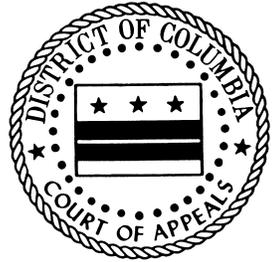

Appeal No. 24-CF-0830



DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court
Received 08/22/2025 02:09 PM
Filed 08/22/2025 02:09 PM

MARCUS WALKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division
No. 2022-CF1-006280

REPLY BRIEF

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ARGUMENT

The parties agree that this Court should merge several of Mr. Walker's convictions. They agree that the three convictions for possession of a firearm during a crime of violence merge into a single conviction. And they agree that the conviction for assault with a dangerous weapon against the minor child merges with the other assault conviction.

After the Government's concessions, two issues remain on appeal. *First*, the trial court erred by instructing the jury that it must convict Mr. Walker of murder even if it found that a reasonable person in his position might lose control and act violently on impulse. In doing so, the trial court instructed the jury to convict Mr. Walker even if it found he acted without malice. This contravenes District of Columbia law established in *Comber v. United States*, 584 A.2d 26 (D.C. 1990) (*en banc*). *Second*, this Court should merge Mr. Walker's assault with a dangerous weapon conviction with respect to Moesha Pearce into his second-degree murder while armed conviction because the convictions arose from a single assault.

I. THE TRIAL COURT ERRED IN ANSWERING THE JURY'S QUESTION, AND THAT ERROR HARMED MR. WALKER.

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 asked whether “response” referred to the “heat of passion”

(*mens rea*) or the “the acts [Mr. Walker] carried out because of heat of passion” (*actus reus*). App. 589. The trial court answered that “the word ‘response’ refer[ed] to Mr. Walker’s alleged shooting of Mr. King,” meaning the *actus reus*. App. 621.

As explained in Mr. Walker’s opening brief, that answer contravened established D.C. law and allowed the jury to convict Mr. Walker of murder even if it found he acted without malice—an essential element of murder. The Government advances three arguments in defense of the trial court’s erroneous answer: first, plain-error review applies, Gov. Br. 20–22; second, the trial court did not err, *id.* at 22–29; and finally, any error was harmless, *id.* at 29–31. Each argument lacks merit.

A. Mr. Walker Preserved His Objection to the Jury Note Answer, so this Court Reviews *De Novo*.

To preserve an objection for appeal, Mr. Walker need only put the trial court “on notice that [his] position on the correct rule of law differed from the court’s.” *Evans v. United States*, 304 A.3d 211, 219 (D.C. 2023) (quoting *Wilson-Bey v. United States*, 903 A.2d 818, 828 (D.C. 2006) (en banc)). Here, as the parties discussed the jury’s question about whether the word “response” referred to the act or the mental state, the transcript shows the court understood that Mr. Walker disagreed with the Government’s proposal to define “response” as the act of killing Mr. King. The Court stated that “on the first point *I agree with the government*. The *response is the act* that’s committed in the heat of passion.” App. 612 (emphasis added). Thus, contrary to the Government’s claim that Mr. Walker “never disputed”

its definition of “response,” Gov. Br. 21, the court understood that Mr. Walker objected. And the court adopted the Government’s definition over that objection.

Mr. Walker also “direct[ed] the judge’s attention to the correct rule of law,” and thus preserved his objection, in three ways. *Hasty v. United States*, 669 A.2d 127, 134 (D.C. 1995) (holding objection preserved where defendant’s objection should have pointed the judge to the correct standard). First, defense counsel correctly explained that the Government’s definition of response “improperly divorce[d] . . . heat of passion and adequate provocation.” App. 604–05. In other words, defense counsel objected that the Government’s answer erroneously separated the adequate provocation from Mr. Walker’s loss of self-control (heat of passion) and instead directed the jury to consider the proportionality of the act of killing to the provocation. That is the same argument Mr. Walker asserts on appeal.

