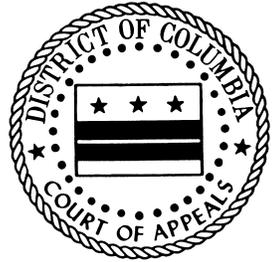


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Appeal No. 24-CF-0830

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DISTRICT OF COLUMBIA COURT OF APPEALS

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MARCUS WALKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

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OPENING BRIEF

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## **ISSUES PRESENTED**

I. To support a conviction for second-degree murder, the government must prove beyond a reasonable doubt that there were no circumstances that mitigated the defendant's mental state. The first issue presented is whether the trial court erred when it responded to a jury question by instructing that whether the mitigating circumstance of "heat of passion" existed depended on the proportionality of the defendant's act, and not on the proportionality of the emotional response and loss of control.

II. This Court merges convictions resulting from a continuous course of assaultive conduct. The second issue presented is whether Defendant's assault convictions, as well as related convictions for possession of a single weapon, merge because they were related to only a single, continuous assaultive act.

## STATEMENT OF THE CASE AND JURISDICTION

After a three-day trial before the Honorable Robert Okun and three days of deliberation, a jury convicted appellant Marcus Walker of (1) second-degree murder while armed, (2) assault with a deadly weapon, (3) assault with a deadly weapon against a minor, (4) three counts of possession of a firearm during a crime of violence, (5) second-degree child cruelty, and (6) possession of a large capacity ammunition feeding device. App. 626–29. It found him not guilty of first-degree murder. App. 626. The court sentenced Mr. Walker to thirty years’ incarceration—twenty years for the murder conviction, five years for each assault, and the remaining sentences running concurrently. App. 662.

Mr. Walker timely appealed. App. 664–83. This Court has jurisdiction because this is an appeal from a final order disposing of all claims. *See* D.C. Code § 11-721(a)(1).

## STATEMENT OF FACTS

### A. Evidence at Trial.

The trial concerned the fatal shooting of Eric King, which occurred in an apartment rented by Witness One (“W1”) in the Carver-Langston neighborhood in Northeast D.C. App. 98. Marcus Walker and his two young children lived in the apartment with W1 at the time of the alleged offenses. Mr. Walker and W1 had previously been in a romantic relationship. App. 99. After they broke up, and while Mr. Walker and his children were living in the apartment, W1 began dating Mr. King. App. 100-02. W1 had her own child, a six-year-old girl referred to hereinafter as the “minor child.” App. 98.

On the night in question, Mr. Walker, W1, and Mr. King sat together in W1’s bedroom watching television. App. 104. W1 described the scene as “fine and perfect.” App. 104.

Later that evening, Mr. King and W1 asked Mr. Walker to leave the bedroom so they could go to sleep. App. 105. Mr. Walker left and returned to the adjacent living room where he was staying with his two children. App. 105-06. W1 and Mr. King then began having sex, with the minor child in the bed with them. App. 108, 121. W1 testified that she believed Mr. Walker could not hear them having sex. App. 159-60.

From the living room of the apartment, Mr. Walker sent text messages to W1, describing her conduct as “disrespectful” because he and his children were in the adjoining room. App. 113-14.<sup>1</sup> He also expressed concern for the minor child because he believed she might be in the same bed as the couple. App. 114-15. W1 responded to Mr. Walker’s text messages. App. 114-15.

At trial, W1 testified that, after she and Mr. Walker exchanged text messages, Mr. Walker opened the adjoining room door, entered the bedroom, and found W1 and Mr. King having sex. App. 116, 123. Mr. Walker asked the couple to stop, but the couple declined and told him to leave. App. 118-19. Mr. King began getting up to confront Mr. Walker, and according to W1, Mr. Walker then shot Mr. King in the chest. App. 118-20. Mr. King fell back onto the bed, and W1 moved to apply pressure to his wound. App. 120. W1 testified that Mr. Walker muttered something and then shot Mr. King again in his “private area.” App. 120. W1 sustained some gunpowder stippling. App. 126, 350.<sup>2</sup> W1 testified that after shooting Mr. King, Mr. Walker left the apartment with his two children. App. 122. Mr. King later died of his gunshot wounds. App. 353.

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<sup>1</sup> The record does not clearly indicate whether Mr. Walker knew W1 and Mr. King were engaged in sexual activity at the time. *Compare* App. 113-14 *with* App. 159-60.

<sup>2</sup> “Stippling” refers to small skin injuries caused by gunpowder fragments. App. 347.

On cross-examination, the defense impeached W1 with a prior accusation that she made and later recanted. Previously, W1 had called the police claiming that another ex-boyfriend had attacked her. App. 178. She reported to the investigating officer that the ex-boyfriend had choked her, pinned her against a wall, and pulled a gun on her. App. 178. Subsequently, she sent an email to the ex-boyfriend's attorney confessing that the accusations were false. App 179-80.

