status, the right to exercise self-defense has always been greatest in the home.[26] The development of the castle doctrine reflects this principle. At common law, a defendant was required to "retreat to the wall" before using deadly force. *Gillis v. United States*, 400 A.2d 311, 312 (D.C. 1979).[27] However, jurisdictions following this common law rule "almost universally" suspended the duty to retreat in the home pursuant to the "castle doctrine," which provides that "one who through no fault of his own is attacked in one's own home is under no duty to retreat." *Cooper v. United States*, 512 A.2d

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[26] The notion that the home is a sanctuary entitled to heightened protection also permeates Fourth Amendment and individual rights jurisprudence. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, our [Fourth Amendment] cases show [that] the entire area is held safe from prying government eyes"); *Payton*, 445 U.S. at 597 n.45 (observing that "the common law's special regard for the home" has influenced "the development of Fourth Amendment jurisprudence," and holding that police officers need an arrest warrant to enter the home to effect a routine felony arrest); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that in-home possession of obscene materials could not be criminalized even if public possession of the same material could be regulated); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (discussing general right to privacy as closely connected with "the sanctity of a man's home and the privacies of life" (quotation omitted)).

[27] This jurisdiction has adopted a "middle ground" position that "imposes no duty to retreat" but permits the jury to consider ability to retreat as a factor in assessing whether a defendant was "actually or apparently in imminent danger of bodily harm." *Gillis*, 400 A.2d at 313.

1002, 1005 (D.C. 1986); *State v. Montalvo*, 162 A.3d 270, 320 (N.J. 2017) (explaining that the duty to retreat is "suspended under the castle doctrine . . . if the confrontation takes place in one's home or castle" (quotations omitted, ellipses in original)). The castle doctrine exception "extend[ed], not merely to one's house, but also to the surrounding grounds." *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) (citing *Beard*, 158 U.S. 550).

More recently, in *Heller*, the Supreme Court described self-defense as an "inherent right" that is at its apex in the home. 554 U.S. at 628-29. In striking down "the District's ban on handgun possession *in the home*," and its "prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense," as contrary to the Second Amendment, the Court emphasized that the home is "where the need for defense of self, family, and property is most acute." *Id.* at 628, 635 (emphases added). The District's total ban on handguns violated the Second Amendment's "core" protection of the right to bear arms in "defense of *hearth and home*." *Id.* at 634-35 (emphasis added). In rejecting the requirement that firearms be kept inoperable—*i.e.*, unloaded and disassembled or bound by trigger lock—*Heller* recognized that the right to self-defense in the home encompasses anticipatory self-defense. The Court found it problematic that the statute had been interpreted to forbid residents from using firearms to stop intruders. *Id.* at 630. Because the trigger-lock requirement made it "impossible for citizens to use [handguns] for the core lawful purpose of self-defense," the Supreme Court declared it unconstitutional. *Id.*[28]

[28] In the wake of *Heller*, courts have continued to find the distinction between the

In light of *Beard*, *Heller*, and the centuries of jurisprudence affording individuals a greater right to self-defense in the home, this Court should hold that the rule of *Laney*, enshrined in Instruction 9.504, does not apply in the home. Rather, where an individual is in his home or on his premises, he does not forfeit the right to self-defense by provocation unless the government proves beyond a reasonable doubt that he intended to provoke violence.

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home and other spaces to be meaningful when assessing the scope of the right to self-defense. For example, the New Jersey Supreme Court recently differentiated between the right of self-defense in the home and in public places in reversing a conviction for a possessory weapons offense in the home. *Montalvo*, 162 A.3d 270. In that case, the defendant and his neighbor had a prior dispute. *Id.* at 274. When the neighbor subsequently knocked on Montalvo's door, the defendant opened the door with a machete in his hand. *Id.* He was charged with unlawful possession of a weapon. *Id.* At trial, the defendant testified that he feared reprisal and had retrieved his machete as a precautionary measure. *Id.* Relying on a case involving possessory offenses *outside the home*, the lower court instructed the jury that self-defense did not justify possession of the machete unless the defendant armed himself "spontaneously to repel an immediate danger." *Id.* at 277-78. The New Jersey Supreme Court reversed, citing *Heller*. *Id.* at 274, 282. The court explained that because "the home is accorded special treatment within the justification of self defense," prior case law requiring "spontaneity" for self-defense outside the home was distinguishable. *Id.* at 282, 283-84. The court reasoned that the right to "anticipatory self defense" in the home "would be of little effect if one were required to keep the weapon out-of-hand, picking it up only 'spontaneously.'" *Id.* at 284-85. Accordingly, answering the door with a machete was "lawful" self-defense, and it was plain error to instruct the jury on principles of self-defense that applied outside the home. *Id.* at 283.