Second, Mr. Walker’s proposed answer stated the correct rule of law. The Government faults Mr. Walker for not providing an answer to the jury’s question that exclusively addressed the application of the term “response.” Gov. Br. 21. But the legal relevance of the jury’s question—the reason the proper understanding of “response” mattered—is that it was essential to how the jury should evaluate the *adequacy* of the provocation. See App. 578 (Original jury instruction: “*For provocation to be considered ‘adequate,’ the person’s response must not be entirely out of proportion to the seriousness of the provocation.*” (emphasis added)). The

Government argued the jury must evaluate the adequacy of the provocation relative to the act of shooting. App. 591. Mr. Walker disagreed, arguing, as he does on appeal, that the jury must evaluate the adequacy of the provocation relative to his loss of self-control. He proposed instructing the jury that “[p]rovocation, *in order to be adequate* to acquit defendant of first or second degree murder, must be such as might naturally induce a reasonable man in the passion of the moment *to lose self-control and commit the act on impulse and without reflection.*” App. 599 (emphasis added). This instruction states the law correctly. *See United States v. Alexander*, 471 F.2d 923, 946 (D.C. Cir. 1972) (recommending a nearly identical instruction).¹

Finally, defense counsel reiterated Mr. Walker’s objection after the trial court’s final decision. App. 620. The Government argues that this preserved only Mr. Walker’s “objection based on the defense’s earlier proposed language.” Gov. Br. 21. As demonstrated above, however, the proposed language from *Alexander* correctly explained that the adequacy of the provocation pertains to the loss of self-

¹ Defense counsel also explained that he did not use the word “response” in his proposed instruction because “we’ve always been cautioned by the Court of Appeals not to randomly kind of explain things that were not [sic] without some anchor in the jury instructions.” App. 609. Accordingly, defense counsel preferred to “cop[y] and paste[] directly from the instruction” and case law rather than substitute in his own language and risk error. *Id.* In this case, defense counsel used the instruction language established in *Alexander*.

control, not the act. Defense counsel’s objection at the end of trial therefore affirmed and reinforced his prior objection and preserved Mr. Walker’s claim for appeal.²

If this Court nonetheless were to find that Mr. Walker did not preserve his objection, his claim would meet the standard of plain-error review. Under that standard, (1) the trial court must have “err[ed]”; (2) its error must have been “plain”; (3) the error must have affected Mr. Walker’s “substantial rights”; and (4) the error must have “seriously” affected the “fairness, integrity, or public reputation of judicial proceedings.” *Malloy v. United States*, 186 A.3d 802, 814 (D.C. 2018) (internal quotation omitted). As explained below, Mr. Walker satisfies each element.

B. The Trial Court’s Response to the Jury Note Misstated the Law.

This Court’s precedents establish that the mitigating circumstance of “heat of passion” due to adequate provocation assesses the defendant’s mental state. The trial court’s reinstruction—which connected the adequacy of the provocation only to the defendant’s act—was inconsistent with black letter law of the District of Columbia.

² The Government also briefly suggests that Mr. Walker waived his objection because defense counsel indicated the court’s instruction was “fine.” App. 620; Gov. Br. 18. The Government takes defense counsel’s statement out of context. Defense counsel said he was “fine with this paragraph.” App. 620. In the context of what the trial court had just said, this referred to the trial court’s answer to the jury’s second question, not the definition of response. App. 619 (stating just before defense counsel’s statement that he was “fine with this paragraph,” “in terms of the second question, I basically used the language from the [*High*] case”). Even if defense counsel had said he was fine the trial court’s definition of response, defense counsel clarified right after that Mr. Walker maintained his objection to the definition of response. App. 620.

The Government's effort to defend the reinstruction cannot overcome that fundamental infirmity. First, the Government's position cannot be reconciled with a fair reading of this Court's en banc ruling in *Comber*. *Contra* Gov. Br. 22–23. Second, the Government misunderstands this Court's admonition, in markedly different circumstances, about “trivial” provocations. *See id.* 27–28. Finally, the Government erroneously suggests that the trial court adequately addressed Mr. Walker's mental state because the second paragraph of the reinstruction also discussed loss of self-control. *Id.* 28–29. But the trial court's error was its imposition of an additional requirement that, in addition to the loss of self-control, the jury must separately determine the proportionality of the violent act to the provocation.

i. Adequate Provocation Mitigates Malice and Precludes a Second-Degree Murder Conviction.