Other than W1's testimony, the only evidence the government presented potentially linking Mr. Walker to the shooting was (1) DNA on a single bullet casing and (2) a blurry and indistinct photo of a person carrying two children around the time of the shooting near the apartment. App. 280, 303-04. No witness identified Mr. Walker as the person in the photo.

**B. Jury Instructions, Verdict, and Sentence.**

After the close of evidence, the trial court instructed the jury on: (1) first-degree premeditated murder while armed, (2) second-degree murder while armed, (3) voluntary manslaughter while armed, (4) possession of a firearm during a crime of violence, (5) assault with a dangerous weapon, (6) assault with a dangerous weapon against a minor, (7) second-degree cruelty to children, and (8) possession of a large capacity ammunition feeding device. App. 576, 580-81, 583.

With respect to the murder charges, the court instructed that the government was required to prove beyond a reasonable doubt that there were no mitigating

circumstances for the alleged homicide. App. 579. Defining mitigating circumstances, the court explained:

Mitigating circumstances can exist when a person acts in the heat of passion caused by adequate provocation. Heat of passion includes such emotions such as rage, resentment, anger, terror and fear. Adequate provocation is conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his self-control and act on impulse and without reflection. For a provocation to be considered “adequate,” the person’s response must not be entirely out of proportion to the seriousness of the provocation. An act of violence or an immediate threat of violence may be adequate provocation, but mere words, no matter how offensive, are never adequate provocation.

App. 578-79.

At the end of the first full day of deliberation, the jury sent a note to the court asking two questions about mitigating circumstances. App. 562, 589, 603. *First*, referring to the instruction that “[f]or a provocation to be considered ‘adequate,’ the person’s response must not be entirely out of proportion to the seriousness of the provocation,” the jury asked,

When discussing “adequate provocation,” should we define the response as heat of passion, “such emotions as rage, resentment, anger, terror, and fear,” OR the acts you carried out because of heat of passion? We are working from the language on page 14 continued on page 15 of the “Jury Instructions” in Section titled “Mitigating Circumstances.”

App. 589. Second, the jury also asked for “an alternative definition of mitigating circumstances that is more concrete or streamlined or plainspoken.” App. 589.

In response to the jury’s questions, the parties submitted competing proposed answers. App. 590, 595. The government advocated answering the first question by simply telling the jury that “response” referred to the violent act. App. 591. The defense disagreed and proposed answering in the form of a revised instruction that, *inter alia*, indicated that the adequate-provocation inquiry pertained to “heat of passion.” App. 599 (proposing that jury be instructed, “If a homicide is committed in the heat of passion caused by adequate provocation, then the defendant is not guilty of the offense of first or second degree murder.”); App. 604-05.

Adopting the government’s proposed interpretation of “response,” the Court answered the first part of the jury’s note as follows:

So in response to your first question, page 14 of the final instruction states: For a provocation to be considered adequate, the person’s response must not be entirely out of proportion to the seriousness of the provocation. *In this case, the word response refers to Mr. Walker’s alleged shooting of Mr. King.* In heat of passion could [include] such emotions as rage, resentment, anger, terror, or fear. I want to remind you that for either first degree murder while armed or second degree murder while armed, the government must prove [beyond] a reasonable doubt that Mr. Walker was not acting in the heat of passion caused by adequate provocation.

App. 621-22 (emphasis added); *see also* App. 600.

In response to the second part of the jury note—requesting further description of mitigating circumstances—the trial court advised the jury:

So in response to your second question, mitigating circumstances exist where the person acts in the heat of passion caused by adequate provocation. Provocation is adequate when it would naturally induce a reasonable person in the passion of the moment to lose self-control and commit the act on impulse and without reflection. The circumstances must be such that an ordinary person in the defendant's circumstances might become sufficiently upset by the provocation to experience a substantial impairment of his capacity for self-control and as a consequence to act violently.

App. 622; *see also* App. 600. After receiving this response and revised instruction, the jury deliberated for two additional days. App. 629.

At the conclusion of deliberations, the jury found Mr. Walker not guilty of first-degree murder while armed. App. 626. It convicted him of (1) second-degree murder while armed, (2) assault with a deadly weapon, (3) assault with a deadly weapon against a minor, (4) three counts of possession of a firearm during a crime of violence, (5) second-degree child cruelty, and (6) possession of a large capacity ammunition feeding device. App. 626-29.

During sentencing, defense counsel argued that the convictions for possession of a firearm during a crime of violence should merge. App. 656-67. The trial court observed that Mr. Walker “might have a very meritorious merger argument” but deferred to the Court of Appeals to decide the issue. App. 656. The court sentenced

Mr. Walker to thirty years in prison—twenty years for second-degree murder and five years for each of the assault convictions. App. 662. The court directed that sentences for the remaining convictions run concurrently. App. 662. The court also assessed \$800 under the Victims of Violence Crime Compensation Act—\$100 for each conviction. App. 662.

