Appeal No. 19-CF-116

DISTRICT OF COLUMBIA COURT OF APPEALS

DARON WINT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

BRIEF FOR APPELLANT

SAMIA FAM

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DISCLOSURE STATEMENT

Daron Wint was represented in the trial court by Judith Pipe and Jeffrey Stein, who were then both attorneys with the Public Defender Service for the District of Columbia. The government was represented at trial by Assistant United States Attorneys Laura Bach and Christopher Bruckmann. The Honorable Juliet J. McKenna presided over the trial.

TABLE OF CONTENTS

Page:

ISSUES PRESENTED....1

STATEMENT OF THE CASE AND JURISDICTION....1

STATEMENT OF FACTS....3

I. Introduction and Overview....3

II. The Evidence at Trial....6

A. The Government's Case-in-Chief....6

i. Evidence Regarding May 13th and 14th....6

ii. The Vehicle Fires....9

iii. The DNA Evidence....10

iv. Other Evidence....12

B. The Defense Case....16

C. The Government's Rebuttal Case....23

D. The Defense's Proffered Surrebuttal....25

E. Verdict and Sentencing....27

SUMMARY OF ARGUMENT....27

ARGUMENT....30

I. The Trial Court Committed Reversible Error in Denying the Appellant's Request for Surrebuttal.....30

A. Legal Standards....30

B. Williams's Testimony Rebutted Darrell's and Anderson's Testimonies.....31

C. Williams's Testimony Would Have Addressed a New Matter that First Arose During the Government's Rebuttal Case. 34

D. Even if the Proffered Testimony Did Not Pertain to a New Matter Raised in Rebuttal, the Trial Court Abused Its Discretion. 40

E. The Error Was Harmful 41

II. Merger 47

CONCLUSION 48

TABLE OF AUTHORITIES

Page(s):

Cases:

Baker v. United States, 867 A.2d 988 (D.C. 2005) ..... 47−48

Bynum v. United States, 799 A.2d 1188 (D.C. 2002) ..... 30−31

* *Chaabi v. United States*, 544 A.2d 1247 (D.C. 1988) 31

Chapman v. California, 386 U.S. 18 (1967) 41

Crane v. Kentucky, 476 U.S. 683 (1986) 30

Dockery v. United States, 746 A.2d 303 (D.C. 2000) 33

* *Edge v. State*, 393 So. 2d 1337 (Miss. 1981) ..... 34−35, 38−39

Garris v. United States, 465 A.2d 817 (D.C. 1983) 47

* *Gregory v. United States*, 393 A.2d 132 (D.C. 1978) ..... 29−31, 34, 40

Holmes v. South Carolina, 547 U.S. 319 (2006) 30

Johnson v. United States, 398 A.2d 354 (D.C. 1979) ..... 29, 40−41

Jones v. United States, 625 A.2d 281 (D.C. 1993) 33

Lee v. United States, 699 A.2d 373 (D.C. 1997) 47

Martin v. United States, 606 A.2d 120 (D.C. 1991) 34

Matthews v. United States, 13 A.3d 1181 (D.C. 2011) ..... 47−48

Roberts v. United States, 213 A.3d 593 (D.C. 2019) 41

Scott v. United States, 975 A.2d 831 (D.C. 2009) 30

United States v. Gaines, 170 F.3d 72 (1st Cir. 1999) 35

* *United States v. Murray*, 736 F.3d 652 (2d Cir. 2013) ..... 34−37

Washington v. Texas, 388 U.S. 14 (1967) 30, 33

Constitutional Provisions:

U.S. Const. amend. V.....30, 41

U.S. Const. amend. VI 30, 41

Statutes:

D.C. Code § 11-721 2

D.C. Code § 14-102 33

* Denotes cases upon which Appellant chiefly relies. *See* D.C. App. R. 28(a)(4).

ISSUES PRESENTED

I. Whether the trial court erred in denying Appellant's request for a brief surrebuttal case when the government's rebuttal case presented new evidence regarding the whereabouts of the person who Appellant put forward as one of the actual perpetrators?

II. Whether, if the court rejects the principal argument regarding surrebuttal, several of Appellant's convictions should merge?

STATEMENT OF THE CASE AND JURISDICTION

On May 22, 2015, Appellant Daron Wint was presented on a complaint charging him with first-degree murder while armed. (R. 5.)[1] On February 19, 2016, he was arraigned on a twenty-count indictment, which was returned on February 17, 2016, charging him with, among other things, the first-degree murder of four decedents.[2] (R. 21.) On September 11, 2018, a jury trial commenced. (9/11 at 57.)

[1] "(R. **)" denotes the index number designated in the Clerk's Record Index/Certification form prepared for the appeal. "(**/** at **)" denotes the month, day, and page number of the transcripts generated from the 2018 trial. "(App. at **)" denotes a particular page from Appellant's Limited Appendix.

[2] Specifically, the indictment charged: (1) first-degree burglary; (2) the kidnapping of Savvas Savopoulos; (3) the kidnapping of Amy Savopoulos; (4) the kidnapping of Veralicia Figueroa; (5) the kidnapping of Philip Savopoulos, with the aggravating circumstance that Philip was under eighteen at the time of the offense and at least two years younger than Appellant; (6) extortion; (7) the first-degree felony murder while armed of Mr. Savopoulos, with the predicate felony being kidnapping, with the aggravating circumstances that the murder was committed in the course of a kidnapping, that it was especially heinous, atrocious, and cruel, and that there was more than one offense of murder in the first-degree arising out of the incident; (8) the first-degree felony murder while armed of Ms. Savopoulos, with the predicate felony being kidnapping, with the aggravating circumstances that the murder was committed in the course of a kidnapping, that it was especially heinous, atrocious, and cruel, and that there was more than one offense of murder in the first-degree arising out of the incident; (9) the first-degree felony murder while armed of Ms. Figueroa, with the predicate felony being kidnapping, with the (*con't*)

The jury received the case for deliberation on October 23, 2018. (10/23 at 293.) On October 25, 2018, the jury returned verdicts of guilty on all counts. (10/25 at 4−15.)

The trial court sentenced Appellant on February 1, 2019, to an aggregate sentence of four terms of life without release.[3] (R. 155.) A timely notice of appeal followed. (R. 157.) This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

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aggravating circumstances that the murder was committed in the course of a kidnapping, that it was especially heinous, atrocious, and cruel, and that there was more than one offense of murder in the first-degree arising out of the incident; (10) the first-degree felony murder while armed of Philip, with the predicate felony being kidnapping, with the aggravating circumstances that the murder was committed in the course of a kidnapping, that it was especially heinous, atrocious, and cruel, that there was more than one offense of murder in the first-degree arising out of the incident, and that the decedent was especially vulnerable due to age; (11) the first-degree felony murder while armed of Mr. Savopoulos, with the predicate felony being burglary, with the same aggravating circumstances set forth in count seven; (12) the first-degree felony murder while armed of Ms. Savopoulos, with the predicate felony being burglary, with the same aggravating circumstances set forth in count eight; (13) the first-degree felony murder while armed of Ms. Figueroa, with the predicate felony being burglary, with the same aggravating circumstances set forth in count nine; (14) the first-degree felony murder while armed of Philip, with the predicate felony being burglary, with the same aggravating circumstances set forth in count ten; (15) the first-degree murder while armed (premeditated) of Mr. Savopoulos, with the same aggravating circumstances set forth in count seven; (16) the first-degree murder while armed (premeditated) of Ms. Savopoulos, with the same aggravating circumstances set forth in count eight; (17) the first-degree murder while armed (premeditated) of Ms. Figueroa, with the same aggravating circumstances set forth in count nine; (18) the first-degree murder while armed (premeditated) of Philip, with the same aggravating circumstances set forth in count ten; (19) arson; and (20) first-degree theft. (R. 21.)

[3] Specifically, the court imposed: life without release for each of the first-degree murder convictions; 96 months for the first-degree burglary; 96 months each for the kidnapping of Mr. Savopoulos, Ms. Savopoulos, and Ms. Figueroa; 144 months for the kidnapping of Philip; 28 months for the extortion; 66 months for the arson; and 28 months for the first-degree theft. (R. 155.)

STATEMENT OF FACTS

I. Introduction and Overview

In the early afternoon of May 14, 2015, first responders went to 3201 Woodland Drive, a house located in Northwest, due to a report of fire. (9/18 at 166.) The fire, which an expert would later testify was intentionally set, was concentrated on the house's second floor. (9/18 at 132, 184, 290.) Firefighters discovered four decedents on the second floor. (9/18/18 at 257, 262, 273.) In one bedroom the firefighters located ten-year old Philip Savopoulos. (9/20 at 17; 9/18 at 273; 9/12 at 982.) In another bedroom, the firefighters found Amy and Savvas Savopoulos, who were Philip's parents, and the family's housekeeper, Veralicia Figueroa (9/18 at 257−62; 9/13 at 1161−62; 9/12 at 911, 918.)[4]

The government's theory was that Appellant Daron Wint restrained the decedents and forced Mr. Savopoulos—who owned a company called American Iron Works ("AIW") and had considerable wealth—to withdraw $40,000 from AIW's bank account in cash and have it delivered to the Savopoulos home. (10/22 at 36.) Specifically, the government's theory was that Daron entered the house sometime between about 11:29a.m. and 3:14p.m. on May 13, 2015. (10/22 at 41.) Appellant took the decedents hostage, either first incapacitating Ms. Figueroa when

[4] A medical examiner ("ME") testified that the causes of Ms. Figueroa's, Mr. Savopoulos's, and Ms. Savopoulos's deaths were multiple blunt force and sharp force injuries. (10/9 at 206, 233, 261.) There was evidence that all three had been restrained. (10/9 at 178, 213−14, 239−40.) As to Philip, the ME testified that he had been badly burned, so she could not look for evidence of restraint. (10/10 at 10−11.) The ME was able to determine that he had stab wounds to his lower left torso, and that he had died of thermal or sharp force injuries, or some combination of the two. (10/10 at 18, 23, 27−29.)

she was alone in the house and then Philip and Ms. Savopoulos when they returned to the house, or first incapacitating Ms. Figueroa and Philip while Ms. Savopoulos was out, then incapacitating Ms. Savopoulos when she returned to the house, and finally incapacitating Mr. Savopoulos when he returned from work that afternoon. (10/23 at 257; 10/22 at 43−44, 47.) The government contended that Mr. Savopoulos was then forced to contact his colleagues at AIW to secure $40,000 in cash from AIW's bank account. (10/22 at 49−50, 56.) The prosecution argued that at some point after Mr. Savopoulos secured the cash on the 14th, Appellant murdered the decedents and, using an accelerant, started a fire on the second floor of the Savopoulos home. (10/22 at 68; 9/20 at 104−05.)