This Court's en banc decision in *Comber v. United States*, 584 A.2d 26 (D.C. 1990), controls the instructional-error question. *Comber* established that heat of passion caused by adequate provocation mitigates “the otherwise malicious nature of the perpetrator's *mental state*, and thus serve[s] as a bar to a conviction for murder.” *Id.* at 41–42 (emphasis added). A mental state of malice is an essential element of murder. *Id.* Therefore, if a defendant's mental state is mitigated by adequate provocation, his alleged homicide cannot be murder. Independent analysis of the *actus reus* is neither required nor appropriate. *See id.* at 41 (describing the doctrine of adequate provocation as based in “a belief that those who kill under

‘extreme *mental or emotional disturbance* for which there is reasonable explanation or excuse’ are less ‘morally blameworthy’ than those who kill in the absence of such influences” (emphasis added) (quoting Model Penal Code § 210.3 cmt. 5, at 53–54 (Official Draft and Revised Comments 1980)).

The Government does not contest that a homicide without malice is manslaughter, not murder. It argues, however, that the jury’s mitigating-circumstances analysis must separately evaluate whether the act of shooting was proportional to the provocation—*in addition* to evaluating Mr. Walker’s mental state. That position contradicts *Comber*’s holding that mitigating circumstances negate the mental state of malice, which by itself precludes a murder conviction.

The Government attempts to reconcile its position with *Comber*, but it misreads the decision. Selectively quoting *Comber*, the Government argues that Mr. Walker’s position is “not quite correct” because “for both murder and voluntary manslaughter, a defendant has acted with the same *mens rea*.” Gov. Br. 27. That position flatly contradicts *Comber*. Quoting the full sentence from *Comber* relied on by the Government reveals the flaw in its argument:

As explained below, in all voluntary manslaughters, the perpetrator acts with a state of mind which, *but for the presence of legally recognized mitigating circumstances, would constitute malice aforethought*, as the phrase has been defined for purposes of second-degree murder.

Comber, 584 A.2d at 37 (emphasis added).

The Court’s teaching in *Comber*, encapsulated in the above quotation, is that the difference between second-degree murder and voluntary manslaughter is a different *mens rea*: Mitigating circumstances negate malice and thereby transform what would otherwise be second-degree murder into manslaughter. *Id.* The Government’s assertion that murder and manslaughter have “the same *mens rea*” is the opposite of what *Comber* says.

ii. **D.C. Law Assesses the Proportionality of the Loss of Self-Control, Not the Proportionality of the Act.**

The Government also argues for a proportionality inquiry directed at the *actus reus* on the ground that not all provocations are “adequate” to negate malice. Gov. Br. 22–24. To support its contention the Government points to language in some cases that a trivial provocation is insufficient. *See* Gov. Br. 22–24. As noted in Mr. Walker’s opening brief, this Court has explained that “a ‘trivial or slight provocation, entirely disproportionate to the violence of the retaliation, is not adequate provocation. Mere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation.’” *Nicholson v. United States*, 368 A.2d 561, 565 (D.C. 1977) (internal quotation omitted);³ *see* Walker Br. 18 n.6.

³ The “trivial” provocation held insufficient in *Nicholson* consisted of “an unsupported assertion that [the defendant] suspected the deceased of having in the past committed adultery with her husband” and a suggestion that the decedent “might have verbally insulted” defendant. *Id.* The possibility of insulting words and unsupported suspicion of past adultery is a far cry from the provocation in this case.

But the Government misunderstands the reason for, and application of, this admonition. As the primary case the Government relies on explains, trivial provocations (such as offensive words) are inadequate because they would not cause a reasonable person to lose so much self-control that they would act violently. *See High v. United States*, 972 A.2d 829, 834 (D.C. 2009). The magnitude of the provocation must be sufficient to cause a “person of reasonable temperament[] . . . to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently.” *Id.* (emphasis added) (internal quotation omitted).