Mr. Walker timely appealed from this final order. App. 664.

## SUMMARY OF ARGUMENT

This Court should vacate and remand Mr. Walker's murder conviction and merge his assault convictions as well as his convictions for possession of a firearm during a crime of violence.

*First*, the murder conviction rests on an erroneous legal foundation and should be vacated. To convict an individual of second-degree murder, the government must prove beyond a reasonable doubt that no circumstances existed that would mitigate the actor's mental state and thereby reduce the crime to voluntary manslaughter. During deliberations, the jury sought clarification of the jury instruction for mitigating circumstances, asking whether the requirement of "adequate provocation" applied (i) to provocation of the heat of passion; or (ii) to provocation of the violent act. The correct answer to that specific question is option (i). The trial court, however, answered with option (ii), instructing the jury that to find adequate provocation, it must find that the *act* of shooting Mr. King was not entirely disproportionate to the provocation. That instruction is contrary to District of Columbia law and therefore requires that the second-degree murder conviction be vacated and remanded.

Under this Court's precedents, "adequate provocation" concerns whether the defendant reasonably lost self-control and acted without a *mental state* of malice. *See Comber v. United States*, 584 A.2d 26, 41-42 (D.C. 1990) (en banc). D.C. law

has long held that a person who commits homicide in the “heat of passion” (*i.e.*, because the actions of another reasonably caused him to lose self-control and act on impulse) is less culpable than one who kills another person without provocation. *See id.* In either instance, homicide remains a culpable, disproportional act. But an individual who acts because he reasonably lost self-control acts without malice and thus may be convicted only of manslaughter, not murder. *Id.* at 46. Here, in response to the jury’s inquiry, the trial court directed the jury to assess the reasonableness of Mr. Walker’s alleged shooting of Mr. King (the act), rather than to evaluate the reasonableness of Mr. Walker’s loss of control (his mental state), given the provocation. This was legal error because it required the jury to apply the adequate provocation test solely to the act rather than to Mr. Walker’s *mental state*, contrary to controlling law. The court’s erroneous instruction thus allowed the jury to convict Mr. Walker of murder without finding beyond a reasonable doubt that he acted with a mental state of malice, an essential element of the crime of murder in the District. *See id.* at 41.

*Second*, several of Mr. Walker’s convictions should merge because the alleged acts constituted a single continuous assault. Based on two gunshots fired at the same person in rapid succession, Mr. Walker was convicted of not just murder but two counts of assault with a deadly weapon; three counts of possession of a firearm during a crime of violence; and second-degree child cruelty. Because

Mr. Walker did not reach a “fork in the road” between the two gunshots, he could not have formed a new intent between the two gunshots. Therefore, they constitute a single assaultive act, which can support only one assault-related conviction (in this case, either second-degree murder or voluntary manslaughter). The two counts of assault with a deadly weapon merge into the murder or manslaughter conviction.

Most clearly, the conviction for assault with respect to the minor child should merge. Even if this Court were to treat the two shots as separate assaults, two shots do not support three assaultive convictions, especially because the evidence at trial indicated that the minor child was not in the path of physical injury.

Further, the three convictions for possession of a firearm during a crime of violence should merge into a single conviction. These convictions are related to the murder and assault convictions discussed above. As explained, those predicate convictions merge. Finally, the pendent possession convictions must follow suit. Even if the predicate convictions did not merge, the possession convictions still merge because they relate to the same assaultive act and the same weapon.

## ARGUMENT

This Court should (1) vacate Mr. Walker’s murder conviction because the trial court erroneously instructed the jury on the mitigating-circumstances element of adequate provocation and (2) merge the multiple convictions for assault and possession of a firearm during a crime of violence.

### **I. THE TRIAL COURT’S ANSWER TO THE JURY QUESTION MISSTATED GOVERNING LAW, AND THAT ERROR HARMED DEFENDANT WALKER.**

As demonstrated below, the trial court erred by instructing the jury to consider the proportionality of Mr. Walker’s alleged act of killing Mr. King to the provocation, rather than the proportionality of his heat of passion (mental state) to that provocation. That erroneous instruction fundamentally undermined and prejudiced the jury verdict.

#### **A. The Trial Court’s Answer Misstated the Law.**

Consistent with D.C. Criminal Jury Instruction 4.202 (homicide, mitigating circumstances element), the trial court initially instructed the jury that “[f]or a provocation to be considered ‘adequate,’ the person’s *response* must not be entirely out of proportion to the seriousness of the provocation.” App. 578 (emphasis added). During deliberations, the jury sent a note asking whether the term “response,” referred to (a) the “heat of passion” or (b) “the acts [ ] carried out because of [the]

heat of passion.” App. 589. The jury also asked the court to give an “alternative” explanation of mitigating circumstances. App. 589.