The defense contended that Daron's brothers—Darrell Wint and Steffon Wint—were the actual perpetrators.[5] Daron testified during the defense case that Darrell brought him to the house on Woodland Drive on May 14, 2015, under the false promise of legitimate labor and, once he realized that his brothers were burglarizing the house, Daron left and did so without realizing that his brothers had kidnapped (and by that point maybe already murdered) anyone. (10/11 at 289; 10/10 at 200−01, 203; *see also* 10/22 at 123.)

For the first time in its rebuttal case, the government introduced what was, in essence, alibi evidence for Darrell. Darrell, who had not testified in the government's case-in-chief, testified that he was in Gaithersburg, Maryland during the morning into the afternoon of May 13th. (10/17 at 102, 212−13.) The government buttressed

[5] Steffon is Daron's full brother. (10/1 at 45.) Darrell is Daron's half-brother; they share a father. (10/10 at 140−41.)

Darrell's alibi testimony in rebuttal with the testimony of his friend Anthony Anderson, who testified that Darrell visited him on the 13th to watch a music video Anthony had produced and had that day uploaded to YouTube. (10/17 at 301.) Thus, Darrell's and Anderson's testimonies were that Darrell was in Gaithersburg on the 13th, not at the Savopouloses' home committing what would become a quadruple homicide.

Due to the alibi the government first presented in rebuttal, Appellant asked the court to present a brief—but critical and targeted—surrebuttal case. In particular, the defense asked to call a single witness: Ikia Williams, who is Anderson's cousin and then-housemate. Williams had testified in the grand jury that on the day Darrell came to Gaithersburg to see her and Anderson, she believed Darrell had called her when he was in front of her house. (10/18 at 341, 344.) Phone records, however, showed that the only communications between Darrell's and Williams's phone during the relevant timeframe occurred on May 19, 2015, and not on May 13, 2015. (10/18 at 345.) Thus, Williams's proffered testimony from the grand jury undermined the evidence of Darrell's alibi by tending to show that the visit occurred not on May 13th, but rather on the 19th.

The trial court rejected the defense request for a brief surrebuttal, stating that: (1) the proffered testimony would not have rebutted Anderson's testimony in the government's rebuttal case; and (2) the proffered testimony did not pertain to a new matter first raised in the government's rebuttal. (10/18 at 459−65.) The trial court was wrong in both respects and this Court should reverse.

II. The Evidence at Trial

A. The Government's Case-in-Chief

i. Evidence Regarding May 13th and 14th

As it argued in closing statements, the government contended that Daron Wint entered the Savopoulos home sometime between about approximately 11:29a.m. and 3:14p.m. on May 13, 2015. (10/22 at 41.) Ms. Savopoulos took Philip to a doctor's appointment in Chevy Chase, Maryland at approximately 9:30a.m. on May 13th (9/12 at 937−39, 942.) Cell-tower records showed that, by several hours later at 11:20a.m., the phone associated with Ms. Savopoulos utilized the cell tower that covered her residence. (10/1 at 294.) Phone records also showed that a teacher from Philip's school text messaged Ms. Savopoulos at 12:29p.m., but that Ms. Savopoulos never responded to that message. (9/13 at 1112; 9/12 at 1062.)

The Savopouloses had a reservation to board their dogs with the Olde Town Pet Resort for the upcoming Memorial Day weekend. (9/12 at 1001−02.) At 3:14p.m. on the 13th, the pet resort called the Savopouloses' land line to confirm the reservation, but could not get through because the line was disconnected. (9/12 at 1007.) A crime scene technician would later testify that the telephone lines had been cut at the point they entered the house from the outside. (9/20 at 122.)[6]

[6] A family friend of the Savopoulos family testified that she saw a woman she believed to be Ms. Savopoulos at 3:25p.m. on the 13th near the intersection of Cleveland Avenue and Calvert Street in Northwest walking in the direction of the Savopoulos home. (9/12 at 1072−73, 1076, 1083.) There were, however, many reasons to question that identification, such as the fact that the person the friend believed to be Ms. Savopoulos was not wearing the clothes that she had been wearing on the surveillance camera footage from the doctor's building. (9/12 at 1098−99.)

Having had no luck with the land line, the pet resort left a voice message on Ms. Savopoulos's cell phone at 4:18p.m. (9/12 at 1009, 1016.) At 5:35p.m., Ms. Savopoulos called back on her cell phone and reconfirmed the boarding. (9/12 at 1011−12, 1016.) An employee of the pet resort, who was familiar with Ms. Savopoulos, said when she spoke with Ms. Savopoulos that afternoon it "was like speaking to somebody different." (9/12 at 1011−12.) Also, Ms. Savopoulos contacted her husband in the afternoon of the 13th and asked that he come home from work early. (9/13 at 1174.)

At roughly 9:15p.m. on the 13th, a woman phoned and ordered two Domino's pizzas to be delivered to the Woodland Drive address. (9/17 at 83, 90.) She paid by credit card and—stating that her son was sick—instructed that the delivery driver leave the pizza on the front porch, which he did. (9/17 at 85; 9/13 at 1218.)

Computer and phone records showed that during the evening of the 13th going into the morning of the 14th, Mr. Savopoulos communicated with the vendor of the house's home security system about whether the system was on motion detector versus continuous record. (9/12 at 1052−53.) Mr. Savopoulos also asked whether the footage was stored off-site someplace, or just on the hard drive in the house.[7]

On the morning of May 14th, Ms. Savopoulos took steps to ensure that another housekeeper, as well as a technician for their sprinkler system, did not go to the house that day. (9/13 at 1297; 9/12 at 1055.) Ms. Figueroa's husband also went to the Savopoulos house that morning and knocked on the door looking for his wife,

[7] Security company personnel testified that the footage was only stored on the hard drive of a computer in the house. (9/27 at 185; 9/13 at 1127.)

but received no answer. (9/17 at 27; 9/13 at 1325.)[8] Shortly thereafter, Mr. Savopoulos called Ms. Figueroa's husband and told him that Ms. Savopoulos had become sick, that they had taken her to the hospital, and that Ms. Figueroa had come along to help. (9/13 at 1328−29.)

Meanwhile, over the afternoon of the 13th and into the morning of the 14th, Mr. Savopoulos was making arrangements—apparently under duress—with his colleagues at AIW and representatives from Bank of America to have $40,000 in cash withdrawn from AIW's bank account. (9/17 at 48−49; 9/13 at 1225, 1237, 1270−74.) Once the needed paperwork was completed on the morning of the 14th, the chief financial officer for AIW, along with Jordan Wallace, who was Mr. Savopoulos's personal assistant, went to the bank and retrieved the $40,000. (9/17 at 113, 116; 9/13 at 1231, 1237, 1243, 1274.) Mr. Savopoulos told Wallace that he would leave the garage door open so that Wallace could put the money inside of one the cars in the garage. (9/17 at 147−48.) Mr. Savopoulos further told Wallace not to knock because he was on a conference call. (9/17 at 148.) Wallace did as he was instructed, and, once completed, texted Mr. Savopoulos, "Package delivered," at 10:26a.m. on the 14th. (9/17 at 153.) Mr. Savopoulos never responded. (9/17 at 154.)

Phone records showed that Daron's girlfriend Vanessa Hayles sent several messages through Facebook Messenger to the phone associated with Daron during the 13th and 14th, expressing her concern that Daron was not responding to her messages. (10/9 at 88−92; 9/25 at 167−69.) Likewise, Daron's stepmother testified

[8] Ms. Figueroa normally stopped working at about 3:00 or 3:30p.m., and had never spent the night. (9/13 at 1180, 1191−92.)

that she became concerned for Daron—who was living with her and Daron's father at the time—when he did not come home on the evening of the 13th. (9/25 at 101.) She testified that he was not home when she woke up around 7:00a.m. on the 13th and that she did not see him until about 6:00p.m. on the 14th. (9/25 at 100−03.)

Finally, surveillance videos showed Daron and Darrell together in a Walmart in Landover Hills in Prince George's County, Maryland at around 10:23p.m. on the 14th. (9/25 at 115.) Video showed that Darrell gave the clerk money for some clothing and gloves. (9/25 at 121−23.) Video further showed that Daron and Darrell made a second trip to the same Walmart at approximately 11:26p.m. that night. (9/25 at 118.) That video showed Daron using money to purchase a backpack. (9/25 at 124−26.)

ii. The Vehicle Fires

On the evening of May 14th, the Savopouloses' Porsche was found on fire in a church parking lot near the 8000 Block of Annapolis Road in Prince George's County. (9/24 at 113−14.) An expert testified that the fire had been deliberately set with an accelerant. (9/24 at 164.) Surveillance footage showed a person, who both sides agreed was *not* Daron Wint, running from the fire holding a white bucket. (9/26 at 158; 9/24 at 135.) Law enforcement recovered a construction-worker type vest on the driver's side floorboard of the Porsche. (9/24 at 160.)