See also Kachalsky v. Cty. of Westchester, 701 F.3d 81, 89, 94-96 (2d Cir. 2012) (noting that the right to self-defense, and the corresponding right to bear arms, "are at their zenith in the home"; describing the home as "special," "subject to limited state regulation," and where the Second Amendment's "core concerns are strongest"; and applying intermediate scrutiny to a law that regulated only carrying firearms in public where the state has historically had greater latitude to regulate than inside the home).

Here, Mr. Peyton was indisputably in the sanctuary of his home when Mr. Harrison arrived, uninvited, in the middle of the night and began banging on his daughter's widow. Mr. Peyton opened the door of his unit and walked two steps to the front door of the apartment building—a distance far shorter than the 50 to 60 yards that Beard traversed to confront the decedent in that case. By all accounts, Mr. Peyton was standing in the "doorway" or "threshold" of the apartment building when Mr. Harrison attacked him. 2/7/18 at 76 (N.G.'s testimony); 2/8/18 at 88 (A.W.'s testimony); 2/14/18 at 408 (Mr. Peyton's testimony). Under these circumstances, the trial court erred in giving the jury Instruction 9.504, which permitted it to find forfeiture of self-defense based on the wrongheaded notion that one may anger (provoke) an intruder by confronting him. Finally, in the event of retrial, the Court should admonish that the evidence as presented would not permit *any* forfeiture of self-defense instruction.[29]

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[29] There was an insufficient factual predicate to give even an intent-based provocation instruction had the government requested one. The basis of the government's provocation theory—that Mr. Peyton (1) knew it was Mr. Harrison outside; (2) was upset with him because of the delay in returning his phone; and (3) went to the door with a gun in his hand, 2/13/18 at 164—was insufficient as a matter of law to establish an intent to provoke violence where Mr. Peyton "neither used, nor threatened to use, force" prior to being punched. *Beard*, 158 U.S. at 558. *See* 2/13/18 at 169-70 (judge finding "no evidence that [Mr. Peyton] brandished the weapon" or "did anything with respect to using the weapon . . . before Mr. Harrison hit him"). Coming to the door with a gun in hand in response to middle-of-the-night banging on the window and asking Mr. Harrison to leave was analogous to Beard carrying a shotgun to the orchard fence and "command[ing]" the decedent "to leave his premises." *Beard*, 158 U.S. at 558. As this Court has recognized, merely carrying a gun does not result in forfeiture of the right to self-defense. *Blades v. United States*, 200 A.3d 230, 243-44 (D.C. 2019). Assuming *arguendo* that Mr. Peyton knew it was Mr. Harrison banging at the window at 2 a.m., a fact Mr. Peyton disputes, 2/13/18 at 167, that fact is not legally significant

B. THE JUDGE ERRED IN GIVING GENERIC INSTRUCTION 9.504, WHICH DID NOT REFLECT HER FINDINGS ON AGGRESSION AND PROVOCATION.

In addition to delivering a wholly inappropriate and damaging instruction, the judge further erred in giving generic Instruction 9.504 without tailoring it to reflect her ruling. As an initial matter, the judge told the jury that Mr. Peyton forfeited his right to self-defense if it found that "Mr. Davon Peyton was the aggressor." 2/15/18 at 575. This portion of the instruction directly contradicted her ruling that there was insufficient factual basis for a jury to find that he was the aggressor. 2/13/18 at 165. However, by giving this instruction reflexively, she communicated to the jury "that in the opinion of the court, there was evidence" to support the aggressor instruction. *Beard*, 158 U.S. at 559.[30]

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because Beard also knew who was at his fence when he walked across the orchard with a shotgun.