The parties disagreed over how to answer the jury’s questions, and each submitted different recommended answers. App. 603. The government proposed a simplistic answer to the jury’s question: telling the jury only that the term “response” refers to the act. App. 591-92. As discussed below, defense counsel argued for a revised instruction that explained that provocation must be adequate to cause the heat of passion mental state (not the violent act or its result). App. 599.

The court adopted the government’s proposed answer to the jury’s primary question, instructing the jury that “the word response refers to Mr. Walker’s alleged shooting of Mr. King.” App. 621. Placed in context of the existing mitigation instruction, the court effectively re-instructed the jury that: “For [the] provocation to be considered ‘adequate,’ the [‘alleged shooting of Mr. King’] must not be entirely out of proportion to the seriousness of the provocation.” App. 578, 621.

That revised instruction was erroneous. The trial court erred by instructing the jury that, to determine the adequacy of the provocation, it should evaluate the proportionality of the alleged *act* (shooting) to the provocation, rather than the proportionality of Mr. Walker’s *mental state* (heat of passion) to the provocation. The result of that fundamental misstatement of governing law was an erroneous murder conviction.

**i. Standard of Review.**

Because defense counsel raised and preserved an objection to the trial court’s re-instruction, this Court reviews that ruling *de novo*. *Evans v. United States*, 304 A.3d 211, 219 (D.C. 2023). Defense counsel made clear he was preserving the objection at the end of the conference with the judge by reiterating that the defense still objected to the instruction and the court had overruled that objection. App. 620.

**ii. Under District of Columbia Law, the Sole Difference Between Murder and Voluntary Manslaughter is the Defendant’s Mental State—Presence of Mitigating Circumstances Negates the Mental State of Malice Required For Murder.**

This case involves a *partial* defense to a murder charge, that the presence of mitigating circumstances (“heat of passion” caused by adequate provocation) reduces the culpability of the perpetrator of a homicide and therefore precludes a murder conviction (reducing an intentional homicide from murder to manslaughter).<sup>3</sup> *See Comber v. United States*, 584 A.2d 26, 40 (D.C. 1990) (en

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<sup>3</sup> It is useful to distinguish two distinct categories of defenses to a murder charge. A complete or absolute defense to murder—also sometimes referred to as “excuse” or “justification”—requires the acquittal of the person accused of the murder. The most common example is homicide committed in justified self-defense. Where self-defense or other absolute defense is established, the defendant lacks criminal culpability and cannot be convicted of either murder or manslaughter. *See McPhaul v. United States*, 452 A.2d 371, 373 (D.C. 1982). In contrast, mitigating circumstances are only a *partial* defense to a murder charge—where the government fails to establish beyond a reasonable doubt the absence of mitigating circumstances, the defendant may still be criminally convicted of an intentional homicide, but the

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banc). The reason the heat-of-passion defense reduces murder to manslaughter is because it mitigates the “malicious nature of the perpetrator’s *mental state*, and thus serve as a bar to a conviction for murder.” *Id.* at 41-42 (emphasis added); *see Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984) (“[W]here the defendant acted with ‘adequate provocation’ . . . , malice may be mitigated . . .”). One who acts in the heat of passion does so with a less culpable mental state than one who kills without adequate provocation. *Comber*, 584 A.2d at 41-42. Because a mental state of malice is an essential element of murder, mitigating circumstances preclude a murder conviction. *Id.* at 36; *Logan*, 683 A.2d at 671.<sup>4</sup>

Indeed, the *only* difference between murder and the lesser crime of voluntary manslaughter in D.C. is the less culpable mental state—*i.e.*, absence of malice—resulting from mitigating circumstances. As this Court explained, “[i]n this jurisdiction, a homicide constitutes voluntary manslaughter where the perpetrator kills with a state of mind which, but for the presence of legally recognized mitigating circumstances, would render the killing murder.” *Comber*, 584 A.2d at 42. “Killings classified as voluntary manslaughter would in fact be second degree murder but for

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severity of the crime is reduced to manslaughter. *See Comber*, 584 A.2d at 41-43. Only the partial defense of mitigating circumstances is at issue in this case.

<sup>4</sup> The term “malice” is used as an umbrella category for the mental states required for each murder crime. *Comber*, 584 A.2d at 38 (acknowledging that malice is antiquated shorthand for multiple distinct mental states that distinguish different types of murders).

the existence of circumstances that in some way mitigate malice.” *United States v. Bradford*, 344 A.2d 208, 215 (D.C. 1975) (passage quoted with approval in *Comber*). A finding of mitigating circumstances does not affect the nature, severity, or proportionality of the criminal *act* itself. *See Comber*, 584 A.2d at 42. It simply negates a mental state of malice and reduces what would otherwise be murder to voluntary manslaughter.