The parking lot where the Porsche was found was adjacent to a strip mall which, among other businesses, contained a catering company named La Fontaine Bleue. (9/26 at 144−45.) A La Fontaine Bleue employee testified that at around 5:00p.m. on the 14th, as she was leaving work, she saw a person she later identified

as Daron pacing back and forth in the church parking lot. (9/26 at 151, 157, 162.) When she was shown the surveillance footage of the man with the bucket running away from the scene she indicated that it was not Daron. (9/26 at 157−58.)

Shortly after midnight on May 16, 2015, firefighters found Appellant's Ford Windstar van engulfed in flames in an industrial area near Frolich Lane and 51st Place in Hyattsville in Prince George's County. (10/2 at 95−96; 9/27 at 191.) An expert testified that the fire was intentionally set with an accelerant. (9/27 at 219.)

iii. The DNA Evidence

Law enforcement recovered a knife that was propping open one of the windows in the basement of the Savopoulos home. (9/25 at 209; 9/24 at 40−41.)[9] This knife was processed through the District's Department of Forensic Sciences on May 20, 2015. (10/15 at 406.) Forensic specialists with the Bureau of Alcohol, Tobacco, Firearms and Explosives later developed a nuclear DNA profile from the knife handle and determined that Daron could not be eliminated as the source for this profile. (9/27 at 37.) The probability of randomly selecting an unrelated individual who had the profile was one in 3.7 trillion United States Caucasians, one in 90 billion African-Americans, and one in 55 trillion United States Southwest Hispanics. (9/27 at 38.)

Law enforcement found two boxes of Domino's pizza on the scene, one of which contained uneaten crust. (9/26 at 227.) Analysists recovered DNA profiles from two swabs taken from this pizza crust—one swab was taken from the chewed

[9] There also were windows in the basement propped open with, respectively, a screwdriver and a Frisbee; these items were not subjected to DNA analysis. (9/26 at 258; 9/25 at 157−60.)

side of the crust while the other was taken from the side of the crust one would hold while eating. Daron could not be excluded as the source of the profiles obtained from the swabs, and the probability of randomly selecting an unrelated individual with those DNA profiles was one in three sextillion United States Caucasians, one in 10 quintillion African-Americans, and one in 47 sextillion Southwest United States Hispanics. (9/27 at 82.)

A nuclear DNA mixture with at least three contributors was found on the construction vest recovered from the Porsche. (9/27 at 89.) Appellant and Mr. Savopoulos could not be excluded as contributing to the multiple source profile. (9/27 at 89.) Assuming the major component was two contributors, the probability of randomly selecting an unrelated individual who could be included as a contributor to the major component of this mixture was one in 10 million United States Caucasians, one in 41 million African-Americans, and one in 10 million United States Southwest Hispanics. (9/27 at 89−90.)

Hair was recovered from a hard hat found in the garage, as well as from the bedding near to where Philip's body was found. (10/9 at 32, 35; 10/1 at 37; 9/26 at 127; 9/25 at 228.) These hairs were tested for mitochondrial DNA, and Daron could not be excluded as the source of the hairs. An expert estimated that the mitochondrial profiles from the hairs from the bedding and the hard hat would be estimated to be present in .12% of African-Americans, .11% of United States Caucasians, and .12% of United States Hispanics. (10/1 at 40.) The same profiles would be expected to be seen in all of Daron's maternal siblings, to include Steffon. (10/1 at 40−41, 43.)

iv. Other Evidence

Daron's brother Steffon Wint claimed to have no memory of where he was on May 13th or 14th. (10/1/18 at 69.) Steffon testified that in early 2015 he was working for a company named PCM Services as a construction supervisor. (10/1 at 52−53.) PCM had a contract that May to repaint the dorms at George Washington University. (10/1 at 69−70.) As a supervisor, Steffon had the ability to hire short-term labor for projects. (10/1 at 69.) Steffon had thus reached out to both Daron and Darrell about working on the dorms project. (10/1 at 71.) In addition, as of May 2015, PCM had assigned him a white pickup truck. (10/1 at 106.)

The government introduced time sheets that asserted that Steffon worked from 6:00a.m. to 4:30p.m. on the 13th and 6:00a.m. to midnight on the 14th. (10/1 at 92−94.) The only signatures, however, on the time sheets were Steffon's signatures. (10/1 at 112; *see also* 10/3 at 144.) In theory, Steffon's supervisors could have double checked his time sheets by cross referencing them with GPS devices on the work vehicle, but the government did not introduce any evidence that that had happened as to Steffon's sheets from the 13th and 14th. (10/1 at 109−10.) Thus, the only documentation of where Steffon was on the days in question came from the time sheets he alone had completed.

Steffon also claimed that he was not particularly close with his brother Darrell. (10/1 at 72.) The defense, however, introduced phone records that showed that Steffon and Darrell had a total of twenty-three telephone calls or attempted calls between each other between May 12th and 15th, to include a 415-second call from

Darrell to Steffon on the 14th starting at 5:43p.m. (10/1 at 189, 193.)[10] Steffon further acknowledged that as of May 2015 he was living in an apartment building close to the parking lot where the Porsche was discovered. (10/1 at 198.)

A tow truck driver testified that on May 14, 2015, as he was parked on Annapolis Road in Prince George's County, an African-American man in his twenties approached him and asked him to take him to the District to tow his van. (9/24 at 184−85, 187.) The driver testified that the man did not provide him with an address, but rather directed him to the 2400 Block of Pennsylvania Avenue in the Foggy Bottom neighborhood of Northwest. (9/24 at 185, 201−02.) Once the driver picked up the van, he towed it back to Maryland—he could not recall exactly where—with the man riding in the cab with him. (9/24 at 189−90.) The driver testified that the passenger borrowed his phone after explaining that his phone could not make calls. (9/24 at 192.) The driver testified that when the passenger got out of his truck in Maryland, the passenger started to use his own phone to make apparent calls—this made the driver "scared" because he did not understand why the passenger would have asked to use his phone if his own phone was able to make calls. (9/24 at 198.)

Godfrey Ayling, Daron's brother-in-law, testified that on the evening of May 15th he picked Daron up from Daron's father's house to go to the gym. (10/2 at 55, 82.) Ayling claimed that Daron showed him $1,200 in $100-dollar bills and told him

[10] The government did not call Darrell Wint in its case-in-chief.

he had won the lottery. (10/2 at 84.)[11] Ayling further testified that Daron, telling him that he had been involved in a hit and run, had asked him for help in burning his van. (10/2 at 85.) Ayling declined. (10/2 at 85.)

Daron's fiancée Devonie Hayles, who lived in New York City, told the jury that as of May 2015 she would usually communicate with Daron through Facebook Messenger because his phone could not make or receive calls. (10/2 at 107, 109, 111, 113.) She testified that she left several messages for Daron on May 13, 2015, and May 14, 2015, but he did not return them until the evening of the 14th. (10/2 at 119−21; *see also* 9/25 at 167−68.) In contacting her, Daron asked her whether cell phones "could be traced," to which she responded affirmatively. (10/2 at 123.) He also sent her a picture of two cell phones. (10/2 at 123; 9/25 at 175.)

Daron visited Hayles in New York City on May 17, 2015, and gave her an iPhone; she believed it was one of the phones in the picture he had sent her. (10/2 at 126−29.) She saw him with multiple $100 bills, and he told her that he had sold his van for $700 and had won money in the lottery. (10/2 at 124−25, 130−35.)

On the evening of May 20, 2015, Hayles and Daron saw a news report about the Woodland Drive murders that included Daron's photograph. (10/2 at 133.) They went to a hotel, and in the morning, Hayles took Daron to a taxi stand so he could

[11] The parties stipulated that the lottery agencies in the District, Maryland, and New York are all required to maintain records of all persons who claim lottery prizes in excess of $601. (10/2 at 96.) These state lottery agencies searched their records between January 1, 2015, and May 21, 2015, for Appellant and each state lottery agency reported that he did not claim any prize in excess of $601. (10/2 at 96−97.)

charter a cab back to the District to self-surrender to the police. (10/2 at 135, 137−38.)

Chelsea Nunez, a friend of Darrell's, testified that on May 21st Darrell asked her and another female friend to assist him in getting money orders so that a friend of his could get a lawyer. (10/2 at 189, 192.) Nunez picked him up in her car and Darrell handed both women approximately $2,800 in $100 bills, which the three then used to purchase money orders. (10/2 at 193.) Afterwards, they drove to a hotel in the College Park area where Daron joined them—identifying himself to Nunez as "Jason." (10/2 at 203−05.) He got into Nunez's car, and Darrell, getting into a white truck, told her to follow him. (10/2 at 206.) As they were driving, law enforcement officers stopped both vehicles and arrested Appellant. (10/2 at 215−16.)

When the police searched the vehicle in which Daron was riding they recovered money orders, but no cash. (10/3 at 37.) In contrast, the police recovered over $7,300 in cash in the truck in which Darrell was riding. (10/3 at 33.) They also recovered $300 in Darrell's sock. (10/17 at 240; 10/15 at 506.)

Once he was arrested, a search of the smartphone associated with Daron showed internet searches on May 14th for "How to beat a lie detector test," "How to factory reset iPhone 6 and get rid of iCloud," and "How to factory reset iPhone 6." (10/9 at 93.) In the following days there were searches for, among other similar things, "Fox 5 news and D.C. fire," "Ten hideout cities for fugitives," and "Five countries with no U.S. extradition treaty." (10/9 at 95.)