Acting violently against another person “on impulse and without reflection,” *id.* at 833 (internal quotation omitted), requires a more substantial loss of self-control than a nonviolent or other, less severe reaction. The *actus reus* may, in some instances, provide context that may inform the degree of loss of self-control that is required: a near-total loss of self-control sufficient to cause a person to act violently on impulse. However, the dispositive question remains the actor’s mental state at the time of the homicide. Indeed, this Court has approved jury instructions that define adequate provocation with reference to what would cause a reasonable loss of self-control. *See, e.g., Williams v. United States*, 858 A.2d 984, 1002 (D.C. 2004) (approving instruction: “A person acts upon adequate provocation if his action is provoked by conduct 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.”); *Howard v. United States*, 656 A.2d 1106, 1114 n.10 (quoting similar instruction).⁴

This distinction between the mental state and the act is important. Here, a jury might find the act of shooting was disproportionate to the provocation while also finding a person in Mr. Walker’s circumstances might lose self-control such that the shooting was done on impulse and without reflection. The sole question properly before the jury in determining murder versus manslaughter is whether the accused acted out of a loss of self-control—meaning, without malice. No malice, no murder.⁵

Even if this Court were inclined to read the language in *High*, *West*, and *Nicholson* as the Government suggests, those cases must be construed in light of

⁴ This is consistent with the Government’s argument that adequate provocation sufficient to defeat malicious destruction of property differs from that required to decrease second-degree murder to manslaughter. Gov. Br. 25–26. The loss of self-control resulting in property destruction is less than the loss of control involved in shooting a person.

⁵ The cases the Government relies on further demonstrate that the adequate-provocation inquiry evaluates whether the provocation would cause a reasonable person to lose self-control, not whether the act of killing is proportional to the provocation. *High*, 972 A.2d at 836 (“We are satisfied that a reasonable person would not have *lost his self-control* and killed a close, childhood friend” (emphasis added)); *Nicholson*, 368 A.2d at 565 (“Our law recognizes as such evidence facts showing adequate provocation by the victim causing the defendant to strike out in the sudden heat of passion.” (internal quotation omitted)); *West v. United States*, 499 A.2d 860, 864 (D.C. 1985) (“We have previously defined ‘adequate provocation’ as that which ‘might naturally induce a reasonable person in the passion of the moment *to lose self-control* and commit the *act on impulse and without reflection*.’” (emphasis added; internal quotation omitted)).

Comber's en banc holding that adequate provocation mitigates the mental state of malice. 584 A.2d at 41. The Government's position would require the jury to find *both* that (1) Mr. Walker reasonably lost self-control and acted in the heat of passion and (2) his *act* was not entirely disproportionate to the provocation. Because a reasonable loss of self-control alone negates malice (and thus murder), the Government's argument would impose a further requirement inconsistent with *Comber*. This would relieve the Government of its burden to prove the absence of mitigation beyond a reasonable doubt. Put differently, it would allow the jury to convict Mr. Walker of murder despite finding malice had been mitigated.⁶

The Government's reliance on cases from other jurisdictions is similarly unavailing. *See* Gov. Br. 24–25. As *Comber*'s extensive historical survey and analysis illustrates, substantive criminal law varies by state, reflecting policies and judgments specific to each jurisdiction. *See, e.g., Comber*, 584 A.2d at 35–45. To

⁶ The Government discusses *High* at length. *See, e.g.,* Gov. Br. 23. But that case is far afield from this one. First, *High* involved the defendant arguing that there was insufficient evidence of voluntary manslaughter to support a lesser-included-offense instruction, and the Court agreed. *High*, 972 A.2d at 831. Here, Mr. Walker does not challenge the sufficiency of the evidence but rather the law stated in a jury instruction. Second, the facts are significantly different. In *High*, the Court emphasized that there was no adequate provocation because the defendant never actually witnessed the suspected sexual encounter, so his reaction was based “on nothing more than mere suspicion,” and the individual he was trying to protect was “29-years-old” and thus “not particularly vulnerable.” *Id.* at 835. In stark contrast, the Government's evidence here suggests that (1) Mr. Walker directly witnessed the sexual encounter, (2) the encounter involved his recent ex-girlfriend, and (3) Mr. Walker observed a young child on the same bed as the couple having sex.

the extent decisions from other jurisdictions may diverge from the criminal law of the District of Columbia, they are immaterial. What matters here is controlling D.C. law, established by this Court sitting en banc in *Comber*.