**iii. The Trial Court Erroneously Instructed the Jury that the Mitigating Circumstances Inquiry Applies to the Perpetrator’s Act Rather than to His Mental State.**

Contrary to D.C. law as definitively explained in *Comber*, the trial court answered the jury’s question regarding mitigating circumstances by directing it to evaluate Mr. Walker’s alleged act, rather than his mental state. The court instructed the jury that the act of shooting Mr. King must not be entirely disproportionate to the provocation. App. 621. That definition of adequate provocation did not reference Mr. Walker’s mental state. Under that revised instruction, adequate provocation, an essential component of the mitigating circumstance, turned entirely on the act.

This Court’s cases do not isolate the *actus reus*—and exclude *mens rea*—for purposes of determining adequate provocation as the trial court instructed the jury. To the contrary, the Court has consistently explained that the appropriate inquiry evaluates whether the provocation would cause a reasonable person to lose control

such that their actions were based on impulse and with a mental state of heat of passion. “[P]rovocation is adequate where it would ‘naturally induce a reasonable man in the passion of the moment *to lose self-control* and commit the act *on impulse and without reflection.*” *High v. United States*, 972 A.2d 829, 833 (D.C. 2009) (emphasis added) (quoting *Brown v. United States*, 584 A.2d 537, 543 n.17 (D.C. 1990)). In other words, the provocation must be sufficient to cause a reasonable person to lose enough self-control to cause him to act on impulse. *See id.* at 834 (perpetrator must become “sufficiently upset by the provocation to experience *substantial impairment of his capacity for self-control* and, *as a consequence*, act violently” (emphasis added) (internal quotation omitted)).<sup>5</sup> As defense counsel put it at trial: under the law, adequate provocation cannot be “divorce[d]” from the heat of passion. App. 604-05. And, contrary to the trial court’s revised instruction, adequate provocation does *not* require the jury to assess the proportionality of the provocation to the *act* done in the heat of passion.<sup>6</sup>

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<sup>5</sup> *See also id.* at 834 (“[T]he victim’s provoking act must arouse the defendant’s emotions to such a degree that it distorts his very process of choosing.” (emphasis added) (summarizing with approval *People v. Pouncey*, 471 N.W.2d 346, 388 (Mich. 1991))).

<sup>6</sup> To be sure, the predicate provocation must be significant, and so not all provocations are insufficient to cause a reasonable person to act in the heat of passion. *See, e.g., Nicholson v. United States*, 368 A.2d 561, 565 (D.C. 1977) (observing that “[t]rivial or slight provocation[s],” such as verbal insults, would not provoke a reasonable person to lose that much self-control as to act violently and thus cannot support a finding that a defendant acted in the heat of passion); *see also*

(Footnote Cont’d on Following Page)

Indeed, the trial court’s answer to the second part of the jury’s question confirms this error. In the second part of the revised instruction, the trial court told the jury that “[p]rovocation is adequate when it would naturally induce a reasonable person in the passion of the moment to lose self-control and commit the act on impulse and without reflection.” App. 600. In contrast to the court’s direct, *incorrect* answer to the jury’s primary question, this further statement indicates that the jury’s inquiry should focus on assessing the defendant’s mental state—whether a reasonable person under such circumstances would lose control and act on impulse and without reflection.

Because the trial court specifically answered the jury’s first question with an erroneous instruction (adequate provocation inquiry pertains to the act, not the defendant’s mental state), the harm was already done. At a minimum, the court’s inconsistent two-part response likely exacerbated the jury’s evident confusion. *See Foster v. George Washington Univ. Med. Ctr.*, 738 A.2d 791, 792 (D.C. 1999) (failure to dispel jury confusion required reversal).

**B. The Trial Court’s Erroneous Answer Prejudiced Mr. Walker.**

Because of the trial court’s erroneous answer to the jury note, the jury convicted Mr. Walker of second-degree murder based on a misstatement of the law

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*High*, 972 A.2d at 834 (“[T]he law does not excuse actors whose behavior is caused by just any emotional disturbance” (internal citations omitted)).

and without correctly evaluating adequate provocation. The jury question demonstrated it had confused governing law and needed a clarification of the mitigating-circumstances standard. The court's internally inconsistent answer modified the mitigating circumstances instruction in a manner that made it logically impossible for the jury to apply the correct legal standard. Under any standard of review, this is reversible error.