Daron's step-mother testified that before he went to New York, Daron had stored some of his clothing in the crawlspace of the house she shared with Daron's

father. (9/25 at 109−10, 141.) On May 20, 2015, law enforcement searched this residence and received Daron's step-mother's consent to search the crawlspace. (9/25 at 112, 143−44.) The parties stipulated that Daron's clothing and other belongs were seized as evidence on May 20th and deposited with the District's Department of Forensic Sciences after being sealed. (10/10 at 62−63.)[12] Forensic analysis showed, not surprisingly, that Daron's DNA was on multiple pieces of this clothing. (9/27 at 152.)

The government introduced phone records for a phone number—ending in 1903—associated with Darrell, which showed that on the 13th between 1:30p.m. and 2:00p.m. the phone was using a tower near where Rhode Island Avenue, North Capitol Street, and Florida Avenue meet in the District. (10/1 at 286−87; *see also* 10/18 at 366.) The records also showed that between 2:44p.m. on the 13th and 9:38p.m. on the 14th, the phone used towers in Montgomery County; at 11:17p.m. the phone utilized a tower in Cheverly in Prince George's County. (10/1 at 286−87.)

AIW records showed that Daron had worked as a shop laborer at AIW's facility in Hyattsville in Prince George's County from May 16, 2003, to April 28, 2005. (9/17 at 40, 78.)

B. The Defense Case

Daron testified in his own defense. (10/10 at 119.) He testified that on May 11, 2015, his brother Darrell told him that their other brother—Steffon—was doing

[12] This stipulation, which was United States Exhibit #911, was admitted into evidence and provided to the jury for its deliberations, but was not read into the record for the transcripts. (10/10 at 62−63.) Appellant will be seeking to augment the record with the stipulation itself.

a painting and drywall job on that Wednesday, May 13th, and they could use Appellant's help. (10/10 at 140−41, 144.) Darrell told Daron to meet him in the parking lot across the street from PCM Services at 6:00a.m. on the 13th. (10/10 at 145.)

Shortly after 6:00a.m. on the 13th, Daron drove his van to the lot to meet his brother. (10/10 at 150, 155.) Darrell walked up, alone, and told him that he and Steffon did not need him to work that day, but would pay to use his van. (10/10 at 155−56.) Daron asked for at least $300 and Darrell agreed, saying that he would return the van at some point between 5:00p.m. and 6:00p.m. that afternoon. (10/10 at 156−57.)

Darrell then drove the van to a house in Silver Spring in Montgomery County, Maryland and went inside while Daron waited in the van. (10/10 at 168−69.) The two then went to a fast-food restaurant. (10/10 at 170.) Daron asked Darrell to take him to his friend Ed's house. (10/10 at 161.)[13] Daron testified that Ed always had a lot of people coming and going, and Daron would hang out there from time to time. (10/10 at 167−68.)

Darrell dropped him off at Ed's house, and Daron spent the day with Ed and the other people who were there. (10/10 at 174.) At some point, he realized that he had left his cell phone in his van. (10/10 at 173.) That afternoon, he drank too much liquor and passed out on Ed's couch. (10/10 at 175−77.) He eventually woke up at about 10:00a.m. on May 14th. (10/10 at 177.)

[13] By the time of trial, Ed had died from a drug overdose. (10/17 at 36.)

Darrell eventually came back, but this time he was driving a Porsche. (10/10 at 178.) Daron testified that Darrell told him that he and Steffon had about thirty more minutes left on the job, but that they needed his help. (10/10 at 179.) Daron agreed to go. (10/10 at 179.)

Daron asked Darrell where his van was located. (10/10 at 178.) Darrell started to give Daron the location, at which point Daron asked for something with which to write. (10/10 at 180−81.) He also told Darrell that he needed to get to the van so he could get his phone, to which Darrell said "don't worry, I got your phone with me right here." (10/10 at 181.) Once Darrell gave him his phone, Daron used it to record where Darrell had told him the van was located, which was "24th and K." (10/10 at 182, 185.) Daron also asked Darrell to stop and get "something to eat because [he] was still feeling upset from the drinking." (10/10 at 186.) Darrell did not make any stops, but Daron was "under the impression that [he] would get food at some point." (10/10 at 186.)

Eventually, Darrell parked the car in front of the Savopouloses' home, on the street that was in front of the main door. (10/10 at 187.) Darrell opened the front door with a key, and had Daron sit in the small dining room by the front door while he went upstairs. (10/10 at 189−91.) When Darrell returned, he placed a pizza box on the table in front of Daron. (10/10 at 192.) At this point, Darrell was wearing construction gloves, which Appellant found "weird," and he asked Darrell why was he "grabbing the pizza with those dirty gloves." (10/10 at 193.) Daron ate a piece of the pizza, but left the "crust back in the box because it was cold and hard." (10/10 at 193−94.)

Daron realized that he had left his phone in the Porsche. (10/10 at 195.) Darrell let Daron out through the front door, and told him to come back in through the garage. (10/10 at 196−97.) Daron got his phone, went to the garage and, when it opened, he went in. (10/10 at 197−98.)

Once in the garage Darrell gave Daron a construction vest and a hard hat, which Daron put on, although it struck him as unusual, "[b]ecause you don't need that to do work in a residential home, only if you're on a construction site." (10/10 at 200.) Darrell responded that he needed to wear it because they were "going to be unloading the house" and he did not "want [Appellant] to be sticking out." (10/10 at 200.) Daron understood that by "unloading the house" his brother meant "[s]tealing," which Daron told his brother he wanted no part of. (10/10 at 200.)

Daron demanded that Darrell take him to the van, but Darrell said he "need[ed his] help," and could not "take [him] home." (10/10 at 201.) Daron threw the hard hat on the ground and left from the garage, but in doing so he forgot that he was still wearing the vest.[14] (10/10 at 202.) Daron testified that he started walking, with the idea that he would find a main road with a bus line. (10/10 at 204.)

Daron testified that, all in all, he had only been in the main entrance, the small dining room, and the garage of the Savopoulos home. (10/10 at 203.) He did not have any idea that people, alive or dead, were upstairs. (10/10 at 203.)

As Daron was searching for a bus line, Darrell pulled up next to him in the Porsche and told him that he would take him to his van. (10/10 at 205.) Instead,

[14] Daron testified that he had taken his backpack off to put on the vest, had left it on the ground when he left, and never saw it again. (10/10 at 225.)

Darrell drove him to the parking lot in the strip mall on Annapolis Road with La Fontaine Bleue and said he could no longer take him to his van. (10/10 at 206−07.) Darrell gave him $300 and two phones he said he had found in the park; Daron thought this was for using his van. (10/10 at 208, 220.)[15] Darrell left without giving Appellant the van keys. (10/10 at 209.)

After Darrell left in the Porsche, Daron found a tow truck in the strip mall parking lot and asked the driver to take him to the address Darrell gave him. (10/10 at 209, 213.) Once they retrieved the van from downtown, Daron asked the driver to take him and the van back to Maryland and the La Fontaine Bleue parking lot because Darrell had said he would return to the strip mall around 5:00p.m. to pick up another person. (10/10 at 215.) During the drives, because his phone could not make or receive calls, Daron used the driver's phone to call Darrell (about returning the keys to the van), as well as a cousin and his stepmother. (10/10 at 214−15.)

The tow truck driver dropped Daron and his van off at the La Fontaine Bleue parking lot. (10/10 at 216.) The van was unlocked; at some point Daron went into the glove box looking for a cigarette, and found a spare set of keys to the van. (10/10 at 217−18.) He then drove back to his father's house. (10/10 at 218.)

While at his father's house he saw a news report about a fire and murders; he recognized the house as the one Darrell had taken him to that afternoon. (10/10 at

[15] Daron confirmed that he asked Hayles whether cell phones could be tracked. (10/10 at 223.) Daron testified that when the police did not show up at his father's house having traced the phones, he figured Darrell was telling the truth about the phones not coming from the crime. (10/10 at 223.)

221.) He testified that he then looked up how to beat a lie detector test so that he could protect his brother should the police contact him. (10/10 at 222.)

Later that evening, Darrell picked him up to go to Walmart and gave him $6,000 cash. (10/10 at 223−24.) They made two trips: on the first trip Darrell bought pants, gloves, and a shirt; on the second trip Daron bought a backpack. (10/10 at 224−26.) Daron testified that in between the two trips Darrell drove them to a house in a residential area. (10/11 at 193−94.) Darrell went into the house, but Daron waited in the car. (10/11 at 194.)

In the ensuing days, Daron determined that he should dispose of the van because, although he had nothing to do with the murders, the van could link him to the crime. (10/10 at 228.) On May 15th he asked his brother-in-law Ayling to help him dispose of the van, but Ayling declined. (10/10 at 228.) Daron testified that when he woke up the next day planning to burn the van, the van was gone and he never saw it again. (10/10 at 228−30.)

That Sunday, Daron took the bus to New York City to see Hayles. (10/10 at 232−23.) He continued to search online for articles about extradition and hideout cities "[b]ecause [he] watch[ed television shows] where people go to jail for crimes they didn't commit and [he] didn't want to be one of them person[s]." (10/10 at 236.) He also testified that he used some of the $6,000 that Darrell had given him to buy Hayles dinner, shoes, and other items. (10/10 at 234.)

On the evening of the 20th, Daron was watching television with Hayles when his face came on the news in relation to the homicides. (10/10 at 236.) Daron thereafter spoke with both his father and the lead detective by phone and decided to

return to the District to self-surrender. (10/10 at 237.) That evening, he and Hayles spent the night in a hotel and he spoke with Darrell, who said he would retain an attorney for him. (10/10 at 240, 243.)

In the morning, Daron took a taxi back to the District and met up with Darrell. (10/10 at 248−49.) Darrell drove to the house in Silver Spring he had gone to with Daron on the morning of the 13th, and picked up someone who introduced himself to Daron as "Garnette." (10/10 at 250−51.) Darrell then took Daron to a hotel and rented a room in Garnette's name, with the plan that Daron would stay there while Darrell continued to arrange for counsel. (10/10 at 252.)