In any event, there are plenty of cases from other jurisdictions that agree with Mr. Walker's position. *See, e.g., Commonwealth v. Hart*, 565 A.2d 1212, 1217 (Pa. 1989) ("The significance of 'heat of passion' and 'unreasonable belief' are that as a matter of law they are deemed to rebut the malice element of murder."); *Garrison v. State*, No. 03-K-17-000469, 2019 WL 290016, at *3 (Md. Ct. Spec. App. Jan 15, 2019) (unpublished) ("When an intentional killing stems from heat of passion, it is not considered the product of free will, so malice is negated, and the homicide may be mitigated from murder to manslaughter."); *People v. Crummie*, No. 311047, 2013 WL 5663228, at *5 (Mich. Ct. App. Oct. 17, 2013) (unpublished) ("The presence of malice is the sole difference between murder and manslaughter.").

iii. The Trial Court Erroneously Directed the Jury to Focus on the Proportionality of the *Actus Reus*.

Finally, the Government argues that the trial court did not instruct the jury that adequate provocation focuses on the act. Gov. Br. 28–29. In the Government's reading, the trial court's reinstruction told the jury that the "response" referred to the act while continuing to advise that the adequate-provocation analysis considers the loss of self-control (*i.e.*, the defendant's mental state). *Id.* This misses the point.

The court's answer imposed an independent requirement that, beyond a

reasonable loss of self-control causing the violent act, the jury must also find that the act of shooting was not entirely disproportional to the provocation. The court reinstructed the jury that “[f]or [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, 621.⁷ That instruction required the jury to find more than the mitigation of malice and thus contravenes *Comber*.

The final paragraph of the reinstruction discussing the loss of self-control did not cure the error. A reasonable jury faced with these dueling instructions would have understood that it needed to find both (1) that a reasonable person in Mr. Walker’s shoes might lose his self-control and shoot Mr. King on impulse and without reflection and (2) that the act of killing Mr. King was not entirely disproportionate. District of Columbia law requires only the former.

Even if the jury had somehow understood the second paragraph of the trial court’s answer to direct it to focus on the loss of self-control, this would contradict the first part of the trial court’s answer. The jury would have been, at best, deeply confused. Such confusion and resulting indeterminacy as to the basis of the jury’s

⁷ This quote inserts the trial court’s definition of “response” into the jury instruction in place of the word “response” and thus presents this sentence of the instruction in context, as the jury would have understood it after reinstruction. Walker Br. 14.

verdict provides independent grounds to vacate Mr. Walker’s murder conviction. *See Foster v. George Washington Univ. Med. Ctr.*, 738 A.2d 791, 792 (D.C. 1999).

Although this Court should not apply plain-error review, *see supra* Part I.A, the error here satisfies that standard. The preceding analysis shows that the error fits the first, second, and fourth elements of plain-error review (the third element is discussed in the next section). On the first prong, as explained above, the trial court erred by incorrectly instructing the jury. That error was plain, satisfying the second prong. *Contra* Gov. Br. 35. It has been black-letter law in the District of Columbia since at least 1990 that adequate provocation addresses only the defendant’s mental state of malice. *See Comber*, 584 A.2d at 41–42. Finally, because the instructional error affects the jury’s finding of *mens rea*, it also fulfills plain-error review’s fourth prong: it “seriously affected the fairness, integrity or public reputation of [the] judicial proceeding[].” *Malloy v. United States*, 186 A.3d 802, 820–22 (D.C. 2018) (erroneous *mens rea* instruction satisfied plain error’s fourth prong).

C. The Trial Court’s Error Prejudiced Mr. Walker.

The prejudice standard varies depending on whether this Court finds Mr. Walker preserved his objection to the court’s answer to the jury question. If Mr. Walker preserved his objection (as he did), the Government does not contest that this Court must vacate his conviction unless it finds the error was “harmless *beyond a reasonable doubt*.” *Chapman v. California*, 386 U.S. 18, 24 (1967)

(emphasis added); Walker Br. 20–21(discussing *Chapman*); Gov. Br. 11 n.6 (acknowledging Mr. Walker’s argument and offering no contrary argument).

If, however, the Court finds that Mr. Walker did not preserve his objection and applies the plain-error standard, the parties agree that Mr. Walker must show the error affected his substantial rights. *Malloy*, 186 A.3d at 815; Gov. Br. 11 n.6. Under this standard, this Court will reverse if “it is reasonably probable that the jury . . . ‘would have harbored a reasonable doubt about [the defendant’s] guilt if it had been properly instructed.’” *Malloy*, 186 A.3d at 820 (internal quotation omitted) (holding *mens rea* instruction error affected defendant’s substantial rights). Here, because Mr. Walker preserved his objection, *see supra* Part I.A, the *Chapman* standard applies. But Mr. Walker should prevail under either standard.