**i. Legal Standard.**

Because the jury question addressed a controlling issue in the trial, the government must show the trial court's erroneous response was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). While it appears this Court has not directly addressed the standard of review for an erroneous answer to a jury note, it has held that the *Chapman* standard applies when a trial court declines to answer a jury note on a controlling issue. *Gray v. United States*, 79 A.3d 326, 340 (D.C. 2013). "The provision of an answer to a jury note that is adequate to dispel jury confusion on a controlling issue of a case is such an important aspect of due process of law that we [must] be satisfied beyond a reasonable doubt that an omission to provide [such an answer] was harmless before we [can] conclude that it did not vitiate the verdict." *Id.* (alterations in original) (quoting *Preacher v. United States*, 934 A.2d 363, 370 (D.C. 2007)). If declining to answer a jury question is subject to the *Chapman* standard, *a fortiori* that same standard should

apply to this court’s review of an erroneous response to a jury question regarding a controlling legal issue. An erroneous answer is at least as harmful and misleading as no answer.<sup>7</sup>

In evaluating harm from the response to a jury note, courts consider not just a hypothetical reasonable jury but also the specific jury in the case. *See Evans*, 304 A.3d at 231 (analyzing the how long the jury deliberated, how quickly the jury reached a consensus after receiving the court’s answer, and the other verdicts reached by the jury).

**ii. The Erroneous Instruction Significantly Altered the Jury’s Consideration and Determination of a Controlling Issue.**

The trial court’s answer prejudiced Mr. Walker because it left the jury with the mistaken impression that to find adequate provocation it needed to believe that

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<sup>7</sup> On one occasion, this Court—without analysis or discussion—applied the lower, ordinary harmlessness standard for instructional errors under *Kotteakos v. United States*, 328 U.S. 750 (1946), to a response to a jury question regarding what appears to have been a controlling issue. *See Fitzgerald v. United States*, 228 A.3d 429, 443 (D.C. 2020) (finding the error harmful under *Kotteakos*). More often, however, the Court has not addressed the standard of review because, under either *Chapman* or *Kotteakos*’s less demanding “fair assurance” test, the error harmed the defendant. *See, e.g., Evans*, 304 A.3d at 231; *Preacher*, 934 A.2d at 370. Because *Fitzgerald* found harm under the less demanding standard without discussing or analyzing the appropriate standard of review for jury note answers, it should be understood as following this practice rather than adopting the lower standard. Regardless, even under *Kotteakos*, there can be no “fair assurance . . . that the judgment was not substantially swayed by the error.” *Evans*, 304 A.3d at 231 (quoting *Kotteakos*, 328 U.S. at 765).

shooting Mr. King was not an entirely disproportionate response to the provocation. *cf. Fitzgerald v. United States*, 228 A.3d 429, 443 (D.C. 2020) (finding an error harmful because “[t]he trial court’s re-instruction permitted the jury” to convict based on an incorrect legal standard). The trial court effectively added a new requirement for mitigating circumstances not supported by D.C. law: that the jury must also find that the *act* of killing is not entirely disproportionate to the provocation. Under the trial court’s instruction, the jury could convict Mr. Walker of murder even if it believed he reasonably lost self-control in a heat of passion, provided it concluded that the act of shooting Mr. King was entirely disproportionate to the provocation. In that scenario, the jury could convict Mr. Walker without finding beyond a reasonable doubt that he acted with a mental state of malice—an essential element of the crime. *Comber*, 584 A.2d at 41 (“The absence of . . . mitigation is [ ] an essential component of malice, and in turn of second-degree murder, on which the government bears the ultimate burden of persuasion.” (emphasis added)). At a minimum, the court’s contradictory answers almost certainly confused the jury. *See Foster*, 738 A.2d at 792 (failure to dispel jury confusion required reversal).

Had the trial court properly instructed the jury—by telling the jurors that “response” in the original instruction referred to a heat of passion such that a reasonable person might lose self-control and act on impulse or without reflection—

there is a significant possibility the jury would have reached a different verdict. At least three indicia support this conclusion: (1) the jury note itself, (2) the ultimate verdict, and (3) the evidence presented at trial.

*First*, the fact that the jury sent a note asking multiple questions about adequate provocation strongly suggests that the jury was grappling with whether there were mitigating circumstances for the homicide allegedly committed by Mr. Walker. Moreover, “the circumstances surrounding the jury’s verdict” indicate that the jury viewed this case as close. *Evans*, 304 A.3d at 231 (considering the length of jury deliberation as part of the harmlessness analysis). The jury sent the note after deliberating for an entire day, and it continued deliberating for another two days before reaching a verdict. App. 562, 603, 629. When the jury is uncertain, even minor errors can change the outcome of the trial. And this was not a minor error.