Later that evening, Darrell returned to the hotel with a stack of money orders and told Daron that they were first going to the lawyer and then to the police. (10/10 at 254−55.) Darrell put Daron into a car with several women Daron had not met before, while Darrell got into a truck. (10/10 at 255−56.) As they were driving, law enforcement stopped both vehicles and arrested Daron. (10/10 at 259.)

On cross-examination, Daron admitted that shortly before the homicides he had been pulled over in his van for expired tags and told police that his name was Steffon Wint. (10/11 at 256.) He did this because he did not have a license and he wanted to be able to get the van back, and he did not think giving Steffon's name would get Steffon in any real trouble. (10/11 at 286.)

The defense called Rolando De Leon, who in 2015 lived and often worked in the area of Frolich Lane and 51st Place in Hyattsville—near where Appellant's burning van was found. (10/15 at 334−35.) On the night of May 15th going into May 16th, he was outside working on a bus when he saw a vehicle fire. (10/15 at 335−36.)

Next to the vehicle that was in flames was a white pickup truck. (10/15 at 337.) He saw a person run, get into the truck, and drive off.[16]

Maria Da Silva, a housekeeper in the Savopouloses' neighborhood, testified that on the afternoon two days prior to the fire she had seen a suspicious man who was definitely *not* Appellant pacing back and forth in the neighborhood. (10/15 at 362, 365, 367, 372.) She had seen the surveillance footage from the La Fontaine Bleue parking lot depicting the man running with a bucket and indicated that he could be the person she saw pacing. (10/15 at 371−72.)

Brandon Cooper, one of Darrell's best friends, testified that Darrell was not always with his phone. (10/15 at 466.) Sometimes when he called Darrell's phone, their friend Garnette would answer and Darrell would not be there. (10/15 at 466−67.) In other words, the defense evidence was that Darrell was not always with his phone.[17]

C. The Government's Rebuttal Case

The government called Darrell Wint, who denied having played any role in the murders. (10/17 at 198−99.) He testified that on the morning of May 13, 2015, he unsuccessfully attempted to get work as a day laborer, and then decided to visit his friend Anthony Anderson at the home Anderson shared with his cousin, Ikia Williams, in Gaithersburg, Maryland. (10/17 at 97−99, 212−13.) Anderson produced

[16] At trial he said the person got into the passenger side, while in the grand jury he said the person got into the driver side. (10/15 at 343−44.) As recounted above, as of May 2015, PCM had assigned Steffon a white pickup truck. (10/1 at 106.)

[17] The defense called the lead detective on the case, who testified that a phone extraction had not been done on the phone associated with Darrell. (10/17 at 14.)

music videos, and Darrell testified that the reason he had gone out to Gaithersburg was to watch a video that Anderson had just made. (10/17 at 101.) Darrell testified that Ikia was also there and that he had spent "a couple" hours at their house. (10/17 at 102.) He did not recall exactly when he had left, but claimed that he left to get his son from school. (10/17 at 102.) Phone records showed the phone associated with Darrell used a cell tower in the vicinity of Gaithersburg at 10:24a.m. (10/18 at 365.)

Darrell testified that during the afternoon of the 14th he got many calls from a number that he did not recognize; eventually, he got a text from the number stating that it was Daron. (10/17 at 118.) By the time he returned the call some other person—who Darrell did not recognize—answered the phone. (10/17 at 119.)

That night, he picked Daron up from his father's house and made two trips to Walmart. (10/17 at 121−22.)[18] Darrell also testified that Daron had told him his car had run out of gas, so they stopped for gas on the way to Walmart and put the gas into a bucket. (10/17 at 123.) According to Darrell, in between the trips to Walmart Daron directed him to drive to an industrial park off of Kenilworth Avenue. (10/17 at 124−25.) Daron then got out of the car with the gas and was gone for about five minutes, then got back in the car with the bucket. (10/17 at 125−26.) As Darrell was driving away, he saw some smoke. (10/17 at 127.)[19]

[18] Darrell testified that they made the second trip because he had forgotten to buy something on the first visit. (10/17 at 122.)

[19] A detective testified that on May 22, 2015, he responded to Frolich Lane and 51st Place near where the van was found. (10/18 at 434.) He found a "burnt pile of debris" that had apparent zip ties, snaps or grommets, and what was left of a backpack with braided strings for straps. (10/18 at 437−40.)

Darrell's testimony about the day of Daron's arrest was more or less the same as the testimony of Daron and Nunez. After he saw Daron's face on the news, he spoke to Daron on the phone and made a plan for Daron to self-surrender. The next day, he took Appellant to a hotel room while he secured money orders to pay the lawyer. (10/17 at 138.) Later, as they were driving in two separate vehicles to self-surrender, police stopped both vehicles and arrested Daron. (10/17 at 156.)

Anthony Anderson testified that he produced music videos and that, on a day in May 2015, he was "dropping" a music video, called "Haters Hate," by uploading it to YouTube. (10/17 at 298.) According to the data on YouTube, the video was uploaded on May 13, 2015. (10/17 at 299.) Anderson testified that the day he uploaded the video was the same day that Darrell came to his home. (10/17 at 301.) In other words, Anderson's and Darrell's testimonies, combined with the YouTube data, gave Darrell an alibi by placing him in Gaithersburg, as opposed to the District, in the morning and early afternoon of May 13th.

D. The Defense's Proffered Surrebuttal

In response to the Gaithersburg alibi the government advanced for Darrell in its rebuttal case, the defense moved for a brief surrebuttal case to present the testimony of Anderson's cousin, Ikia Williams.[20] Williams had testified in the grand jury that on the day Darrell came to watch the video at her and Anderson's home,

[20] The defense first moved for surrebuttal in an email sent to the trial court and government counsel on the morning of October 18, 2018. Appellant has included this email in his Limited Appendix. (App. at 6.)

she "believe[d Darrell] called [her] and told [her] he was at the door." (App. at 56.)[21] When asked why she believed that Darrell called her to let her know he was outside, she told the grand jury that, "It could've been because I was upstairs, but—I mean, Anthony was downstairs—but he usually does that. Like, if he's at the door, he'll tell me. He won't knock. He'll just tell me he's at the door, and I'll just open it." (App. at 56.) Phone records, however, showed that there was no text or call on May 13th. Rather, the only communication between Darrell's phone and Williams's phone in that general timeframe was six days later, on May 19th. (10/18 at 345.) The defense argued that Williams's testimony supported an inference that the day in May when Darrell had visited Anderson and Williams was not May 13th, but May 19th, and that Darrell had not been in Gaithersburg when the incident at the Savopoulos home began. (10/18 at 339, 341.)

The trial judge denied the defense's request for surrebuttal because, in her view, the proffered testimony was "equivocal" and would not have rebutted Anderson's testimony in the government's rebuttal case. (10/18 at 459, 464.) She further denied surrebuttal because she concluded that the proffered testimony did not pertain to a new matter first raised in the government's rebuttal. (10/18 at 463−64.)

[21] The government produced Williams's grand jury transcripts pursuant to a protective order. The parties and the court, however, agreed that given the litigation and the trial court's ruling, her grand jury transcripts had become part of the record. (10/18 at 465.) Appellant has included the transcript of Williams's grand jury in his Limited Appendix. (App. at 45−72.)

E. Verdict and Sentencing

The jury received the case for deliberation on October 23, 2018. (10/23 at 293.) On October 25, 2018, the jury returned verdicts of guilty on all counts. (10/25 at 4−15.) The trial court subsequently sentenced Appellant to an aggregate sentence of four terms of life without release. (R. 155.)

SUMMARY OF ARGUMENT

Darrell Wint's whereabouts on May 13, 2015, was one of the most critical issues at trial because the defense contended that Darrell was the person who had kidnapped and murdered the Savopouloses and Ms. Figueroa, and the government contended that the kidnappings began sometime between about 11:29a.m. and 3:14p.m. According to Daron, Darrell was with him that morning, meeting up at the parking lot of PCM Services and going to Silver Spring, McDonald's, and Ed's house before leaving in Daron's van—apparently to head to the Savopoulos home.

In its rebuttal case, the government called Darrell for the first time and introduced evidence that he had an alibi for the critical time when the kidnappings began, because he had been in Gaithersburg with Anthony Anderson and Ikia Williams on the morning and early afternoon of the 13th, watching a music video that Anderson had released that day.

The defense sought to counter this alibi evidence by calling Williams and presenting her phone records in a brief, targeted surrebuttal case that would have

shown that Darrell had not called or texted her on May 13th, as was his practice when he visited her home and as she believed he had done when he came to visit in May, but had done so on May 19th. The proffered surrebuttal evidence would have seriously undermined the conclusion that Darrell had visited Gaithersburg on the 13th.

The trial judge refused to allow the surrebuttal, ruling that Williams's testimony would not have rebutted Anderson's testimony because it was "equivocal" and not inconsistent with the government's evidence that the Gaithersburg visit occurred on the 13th; in other words, she found that the surrebuttal evidence would not have rebutted the testimonies of Anderson and Darrell. The judge further ruled that the defense was not entitled to surrebuttal because the proffered evidence pertained not to a "new matter" first raised in the government's rebuttal, but to the general topic of Darrell's whereabouts, which had been at issue in the government and defense cases, and that if she interpreted the Gaithersburg evidence as a new matter "trials would never end, we would just continue to go back and forth and back and forth. . . ." (10/18 at 460.)