The Government does not address Mr. Walker prejudice arguments. *See* Walker Br. 23–24. For example, it fails to address the jury note itself. The jury asked if it needed to find that the “heat of passion” was not entirely disproportionate to the provocation or whether it needed to find that the specific resulting “acts” were not entirely disproportionate to the provocation. App. 589. This indicates the jury saw a distinction between the act and the mental state for purposes of determining adequate provocation; otherwise, its question would have been meaningless.

The Government also fails to address Mr. Walker’s argument that a heat-of-passion finding fits with the jury’s acquittal on first-degree murder. Walker Br. 23.

By not finding premeditation, the jury found that Mr. Walker did not have an intent to kill when he entered the bedroom, which aligns with a finding that he shot only after being provoked by what he witnessed upon entering.

Rather than address these arguments, the Government rehearses the same arguments it made at trial against giving a heat-of-passion instruction in the first instance, this time to suggest that the jury's question was irrelevant to its verdict. Gov. Br. 30. The Government lost that argument at trial. App. 454. After all, when Mr. Walker entered the bedroom, he saw a recent ex-girlfriend having sex with another man, on the same bed as a five-year-old child. *Id.* This was the same child who had previously complained to Mr. Walker about her mother having sex in the same bed as her on other occasions. App. 114 (texts recounting "hearing stuff" from child about Ms. Pearce having sex while "you child lay in that bed").

II. THE COURT SHOULD VACATE MR. WALKER'S CONVICTIONS FOR ASSAULT WITH A DANGEROUS WEAPON.

After the Government's concessions, Gov. Br. 36, the remaining dispute is whether the assault with a dangerous weapon ("ADW") charge against Ms. Pearce merges with the charge for second-degree murder with a firearm.

A. Assault with a Dangerous Weapon Is a Lesser Included Offense of Second-Degree Murder with a Firearm.

The Government argues the convictions cannot merge because ADW is not a lesser-included offense of second-degree murder while armed under *Blockburger v.*

United States, 284 U.S. 299 (1932). Gov. Br. 32–33. This Court’s precedents say otherwise: “Assault with a dangerous weapon is a lesser-included offense of second-degree murder while armed.” *Little v. United States*, 709 A.2d 708, 715 (D.C. 1998).

The Government attempts to avoid this established law by focusing not on the ADW statute but on the particular theory—intent to frighten or attempted battery—the Government charged. Gov. Br. 33; see *Perez Hernandez v. United States*, 286 A.3d 990, 998 (D.C. 2022) (en banc) (discussing the different assault theories). The Government cites no authority to support this approach, and there is none.

Rather, courts routinely describe the *Blockburger* test as focusing on the “statutory offense.” *Brown v. Ohio*, 432 U.S. 161, 168 (1977); see *Rogers v. United States*, 222 A.3d 1046, 1053 (D.C. 2019) (“[W]e focus on the *statutory* elements of each offense” (emphasis added)), *abrogated on other grounds by, Cardozo v. United States*, 315 A.3d 658 (D.C. 2024) (en banc); *Nero v. United States*, 73 A.3d 153, 159 (D.C. 2013) (describing *Blockburger* as applying when “the same act or transaction constitutes a violation of two distinct statutory provisions” (quoting *Blockburger*, 284 U.S. at 304)). ADW is governed by a single statute which necessarily encompasses both theories of assault. See D.C. Code § 22-402. So if the ADW charge would merge under either theory, the crime merges.

In keeping with *Blockburger*’s statutory focus, this Court typically analyzes whether assault charges merge without considering the specific theory of assault the

Government alleged. *See, e.g., Rogers*, 222 A.3d at 1053. *But see Frye v. United States*, 926 A.2d 1085, 1100 & n.9 (D.C. 2005) (discussing the elements of both theories but noting that “[f]or purposes of determining the merger issue, it makes no difference” which theory was analyzed). This approach makes sense. It is impossible to commit second-degree murder while armed without simultaneously committing ADW. *See Little*, 709 A.2d at 715 (D.C. 1998). It does not matter if the defendant, in addition to the battery assault necessarily completed as part of the murder, might have also committed an intent-to-frighten assault with an additional element. ADW is always a lesser-included offense of second-degree murder while armed.