*Second*, the jury’s not-guilty verdict on first-degree murder renders harm from the erroneous instruction more likely. By finding Mr. Walker not guilty of first-degree murder, the jury rejected the government’s premeditation argument. *See Bright v. United States*, 698 A.2d 450, 458 (D.C. 1997) (premeditation and deliberation are the distinguishing factors between first- and second-degree murder). The jury did not believe the government had proven that Mr. Walker intended to shoot Mr. King before he entered the bedroom. That conclusion is consistent with a

finding that Mr. Walker acted in the heat of passion in response to what he saw when he opened the bedroom door.

*Third*, the evidence presented at trial supported a heat-of-passion defense. When Mr. Walker entered the bedroom, he witnessed his ex-girlfriend having sex with another man she had known for less than a month. He also saw a young child lying in the same bed as the couple while her mother was engaging in activity manifestly inappropriate for a six-year-old girl to witness. It cannot be said beyond a reasonable doubt—or even with fair assurance—that the jury would not have concluded that this sight reasonably caused Mr. Walker to act on impulse and without reflection.

## **II. THE CONVICTIONS FOR ASSAULT WITH A DEADLY WEAPON AND POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE MERGE.**

Based on the shooting of Mr. King, the jury convicted Mr. Walker of the following: (1) second-degree murder while armed regarding Mr. King; (2) assault with a deadly weapon against W1; (3) assault with a deadly weapon against the minor child, (4) child cruelty with respect to the minor child; and (5) three counts of possession of a firearm during a crime of violence, relating to the murder and two assault charges. App. 626–29. These seven convictions arose from two gunshots, both directed at Mr. King. (The eighth conviction, for possession of a large capacity ammunition feeding device, involved separate conduct.)

Because the two gunshots constituted a single, continuous course of assaultive conduct, the assault and possession-of-a-firearm convictions should merge, resulting in (1) the murder conviction, (2) a single conviction for possession of a firearm during a crime of violence, and (3) the child-cruelty conviction. If this Court vacates the murder conviction (as it should), the two assault convictions should still merge into a single assault conviction.

**A. Under D.C. Law, this Court, Merges Convictions Resulting from a Continuing Course of Assaultive Conduct.**

In the District of Columbia, the Court of Appeals (not the trial court) considers the merger of convictions in the first instance. *See Joiner v. United States*, 585 A.2d 176, 178 (D.C. 1991) (merging assault convictions but emphasizing that “the trial court did not err in allowing the seven convictions to stand pending appeal”). “[W]hen the evidence establishes ‘a continuing course of assaultive conduct,’ rather than ‘a succession of detached incidents,’ the defendant is properly charged with only one count of assault.” *In re T.H.B.*, 670 A.2d 895, 900 (D.C. 1996) (discussing the consensus of “a line of cases” and holding two assault convictions merged).

Even when “a criminal episode of assault involves several blows or wounds, and different methods of administration,” the assault remains a single crime “for purposes of sentencing.” *Owens v. United States*, 497 A.2d 1086, 1096 (D.C. 1985) (quoting *Smith v. United States*, 418 F.2d 1120, 1121 (D.C. Cir. 1969)). This Court has recognized that “ordinary assault”—meaning assault “not accompanied by the

intent to commit another offense”—is a crime that “by [its] very nature, tend[s] to be committed in a single continuous episode rather than in a series of individually chargeable acts.” *Id.*

**B. The Two Assault Convictions Merge with the Murder Conviction.**

If this Court does not vacate the murder conviction, the assault convictions would merge with it because the government’s evidence shows only a single “continuing course of assaultive conduct.” *In re T.H.B.*, 670 A.2d at 900. A burst of assaults directed at the same victim will permit multiple assault convictions only if, between the shots, Mr. Walker “realized that he ha[d] come to a fork in the road, and nevertheless decide[d] to invade a different interest.” *Stevenson v. United States*, 760 A.2d 1034, 1037 (D.C. 2000). This requires “an appreciable length of time between the acts that constitute the two offenses,” or the act must result from a “fresh” impulse and not the same impulse that motivated the first assault. *Cullen v. United States*, 886 A.2d 870, 873 (D.C. 2005) (quoting *Sanchez-Rengifo v. United States*, 815 A.2d 351, 354-55 (D.C. 2002)).

No such fork in the road occurred here for three reasons. First, the shots occurred in quick succession. Second, the shots were directed at the same victim, Mr. King. Although W1 sustained some stippling, the government disclaimed any argument that she was the target and pursued only an intent-to-frighten theory. App. 391. Third, the shots stemmed from the same impulse. Thus, as in *Cullen*, the

“brief passage of time between the[ ] acts ‘did not terminate [Mr. Walker’s] original intent.’” 886 A.2d at 875 (quoting *Gray v. United States*, 544 A.2d 1255, 1258-59 (D.C. 1988)); *Cf. Bryant v. United States*, 93 A.3d 210, 226 (D.C. 2014) (merging possession of a firearm during a crime of violence convictions because the defendant had no “opportunity” “to reflect on whether to abandon his criminal enterprise” and did not “cho[o]se to invade a new and distinct interest”).