Both rulings were erroneous. Williams's testimony and phone records would have given the jury a reasonable basis to conclude that Darrell did not visit Gaithersburg on the 13th, and therefore rebutted the alibi case the government advanced on rebuttal through the testimonies of Anderson and Darrell. And the alibi

the government advanced for Darrell for the first time on rebuttal qualified as a "new matter" that gave the defense a *right* to surrebuttal. *See Gregory v. United States*, 393 A.2d 132, 137 (D.C. 1978) (when adverse party introduces a "new matter[]" the other party "has a *right* to surrebuttal") (emphasis in original).

Furthermore, even if Williams's proffered testimony did not respond to a new matter, the judge was still required to exercise discretion in deciding whether to permit surrebuttal. *See Gregory*, 393 A.2d at 137 (holding that in cases where rebuttal did not introduce a "new matter[]" "surrebuttal is within the sound discretion of the judge"). Instead, the judge erroneously found surrebuttal foreclosed "as a matter of law." (10/18 at 463−64.) Because a failure to exercise discretion in a matter requiring discretion is itself an abuse of discretion, the trial judge erred in categorically rejecting the surrebuttal. Moreover, on this record a proper exercise of discretion could only lead to one outcome: permission for the surrebuttal. *See generally Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979) ("[T]he facts may leave the trial court with but one option it may choose without abusing its discretion, all the others having been ruled out."). The proffered evidence was critically important for the defense, there was no way for the defense to have responded preemptively in its case, and the admission of the evidence would have taken very little time.

Finally, the government cannot show that the erroneous preclusion of surrebuttal was harmless beyond a reasonable doubt. As a result, the Court must reverse.

ARGUMENT

I. The Trial Court Committed Reversible Error in Denying the Appellant's Request for Surrebuttal.

A. Legal Standards

A criminal defendant has a right to "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Whether this right springs from the fundamentals of due process or from the Confrontation and Compulsory Process clauses of the Sixth Amendment, it encompasses "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Scott v. United States*, 975 A.2d 831, 837 (D.C. 2009) ("The Constitution, whether in the Fifth Amendment's Due Process Clause or in the Sixth Amendment's Compulsory Process and Confrontation clauses, guarantees a criminal defendant a fair and meaningful opportunity to present a complete defense.") (citations omitted).

The purpose of rebuttal evidence is to "explain, repel, counteract, or disprove" the evidence of the adverse party. *Gregory*, 393 A.2d at 137 (citation omitted). The same is true of a surrebuttal, except that its function is to explain, repel, counteract, or disprove evidence presented in a rebuttal. *Bynum v. United States*, 799 A.2d 1188, 1194 (D.C. 2002). Though narrower in scope than a defense to the government's case-in-chief, surrebuttal nonetheless serves an important purpose. It helps to

preserve the defendant's right to present a meaningful defense by allowing him to present evidence that responds to new issues that arise in the course of the government's rebuttal. *Bynum*, 799 A.2d at 1194.

When proffered surrebuttal evidence goes to rebut a "new matter[]" brought out in the government's rebuttal case, surrebuttal is available as a matter of "*right*." *Gregory*, 393 A.2d at 137 (emphasis in original); *see also Chaabi v. United States*, 544 A.2d 1247, 1249 n.6 (D.C. 1988) (stating that when a "new matter" is brought out in the government's rebuttal case, surrebuttal is "mandatory"). In instances where the proffered surrebuttal evidence does not pertain to a new matter brought out in the government's rebuttal, surrebuttal may nonetheless be appropriate subject to "the sound discretion of the [trial] judge." *Gregory*, 393 A.2d at 137.

Under this standard, because Williams's testimony went to rebut Darrell's Gaithersburg alibi, which was a new evidentiary matter first raised by the government in its rebuttal case, the case law allowed him to present his contrary evidence as a matter of right. Even if this Court disagrees and finds that Williams's testimony did not go to such a new matter, the trial court should have allowed or denied surrebuttal subject to the court's sound exercise of discretion, as opposed to what the judge did here: erect a blanket rule that surrebuttal was impermissible as a matter of law. Furthermore, a proper exercise of discretion on the facts presented here can lead to only one possible outcome: allowing the brief surrebuttal case.

B. Williams's Testimony Rebutted Darrell's and Anderson's Testimonies.

Williams's proffered testimony and the phone records rebutted the government's alibi evidence for Darrell. If Darrell called or texted when he arrived

at Anderson and Williams's home on the day he visited in May, as was typical, the visit could not have been on the 13th, because there was no phone call or messaging between Darrell and Williams on that date. Rather, Williams's grand jury testimony and phone records tended to make it more likely that Darrell had gone to Gaithersburg to watch the video on May 19th, when phone records did show such communication.

The trial judge, however, found that Williams's proffered testimony would not "rebut testimony that Mr. Anderson provided in the government's rebuttal case." (10/18 at 463−64.) The judge stated that Williams testified in the grand jury that there was a date, "sometime in the month of May, she could not recall the exact date, when she, Anthony Anderson, and Darrell Wint were looking at videos on YouTube that Anthony had shot." (10/18 at 459.) She stated that Williams provided some, in the judge's view, "equivocal statements, indicating, I believe he called me, he usually does that when he's outside the door." (10/18 at 459.) The judge, however, found that she did not "think there's any reason to believe that that is an inconsistency that would suggest that this [trip to Gaithersburg] occurred on a different date." (10/18 at 459.)

The judge's ruling overlooked the critical fact that Williams testified before the grand jury that Darrell had called or texted her when he was outside of the home (App. at 56), and that defense counsel proffered that phone records showed that there was no communication between Williams's phone and Darrell's phone on the 13th, but rather only on the 19th, (10/18 at 339). The combination of the proffered testimony and phone records thereby directly rebutted the government's rebuttal

evidence that Darrell had been in Gaithersburg on the 13th: if, as Williams testified in the grand jury,[22] Darrell had called first on the day he visited, he did not visit on the 13th. A jury reasonably could have credited Williams's testimony and concluded that Anderson was mistaken when he recalled that Darrell visited on the exact day "Haters Hate" was released. Because the defense's proffered surrebuttal evidence plainly made Darrell's Gaithersburg alibi "'less probable than it would be without that evidence,'" it was relevant as a matter of law to rebut the government's rebuttal evidence. *Dockery v. United States*, 746 A.2d 303, 306 (D.C. 2000) (quoting *Jones v. United States*, 625 A.2d 281, 284 (D.C. 1993)).

Indeed, Williams's proffered testimony and the phone records were relevant surrebuttal evidence even if Williams's grand jury testimony was subject to more than one interpretation, because evidence need not be conclusive or subject to only one interpretation to be relevant. "'It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. . . . [T]he common objection that the inference for which the fact is offered 'does not necessarily follow' is untenable. . . . A brick is not a wall.'" *Dockery*, 746 A.2d at 308 (citations omitted). Because a jury reasonably could have doubted Darrell's Gaithersburg alibi evidence based on Williams's testimony and the phone records, Appellant had the right to have the jury—not the judge—resolve the question. *See Washington*, 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . [means] the right to present the defendant's version of the facts as well as the

[22] If Williams had testified to something else before the petit jury, counsel could have impeached her with the grand jury transcript and the jury could have considered that testimony for the truth of the matter asserted. *See* D.C. Code § 14-102(b).

prosecution's to the jury so it may decide where the truth lies."); *Martin v. United States*, 606 A.2d 120, 129 (D.C. 1991) (holding that when defense proffered evidence is susceptible to more than one interpretation, the defense is entitled to have the jury, not the trial court, make such determination). The trial court committed legal error in denying the requested surrebuttal on the ground that Williams's proffered testimony did not rebut the government's alibi evidence relating to Darrell.

C. Williams's Testimony Would Have Addressed a New Matter that First Arose During the Government's Rebuttal Case.

It is undisputed that the government did not present any of Darrell's alibi evidence in its case-in-chief, and instead waited until its rebuttal case to advance the Gaithersburg alibi through the testimony of Darrell himself, Anderson, and the YouTube data. Because evidence of the Gaithersburg alibi was not before the jury during the defense case, defense evidence suggesting that Darrell did *not* visit Gaithersburg on May 13th would not have been relevant or logical at that point. The Gaithersburg alibi evidence therefore constituted a "new matter[]" first introduced in rebuttal, which the defense had the right to address by way of the brief surrebuttal case the defense proffered. *Gregory*, 393 A.2d at 137; *see also United States v. Murray*, 736 F.3d 652, 656−57 (2d Cir. 2013); *Edge v. State*, 393 So. 2d 1337, 1341 (Miss. 1981).

The government raises a "new matter" in rebuttal when it presents new evidence that the defense would not have had reason to address previously, either as a matter of logic or evidentiary relevance. *See, e.g.*, *Murray*, 736 F.3d at 658−59 (finding reversible error in denial of surrebuttal where the evidence offered in surrebuttal would not have been relevant before the government introduced new

evidence in the rebuttal case); *United States v. Gaines*, 170 F.3d 72, 83 (1st Cir. 1999) (explaining that surrebuttal is appropriate "to explain away new facts brought forward by the proponent in rebuttal, or evidence to impeach witnesses who testified in rebuttal"). In such a situation, giving the defense the opportunity to respond to the new evidence through a targeted surrebuttal is a matter of "fundamental fairness and due process." *Edge*, 393 So. 2d at 1341.

The trial judge here relied on an erroneously crabbed construction of "new matter" when she concluded that Williams's proffered testimony did not address "a new matter" first introduced in the government's rebuttal case because the defense had put "Darrell Wint's whereabouts on May 13th and 14th at issue in its defense case." (10/18 at 460−61.) The judge found that:

> [W]hat the Government sought to do in its rebuttal case is to establish Darrell's . . . whereabouts for the jury on May 13th and 14th, rebutting what was introduced in the defense case. . . . [If I] interpret . . . that this somehow is new evidence or new matters, trials would never end . . . [but rather] would just continue to go back and forth and back and forth and back and forth, because the whole reason we have a trial is that the government's evidence is different from the defense evidence. And so that would be a never-ending cycle of witnesses coming through.