Moreover, nothing in the background facts the government adduced permitted a jury finding beyond a reasonable doubt that Mr. Peyton intended to provoke Mr. Harris into attacking so he could shoot him, or anything of the sort. To the extent Mr. Peyton was upset about having to buy a new phone, he expressed only minor frustration to N.G., 2/7/18 at 70, accepted a ride from her, *id.* at 123, and told Mr. Harrison by phone that they were "good," 2/13/18 at 298. Mr. Peyton never confronted Mr. Harrison or threatened retaliation. 2/7/18 at 64-65 (testimony that N.G. had never seen Mr. Peyton and Mr. Harrison fight or exchange threatening words). *See Com. v. Samuel*, 590 A.2d 1245, 1298 (Pa. 1991) (holding that "initial display of [a] gun to [decedent] in a non-threatening manner, accompanied with a request to vacate the apartment" did not constitute provocation as a matter of law); *State v. Burns*, 516 P.2d 748, 752-53 (Or. Ct. App. 1973) (holding that defendant did not forfeit right to self-defense by provocation, where, after unsuccessfully trying to eject a drunk guest from his home, he threatened the guest with a gun).

[30] As explained in the Comments to Redbook Instruction 9.504, "[t]he Committee has bracketed language referring to an aggressor and one who provokes the assault to indicate that aggression and provocation are distinct legal theories under D.C.

Second, the judge failed to tailor the provocation instruction according to her own ruling. The judge's ruling that a provocation instruction was appropriate turned on her conclusion that it was a "question of fact for the jury to decide whether or not they think that's what happened rather than *that he was aware of who was outside.*" 12/13/18 at 166-67 (emphasis added). In other words, only if the jury concluded beyond a reasonable doubt that Mr. Peyton *knew* Mr. Harrison was outside could it find provocation. However, the judge failed to give the jury "adequate guidance" on what she viewed as a critical distinction. *Dawkins v. United States*, 189 A.3d 223, 235, 237 (D.C. 2018) (reversible error where self-defense instruction failed to "clearly explain" temporal limitation to duty to retreat). The broad "reason to believe that his presence [would] provoke trouble" language permitted the jury to find forfeiture even if it credited Mr. Peyton's testimony that he came to the door with a gun because he believed an unknown intruder was trying to break into his home. *See supra* p. 33, 44; *infra* p. 48-49.

Not only would a finding of forfeiture under such a scenario be contrary to the judge's ruling, it violates an individual's "inherent right of self-defense" in the home. *Heller*, 554 U.S. at 628 (describing self-defense as an "inherent right" that is "central to the Second Amendment right"). In holding that the trigger-lock requirement was unconstitutional, *Heller* recognized that the right to self-defense in the home necessarily encompasses the right to anticipatory self-defense—*i.e.*, the ability to be ready to meet a potential threat. The right to arm oneself in the

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law and there will be times when it is not appropriate to instruct on both." Instruction 9.504, Comment.

home for the purpose of self-defense would be meaningless if one automatically forfeited this same right by coming to the door of his home with a weapon in response to a potential intrusion. Because the provocation instruction "permitt[ed] reasonable jurors to misunderstand" the law of provocation, it was erroneous. *Dawkins*, 189 A.3d at 236.

C. THE INSTRUCTION WAS PREJUDICIAL.

If the jury concluded that Mr. Peyton was lawfully acting in self-defense when his gun accidentally discharged, he was entitled to acquittal on all charges of homicide. *See supra* Part I. Because Instruction 9.504 permitted the jury to conclude that Mr. Peyton had no right to self-defense, even if it credited the entirety of his testimony, the government was relieved of its burden to disprove self-defense beyond a reasonable doubt. *Rorie v. United States*, 882 A.2d 763, 777 (D.C. 2005); *see also Comber*, 584 A.2d at 40-42 n.17 (holding that where evidence of self-defense is present, the government must disprove self-defense beyond a reasonable doubt). The instruction therefore amounted to constitutional error, subject to *Chapman* review. *Chapman*, 386 U.S. at 24; *see also State v. Birnel*, 949 P.2d 433, 440 (Wash. Ct. App. 1998) ("The aggressor instruction effectively denied [the defendant] of his ability to claim self-defense. An error affecting a defendant's self-defense claim is constitutional in nature and cannot be deemed harmless unless it is harmless beyond a reasonable doubt" (internal citation omitted)). Under that standard, this Court should reverse Mr. Peyton's convictions for involuntary manslaughter while armed and PFCV because the government cannot show that the error was "harmless beyond a reasonable doubt."

Chapman, 386 U.S. at 24.