Because the Court of Appeals considers merger in the first instance, no factfinder at trial ever determined that Mr. Walker formed a new intent between the shots.<sup>8</sup> Thus, even if this Court were to conclude that the evidence *might* support such a finding, to support a conviction, this Court must be convinced beyond a reasonable doubt. That is not possible on the record before the Court.<sup>9</sup>

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<sup>8</sup> Although the jury convicted Mr. Walker of the additional crimes, it was not tasked with deciding the essential question for the merger analysis: Did Mr. Walker form a new intent between the successive shots? App. 582. Thus, although in other contexts this Court often draws inferences in favor of the verdict, there is no basis for such an inference in this context. The jury verdict did not address these questions, and there is no reason to draw inferences in favor of the government (which has the burden of proof beyond a reasonable doubt). *Cf. Young v. United States*, 305 A.3d 402, 415 (D.C. 2023) (explaining that the Court views evidence “in favor of the verdict” when the question turns on “what evidence *the jury chose* to credit” (emphasis added)).

<sup>9</sup> This Court does not appear to have addressed the standard of proof applicable to the fork-in-the-road analysis before. *Cf., e.g., Bailey v. United States*, 831 A.2d 973, 988 (D.C. 2003) (discussing what “the evidence [ ] shows” in the context of the fork-in-the-road analysis but not discussing the standard of proof). Given Mr. Walker’s liberty interest at stake, and the lack of any prior factfinding on the question, the beyond-a-reasonable-doubt standard should apply.

**C. At a Minimum, the Assault Conviction Relating to the Minor Child Merges.**

Even assuming the two shots constituted separate assaultive acts, they still cannot sustain three separate assaultive convictions. As this Court has explained, a single shot fired toward the same person or group generally only supports a single conviction. In *Joiner*, this Court merged seven assault convictions where a defendant fired a shot at a group of people standing close together. 585 A.2d at 178. “It is clear,” the court held, “that appellant committed but one criminal act by firing a single shot toward the men.” *Id.*; see also *Horton v. United States*, 541 A.2d 604, 612 n.10 (D.C. 1988) (“[A]ny two convictions arising from the firing of a single shot would merge on the facts of this case.”). Here, at a minimum, because there were only two shots, the assault conviction regarding the minor child must merge into the assault conviction concerning W1.

The cases where this Court has sustained more assault convictions than the number of assaultive acts concern types of assaults inherently likely to injure multiple people—such as car crashes and arson. See *Smith v. United States*, 306 A.3d 67, 74 (D.C. 2023) (car crash involving multiple passengers); *Graure v. United States*, 18 A.3d 743, 761 (D.C. 2013) (arson). By contrast, this Court has treated gunshots as a more typical form of assault that will merge even when the gun was fired in the direction of multiple people. See *Graure*, 18 A.3d at 761 (“In general, where the evidence is that the defendant committed a single assaultive act directed

at a group of persons, such as by firing a single shot, multiple assault convictions will merge.” (citing *Joiner*, 585 A.2d at 178)).

Even under the framework applied in *Smith* and *Graure*, the convictions merge. The Court declined to merge the assault convictions in those cases primarily because all the victims lay in the “path of physical injury.” *Smith*, 306 A.3d at 74 (emphasizing the path of physical injury); *Graure*, 18 A.3d at 762 (describing as “important to [the Court’s] analysis” that the victims “were not merely put in fear” but rather “were in the path of physical injury from the fire”). Here, the government presented no evidence that the minor child lay in the path of physical injury. The convictions merge.

**D. The Convictions for Possession of a Firearm During a Crime of Violence Merge.**

The convictions for possession of a firearm during a crime of violence also merge for two reasons. First, they merge because, as explained above, the predicate assault convictions merge. *See Nero v. United States*, 73 A.3d 153, 160 (D.C. 2013) (merging convictions for possession of a firearm during a crime of violence because the “predicate offenses” also “merge[d] into one”). Second, the convictions merge because “they arose out of [Mr. Walker’s] uninterrupted possession of a single weapon during a single act of violence.” *Appleton v. United States*, 983 A.2d 970, 978 (D.C. 2009); *see also Hairston v. United States*, 264 A.3d 642, 653 (D.C. 2021) (following *Appleton*).

## **CONCLUSION**

For the foregoing reasons, this Court should (1) vacate and remand Mr. Walker's conviction for second-degree murder while armed and (2) merge the convictions for assault and possession of a firearm during a crime of violence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been electronically served, by the Appellate E-Filing System, upon Chrisellen Kolb, Esq., Chief of the Appellate Division, Office of the United States Attorney, this 28th day of March 2025.

/s/ Sergio Valente  
Sergio Valente