(10/18 at 460−61.)

Although the general topic of Darrell Wint's whereabouts on May 13th and 14th was broadly at issue in the defense case through the defense theory that Darrell was one of the true perpetrators of the offenses at the Savopoulos home, the government's rebuttal raised the new and pointedly specific claim that Darrell had been in Gaithersburg during the critical window, by calling two witnesses who had not testified before and presenting YouTube records. Before this Gaithersburg alibi

evidence was introduced, it would not have made sense for the defense to present Williams's testimony. Presenting Williams's testimony that Darrell called or texted her on the day of his visit in mid-May during the defendant's case-in-chief would have confused the jurors because at that stage of the case the jury had no reason to believe that Darrell might have been in Gaithersburg. Bluntly put, Williams's testimony would not have been relevant. It was only when Darrell and Anderson testified in the government's rebuttal case that Darrell had been in Gaithersburg on May 13th that Williams's memory that Darrell called or texted her on the day of his visit—a day phone records showed *not* to have been the 13th—became relevant. The alibi evidence the government introduced in rebuttal plainly qualified as a "new matter."

In *United States v. Murray*, *supra*, the United States Court of Appeals for the Second Circuit held that a similar rejection of proffered surrebuttal evidence that was not relevant until after the government's rebuttal denied the appellant his right to present a meaningful defense and required reversal. 736 F.3d at 653−54. Patrick Murray was charged with several counts relating to a marijuana-growing operation he had allegedly set up in his friend Matthew Cody's basement. *Id.* at 654. Cody testified that the growing operation was Murray's idea, while Murray denied any knowledge of it. *Id.* Murray testified in the defense case that he had visited Cody's house five to seven times for various reasons in the fall of 2008, but denied spending much time in the neighborhood. *Id.* at 655. In rebuttal, the government for the first time introduced cell-site records showing that ninety-seven calls on Murray's cell phone had utilized a tower near Cody's house in the relevant time period. *Id.* at

655−56. Murray sought to present a surrebuttal case by calling a witness to testify that he was in the area for reasons other than visiting Cody's house, but the trial judge rejected the request. *Id.* at 656.

On appeal, the Second Circuit rejected—as "completely without merit"—the government's argument that surrebuttal was properly denied because "Murray had full opportunity to put forth any evidence of his presence in the . . . area on his direct case and therefore should not have been given a second chance on surrebuttal." 736 F.3d at 658. This argument "misperceive[d] the point in the trial at which the issue became pertinent," the appellate court explained. *Id.* "Until the government offered the cell-tower evidence on its rebuttal case, the question whether Murray did or did not make other visits to the general area of Cody's house had no relevance whatsoever to any issue being tried," and "would have done nothing to advance his case or clarify any issue then relevant." *Id.* Thus, "when the government on rebuttal introduced a new issue into the trial, undertaking to impeach Murray's assertion that he had been to Cody's house only about five to seven times by a showing that his phone" had used a nearby tower ninety-seven times, "Murray should have been permitted to offer evidence of other explanations" for the ninety-seven calls "on that tower." *Id.* at 659.

Just as the proffered rebuttal testimony about Murray's whereabouts lacked relevance until the government presented cell-site evidence in rebuttal, Williams's testimony that Darrell had called or messaged her when he visited in May, according to his usual practice, was not pertinent until the government advanced the Gaithersburg alibi for Darrell in its rebuttal case in an effort to undermine

Appellant's testimony implicating Darrell. Once the new matter of the alibi evidence was before the jury, Appellant should have been permitted to refute that alibi, just as Murray should have been permitted to explain the cell-site pings.

Moreover, the trial court's concern that interpreting the alibi evidence as a "new matter" would lead to "trials [that] would never end," but "just continue to go back and forth and back and forth and back and forth, because the whole reason we have a trial is that the government's evidence is different from the defense evidence," (10/18 at 460), ignored the fact that the defense's proffered surrebuttal case was—although very important to the defense—quite limited in scope and targeted narrowly to rebut a discrete issue.

In *Edge v. State*, *supra*, the Mississippi Supreme Court rejected a trial judge's similar concern and held that principles of "fundamental fairness and due process" entitled the defense to a targeted surrebuttal. 393 So. 2d at 1341. It was undisputed that Larry Edge killed the decedent, but the defense contended that he had only done so to prevent the decedent from harming or killing Edge's wife. *Id.* at 1339. Edge's wife testified during the defense case that she was in the clutches of the decedent at the time of the homicide, and, as a result, her coat got covered in his blood when her husband shot him. *Id.* This evidence that Edge's wife had blood on her coat thereby tended to support her testimony that decedent had her on the ground, was over her and threatening to kill her with a knife at her throat, at the time Edge shot the decedent. *Id.* at 1341.

In rebuttal, the prosecution presented the testimony of a sheriff and two civilians who all testified that they had seen Edge's wife at the relevant time period

and she did not have blood on her coat. 393 So. 2d at 1340. The defense sought a brief surrebuttal case to call a single witness who would have testified that she saw Edge's wife shortly after the shooting and she indeed did have blood on her coat. *Id.* at 1341. The trial judge rejected this request, stating that "the effect of allowing surrebuttal would be continual testimony and we never would get out of here." *Id.* (alterations, citations, and quotations omitted).

The Mississippi Supreme Court disagreed. It noted that a key part of Edge's evidence in support of his claim of defense of others was his wife's testimony that the decedent was actively assaulting her at the time of the shooting. 393 So. 2d at 1341. It ruled that:

> After several state's witnesses testified that they saw no blood on her clothing, fundamental fairness and due process required that the appellant be given an opportunity to call the witness . . . in an attempt to refute the state's position and to corroborate Mrs. Edge's testimony on this very material and crucial point.

Id. Contrary to the trial court's ruling that granting surrebuttal would result in a spiral of continual testimony, the appellate court recognized that a brief surrebuttal case, consisting only of one witness who would rebut the government's rebuttal evidence on the crucial point of whether Edge's wife had blood on her coat, would not lead to never-ending trials. *Id.*

A similar analysis applies here. Just as in *Edge*, allowing the defense to present evidence from a lone witness and phone records on the crucial question of whether Darrell was in Gaithersburg would not have led to a trial that went "back and forth and back and forth and back and forth." (10/18 at 460.) Rather, just as in *Edge*, fundamental fairness and due process required the trial court to permit

surrebuttal on this discrete, but critical, issue of whether Darrell was in Gaithersburg on the 13th.

At bottom, because the surrebuttal would have addressed the new matter of Darrell's supposed presence in Gaithersburg, which was first raised in the government's rebuttal, this Court's precedents granted Appellant a surrebuttal case as a matter of "*right*." *Gregory*, 393 A.2d at 137 (emphasis in original). The trial court erred in holding otherwise.

D. Even if the Proffered Testimony Did Not Pertain to a New Matter Raised in Rebuttal, the Trial Court Abused Its Discretion.

Finally, even if this Court finds that the government's rebuttal case did not raise a "new matter" entitling the defense to surrebuttal as a matter of right, the trial court's blanket assertion that the defense was precluded from calling Williams "as a matter of law" was erroneous. (10/18 at 463.) In *Gregory*, this Court held that, even when no new matters were introduced in rebuttal, allowing surrebuttal "is within the sound discretion of the [trial] judge." *Gregory*, 393 A.2d at 137. Therefore, even after the trial court concluded that the Gaithersburg alibi was not a "new matter," it still had the obligation to exercise its discretion and consider whether to permit surrebuttal.

The judge did not exercise that discretion, however, and instead wrongly held that surrebuttal was precluded as a "matter of law." (10/18 at 463.) Failure to "exercise choice in a situation calling for choice is an abuse of discretion. . . ." *Johnson v. United States*, 398 A.2d 354, 363 (D.C. 1979).

Furthermore, the error is especially apparent here, where the facts "[left] the trial court with but one option . . . [to] choose without abusing its discretion." *Johnson*, 398 A.2d at 364. The proffered evidence went to the heart of the defense's case, as it went to rebut Darrell's alibi. As defense counsel argued to the trial court: "I dare to say that this is probably the most critical issue in the trial. If the jury believes that Darrell Wint was at the home of Ikia Williams and Anthony Anderson in those morning hours, instead of where Daron Wint says he was, we lose." (10/18 at 450.) On the other side of the ledger, the presentation of the surrebuttal case, although vitally important, would have been quite brief. Because the proffered surrebuttal went to the very heart of the defense case and was sharply limited in scope, the trial court was required to grant the requested surrebuttal.

E. The Error Was Harmful

As defense counsel argued below, denying surrebuttal in this circumstance implicated the Confrontation Clause, the Compulsory Process Clause, and the Due Process Clause. (App. at 6.) When an error "is constitutional in nature the proper harmless error review [standard] is the one stated in *Chapman*[*v. California*, 386 U.S. 18 (1967),]: the government must establish that the error is harmless beyond a reasonable doubt." *Roberts v. United States*, 213 A.3d 593, 597 (D.C. 2019) (alterations, citation, and quotations omitted). The government cannot make that showing here.

The whereabouts of Darrell on May 13, 2015, was one of the most critical issues in the trial. According to Appellant, Darrell was with him that morning—at the PCM parking lot, a house in Silver Spring, a McDonald's, and then waiting at

Ed's house, only to leave with Appellant's van for Steffon and his "job." The defense theory was that Darrell and Steffon had then worked together to commit the offenses that occurred at the Savopoulos home.

But Anderson's and Darrell's testimony, along with the YouTube data, portrayed a very different day, one where Darrell attempted to find day labor, but failed, then went in the morning to Anderson's home in Gaithersburg for "a couple of hours" to watch Anderson's music video and left later to pick up his son from school. (10/17 at 102, 213.) If the jury believed that Darrell was in Gaithersburg during the day on May 13th, it would have had to reject the defense theory that he was in the District at the Savopoulos home during the critical window.