The erroneous instruction was devastating to any claim of self-defense in a case where Mr. Peyton admitted he armed himself and went to confront the person banging on his daughter's window in the middle of the night. The jury was wrongly lead to believe that such conduct was forbidden so long as Mr. Peyton had "reason to believe" that his mere "presence" would provoke some sort of "trouble"—a standard easily met where the jury could readily believe that Mr. Peyton was on notice that whoever was at the window would become angry and respond violently—the predictable "trouble"—as occurred here. "The jury must have supposed that, in the opinion of the court, there was evidence" to support the instruction that Mr. Peyton provoked the conflict and thus could not claim self-defense. *Beard*, 158 U.S. at 559.[31] If the judge did not think there was such evidence, then she would not have mentioned the issue in her jury instructions. In applying the instruction that a defendant forfeits the right to self-defense if he puts himself in a position where there may be "trouble," the jury would have looked to the evidence that Mr. Peyton answered the door with a gun as the "provocative" behavior the judge had in mind because it was the only action Mr. Peyton took prior to being punched.

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[31] *See also People v. Townes*, 218 N.W.2d 136, 143 (Mich. 1974) ("[H]owever groundless the charge may be, coming as it does from the court, it is calculated to make the jury believe that, in the opinion of the judge, there was evidence tending to show that appellant brought on the difficulty for the purpose of slaying his adversary; and consequently such an instruction, not authorized by the testimony, is calculated to injure or impair the rights of the defendant." (quotation omitted) (cited by *Rorie*, 882 A.2d at 775)).

The prosecutor's closing argument, which repeatedly emphasized Mr. Peyton's decision to answer the door with a gun as irrefutable evidence of his culpability, invited this misuse: "The evidence shows that the *defendant is the one who started this situation. He is the one who went out there with that gun*, loaded, cocked, and ready." 2/15/18 at 554 (emphasis added). *See also* 2/14/18 at 464-65 ("The defendant, though, heard that knocking . . . And he went and he grabbed Government's Exhibit 17, a gun, and went outside. He didn't grab a cell phone. He didn't grab a flashlight. He didn't even grab a baseball bat. He grabbed a loaded 9 millimeter Smith & Wesson, cocked and ready."); *id.* at 475-76 ("He meant to have that gun when he went to the door, he meant to load it, he meant to cock it."); *id.* at 482-83 ("He knew that firearm was loaded. He knew that safety was off. He knew it was cocked and ready to go. He knew that risk, but he ignored it."). In light of this argument, the jury reasonably may have concluded that by going to the door with a gun, Mr. Peyton deliberately put himself in a position where he had "reason to believe that his presence" would "provoke trouble." However, as discussed previously, coming to the door with a weapon in the middle of the night in response to banging on the window is legally insufficient for forfeiture of the right to self-defense.

Without the erroneous instruction, Mr. Peyton had a compelling defense that he was lawfully acting in self-defense when his gun accidentally discharged. *See supra* pp. 31-32. The jury obviously had doubts about the government's case. It rejected the government's theory that Mr. Peyton intended to shoot Mr. Harrison when it acquitted him of both second-degree murder and voluntary manslaughter.

By giving the jury the broadly-worded Instruction 9.504 and telling it that Mr. Peyton had no right to use force to defend himself if he put himself in a position where he had "reason to believe that his presence" would "provoke trouble," however, the trial court gutted Mr. Peyton's defense of excusable homicide. Relatedly, the erroneous provocation instruction tainted the jury's evaluation of whether Mr. Peyton's conduct amounted to a "gross deviation from a reasonable standard of care," 2/15/18 at 573, which the government was required to prove beyond a reasonable doubt in order to get a conviction for involuntary manslaughter. By suggesting to the jury that the law of self-defense does not countenance going to the door of one's home with a gun in response to middle-of-the-night banging on a window, the Court communicated to the jury that such conduct is by definition a gross deviation from the reasonable standard of care. Accordingly, the government cannot "prove beyond a reasonable doubt" that the erroneous instruction "did not contribute to the verdict." *Chapman*, 386 U.S. at 24.

CONCLUSION

For the foregoing reasons, Mr. Peyton respectfully requests that this Court reverse his convictions for involuntary manslaughter while armed and PFCV.

Respectfully submitted,

/s/ Samia Fam
Samia Fam
Bar No. 394445

/s/ Stefanie Schneider
*Stefanie Schneider
Bar No. 979816

PUBLIC DEFENDER SERVICE
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

*Counsel for Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served through the Court's electronic filing system upon Elizabeth Trosman, Esq., Chief, Appellate Division, Office of the United States Attorney, on this 17th day of October, 2019.

/s/ Stefanie Schneider
Stefanie Schneider