The Government’s interpretation, by contrast, could yield troubling results. The Government could prevent the merger of simple assault and ADW by electing to pursue one of the counts on an intent-to-frighten theory and the other on an attempted-battery theory. The Constitution cannot be evaded by artful charging.⁸

⁸ An exception proves the rule. This Court has recognized a narrow circumstance where it “departs from the normal operation of *Blockburger*” and looks beyond just the statutory elements. *Grogan v. United States*, 271 A.3d 196, 205 (D.C. 2022). In *Whalen v. United States*, 445 U.S. 684 (1980), the Supreme Court, construing D.C. law, merged convictions of rape and felony murder. *Id.* at 694. As this Court explained in *Grogan*, *Whalen* represents a narrow exception to the normal *Blockburger* analysis that applies only “where the greater offense (e.g., felony murder) incorporates a set of alternative lesser offenses (e.g., rape), and then tacks on an aggravating factor (e.g., a killing).” 271 A.3d at 206. But this case falls in the “inverse scenario” where *Whalen* “does not apply” because it is the lesser-included offense (not the greater) that contains alternative theories. *Id.* at 206. And here, the rule of lenity, which featured prominently in the *Whalen* Court’s reasoning, favors

(Footnote Cont’d on Following Page)

B. The Evidence Does Not Show Beyond a Reasonable Doubt that Mr. Walker Committed Distinct Assaultive Acts.

Because ADW is a lesser-included offense of second-degree murder while armed, the next question is whether the two gunshots constitute a single assaultive act and therefore merge. Two threshold matters guide the analysis. First, the Government does not dispute that the proper standard of proof for this analysis is proof beyond a reasonable doubt. *See* Walker Br. 37 & n.8–9; Gov. Br. 35–36.

Second, the right legal test is whether Mr. Walker reached a fork in the road and formed a fresh assaultive intent between the successive gunshots. *See Stevenson v. United States*, 760 A.2d 1034, 1037 (D.C. 2000); Walker Br. 26. The Government argues that the Court should apply the test stated in *Graure v. United States*, 18 A.3d 743, 761 (D.C. 2011). As previously explained, that analysis typically addresses assaults that are inherently likely to injure multiple people. Walker Br. 28.

Under the fork-in-the-road test, the convictions merge because the shots were fired in quick succession and stemmed from the same impulse. *Id.* 26. The Government emphasizes that between the shots Mr. King fell backwards and both Ms. Pearce and Mr. Walker shifted around. Gov. Br. 35. Even assuming this evidence is consistent with a reformulation of intent between the shots, it does not establish such a renewed intent beyond a reasonable doubt.

the traditional *Blockburger* approach. *See Whalen*, 445 U.S. at 713 (Rehnquist, J., dissenting) (lenity “forms the real foundation of the Court’s decision).

Even if this Court applied *Graure*, the convictions would merge. The *Graure* Court situated the arson at issue between two types of gun cases. It explained that firing a single shot, even at a group, results in one conviction. *Graure*, 18 A.3d at 761 (citing *Joiner v. United States*, 585 A.2d 176, 178 (D.C. 1991)). Conversely, “firing a hail of bullets toward a group of persons” may sustain multiple assault convictions. *Id.* at 762. This case is closer to the single shot on that spectrum. Mr. Walker fired two gunshots, and both Mr. King and Ms. Pearce were injured (Ms. Pearce sustained stippling). Yet there were only two shots, and Mr. Walker aimed both at Mr. King. The Government never argued that Mr. Walker intended to hit Ms. Pearce because it pursued an intent-to-frighten theory, not a attempted-battery theory. App. 391. Ms. Pearce was not the “target[] of particularized threats of force” but rather was subject to “a generalized threat of force,” so the assault against her should merge. *Snowden v. United States*, 52 A.3d 858, 873 (D.C. 2012).

CONCLUSION

The Court should (1) vacate Mr. Walker’s second-degree murder while armed conviction and (2) merge the convictions for assault and possession of a firearm during a crime of violence—most of which the Government agrees should merge.

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 22nd day of August 2025.

/s/ Sergio Valente
Sergio Valente