The proffered surrebuttal case, however, strongly cast doubt on Darrell's version of events, by suggesting that Darrell's trip to Gaithersburg was on the 19th, not the 13th. When the trial court precluded Appellant's proffered surrebuttal case it robbed the defense from presenting a powerful piece of evidence that Darrell did indeed have the opportunity to commit the offenses and that he was lying about his whereabouts on May 13th.

Darrell's credibility regarding his whereabouts on May 13th was already in question, considering that he had already given inconsistent stories regarding his whereabouts that day, telling prosecutors on May 26, 2015, that on the 13th he had gone to PCM at about 6:00 or 7:00a.m. and stayed there until noon, as opposed to going to Gaithersburg as he testified at trial. (10/22 at 34.) Evidence that his reported trip to Gaithersburg likely happened on May 19th not only would have tended to knock out his alibi, but would have further cast doubt on all of his testimony. The

jury could well find that Darrell's shifting and factually incorrect statements regarding his whereabouts on the 13th raised an inference of a guilty conscience as to the murders. Given the precluded evidence's power to undo Darrell's alibi and to undermine Darrell's credibility in general, the government cannot show that the judge's error was harmless beyond a reasonable doubt.

The harmful effects of the erroneous preclusion of Williams's testimony in surrebuttal are even more apparent in light of the weaknesses in the government case, which was largely circumstantial and failed to grapple with the overarching inference that this could not have been a one-person job, where a single individual was able to overpower and restrain four individuals for hours on end. Simply put, the government's theory of the case—that Appellant and Appellant alone did the crime—was suspect from day one. Given that the government's theory itself was strained, a juror could well have had a reasonable doubt that the government had carried its burden to show that Appellant committed the charged offenses.

The evidence was consistent with the defense theory that Darrell and Steffon, not Daron, committed the offenses at the Savopoulos home. A variety of evidence pointed to the involvement of people other than Appellant. Defense witness Maria Da Silva testified to evidence consistent with someone, who was decidedly not Appellant, casing the Savopoulos home two days prior to the crime. (10/15 at 362, 365, 367, 372.) Surveillance footage from La Fontaine Bleue showed a person who was *not* Appellant running with a bucket from the scene of the Porsche fire. (9/26 at 158.) And defense witness Rolando De Leon testified that he saw a man getting into a white pickup truck near the van fire in Prince George's County. (10/15 at 337.)

Steffon, of course, was assigned a white pickup truck by PCM as of May 2015. (10/1 at 106.)

Appellant testified that Darrell had given him $6,000 for his van; thus, the evidence that witnesses had seen Appellant with $100 bills was not particularly damning. (10/11 at 188.) In addition, when the police stopped the vehicle in which Appellant was riding they recovered money orders, but no cash. (10/3 at 37.) In contrast, the police recovered over $7,300 in cash in the truck in which Darrell was riding. (10/3 at 32−33.) They also recovered $300 in Darrell's sock. (10/17 at 240; 10/15 at 506.)

The government's contention that the cell-tower records associated with Darrell's phone showed that the phone was generally using towers located in Maryland during the 13th and 14th, to include a tower in Gaithersburg in the mid-morning hours of the 13th (10/18 at 365), was strongly undermined by evidence that Darrell's phone was not always in Darrell's possession, including Brandon Cooper's testimony to that effect, (10/15 at 466−67). Furthermore, cell-tower evidence showed that the phone associated with Darrell was near where Rhode Island Avenue, North Capitol Street, and Florida Avenue meet in the District between 1:30p.m. and 2:00p.m. on May 13th, which was inconsistent with Darrell's testimony that he had not left Maryland on May 13th. (10/18 at 365−66; 10/1 at 286−87.)

The only evidence placing Appellant inside the Savopoulos home came from DNA, and the DNA evidence from the pizza, the vest, the hard hat, and the bedding was entirely consistent with Appellant's innocent presence defense. Appellant provided innocent explanations for the nuclear DNA recovered from the pizza crust

and the construction vest, as well as the mitochondrial DNA recovered from the work helmet—namely, that Darrell had brought him to the Savopoulos home under the false pretense of legitimate work, fed him because he had wanted to stop for food, and had him put on the vest and helmet before Appellant realized the true nature of the "job." A hair with Appellant's mitochondrial DNA profile was recovered from the bedding in Philip's bed, but that profile was the same as Steffon's profile, given that they both have the same mother. (10/1 at 29−30.)

As to the knife recovered from the basement, Appellant testified that he had never seen it until his lawyers shared the discovery. The knife was processed by the District's Department of Forensic Sciences on May 20, 2015, which was the same day Appellant's belongings were processed after the consent search at his father's home, thereby raising the possibility of contamination. (10/10 at 62−63; 9/25 at 110−12, 143−44; 9/20 at 148, 157; *see also* 10/22 at 187−88.) And indeed there was ample evidence of contaminated DNA evidence in this case. For instance, the DNA profile of Steven Weitz, a forensic biologist with the ATF, was found on a pair of scissors recovered from the Savopoulos house. (9/27 at 72.) Weitz was not the technician who had swabbed, collected, or processed the scissors, yet his DNA profile somehow wound up on them, an occurrence he could not explain. (9/26 at 206 ("I do not. I don't know how it got there.").) The DNA profile of Emily Head, a forensic biologist with the ATF, wound up on a towel recovered from the house. Head testified to her belief that her DNA transferred to the towel when her lab coat briefly brushed against the towel during processing. (9/27 at 102.) Finally, the government's DNA expert acknowledged that the DNA testing could not tell

whether Appellant ever actually touched the knife. (9/27 at 127 ("That is correct. There's no way to determine how DNA is transferred to an item of evidence.").) Given this possibility of contamination, the jury may very well have disregarded the evidence on the knife and questioned the value of the DNA evidence in general.

Where the government produced little to no evidence about how events transpired inside the home, and a wealth of other evidence suggested that Darrell and Steffon were involved in the offenses, a jury reasonably could have found that the circumstantial evidence about Daron's whereabouts and actions on the 14th carried little weight, especially in light of the explanations he offered. Appellant presented evidence that he had passed out drunk without his phone on the evening of May 13th, thus his step-mother's testimony that she had been worried because he never stayed out all night without telling her or his father was not particularly inculpatory. (9/25 at 101.) In addition, the unanswered messages from Daron's girlfriend were fully consistent with his testimony that he was separated from his phone during that time. (10/2 at 119; 9/25 at 165−69.) And, although an employee of La Fontaine Bleue testified that she had seen Appellant pacing back and forth in her business's parking lot near to where the Porsche was burned (9/26 at 157, 162), Appellant testified he was at the parking lot because that is where Darrell had dropped him off in the Porsche and where he had the tow-truck driver drop him and his van off after towing it from the District, (10/10 at 207, 215). He also explained that his internet searches in the days following the homicides were motivated by a desire to protect his brother if the police questioned him (10/10 at 222), and his fear of wrongful arrest, "[b]ecause [he] watch[ed television shows] where people go to

jail for crimes they didn't commit and [he] didn't want to be one of them person[s]," (10/10 at 236; *see also* 10/9 at 93−94).

In sum, given the weaknesses in the government's evidence, the evidence of Darrell's and Steffon's involvement, and Appellant's own account of events, Williams's proffered testimony and phone records would have offered a critical refutation of the Gaithersburg alibi the government advanced for Darrell. Because the government cannot carry its burden to show that the erroneous preclusion of the defense surrebuttal was harmless under any standard, this Court must reverse.

II. Merger

Even if the Court rejects the above argument, it still must remand for merger and resentencing. In particular, the two convictions for first-degree felony murder while armed with aggravating circumstances for each decedent—one with burglary and one with kidnapping as the predicate offense—must merge into one first-degree felony murder while armed with aggravating circumstances conviction for each decedent. *Lee v. United States*, 699 A.2d 373, 382 (D.C. 1997). In other words, Appellant cannot remain convicted of both felony murder (kidnapping) and felony murder (burglary) for one decedent. *Matthews v. United States*, 13 A.3d 1181, 1191 (D.C. 2011). Rather, he can only remain convicted of one count of felony murder while armed with aggravating circumstances per decedent, whether predicated on kidnapping or burglary. *Garris v. United States*, 465 A.2d 817, 823 (D.C. 1983).

Then, each of Appellant's convictions for first-degree murder while armed (premeditated), must merge with the remaining convictions for first-degree felony murder while armed with aggravating circumstances. *Baker v. United States*, 867

A.2d 988, 1010 (D.C. 2005). Finally, the predicate felony—whether burglary or kidnapping as the case may be—must merge with the remaining first-degree felony murder while armed with aggravating circumstances conviction for each decedent. *Matthews*, 13 A.3d at 1191.

CONCLUSION

For the reasons stated above, this Court must reverse Mr. Wint's convictions and order a new trial. If the Court disagrees, it must nonetheless remand the case to the trial court with instructions to vacate several of the convictions due to merger.

Respectfully submitted,

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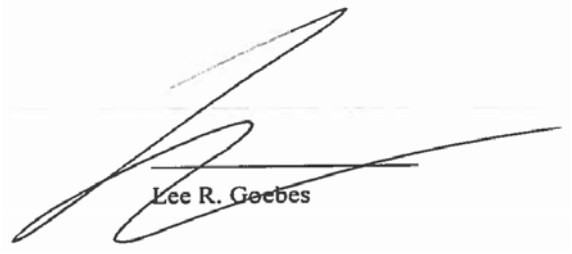

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant Daron Wint has been served through this Court's electronic filing system on Elizabeth Trosman, Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia, on this 22nd day of December, 2020.