NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

WINSLOE DUHANEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

After a defendant on appeal challenges the sufficiency of the evidence under the subsection of the criminal statute under which he was convicted, and, in the trial court, the trier of fact had a full opportunity to convict based on another subsection of the statute but did not reach this subsection, does an appellate court violate Double Jeopardy when it remands a case for the trial court to enter alternative findings of fact and conclusions of law under the other subsection of the statute?

In this case, over the defendant's objection, the Court of Appeals for the District of Columbia ordered such a remand, and ruled that its remand did not violate Double Jeopardy. This ruling conflicts with *Terry v. Potter*, 111 F.3d 454, 458 (6th Cir. 1997) (Double Jeopardy bars further prosecution for an offense when the trier of fact had a full opportunity to convict under one statutory subsection but failed to do so, because the verdict was an implicit acquittal of the alternative offense); *State v. Hescock*, 989 P.2d 1251, 1257 (Wash. App. 1999) (after bench trial, Double Jeopardy bars remand for trial on an alternative subsection, after evidence is found insufficient under the subsection of conviction)(citing *Terry*).[1]

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[1] *Hescock* was decided in 1999 by the Court of Appeals of Washington, not by the Supreme Court of Washington, and therefore is not a decision by a "state court of last resort." *See* Sup. Ct. Rule 10(b). However, *Hescock* is settled law in Washington State. *See State v. Ervin*, 147 P.3d 567, 570 (Wash. 2006) (Supreme Court of Washington cites *Hescock* as one of a series of Washington State cases on the doctrine of "implied acquittal," and describes *Hescock* as "finding implied acquittal where the finder of fact was a judge who was silent as to the alternative means of committing the offense."); Brief of Appellant in *State v. Wright*, 2005 WL 5408570 *12-13 (on appeal to the Supreme Court of Washington, the State argues that *Hescock* bars retrial only when a conviction "was reversed specifically due to insufficient evidence.").

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

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Winsloe Duhaney respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia, rendered and entered in case No. 20-CM-70 in that court on November 17, 2022, in *Winsloe Duhaney v. United States*, which affirmed the judgment of the Superior Court of the District of Columbia. On December 13, 2022, the District of Columbia Court of Appeals denied Duhaney's petition for rehearing.

OPINION BELOW

A copy of the opinion of the District of Columbia Court of Appeals in *Winsloe Duhaney v. United States*, affirming the Superior Court for the District of Columbia, is contained in the Appendix (A001). The Appendix also contains the order of the Court of Appeals denying rehearing or rehearing en banc (A008), the prior remand order of the D.C. Court of Appeals (A009), the Superior Court's Supplemental Findings of Fact and Conclusions of Law on remand (A012), and the Superior Court's Judgment and Commitment order (A015).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The Court of Appeals' decision was entered on November 17, 2022; the Court of Appeals denied panel rehearing and rehearing en banc on December 13, 2022. This petition is timely filed pursuant to SUP. CT. R. 13.1. The Superior Court of the District of Columbia had jurisdiction because petitioner was charged with violating the laws of the District of Columbia. The Court of Appeals for the District of Columbia had jurisdiction pursuant to D.C. Code § 11-721, which provides that the Court of Appeals shall have jurisdiction for all final orders and judgments of the Superior Court of the District of Columbia.

STATUTORY AND OTHER PROVISIONS INVOLVED

D.C. Code § 22-3211(b):

(b) A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent:

> (1) To deprive the other of a right to the property or a benefit of the property; or
>
> (2) To appropriate the property to his or her own use or to the use of a third person.

D.C. Code § 22-3201(2):

(2) "Deprive" means:

> (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or
>
> (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

STATEMENT OF THE CASE

The two-count Information charged Duhaney with assault, and second-degree theft. Duhaney was acquitted of assault and convicted of theft. The theft count charged:

> On or about June 3, 2019, within the District of Columbia, Winsloe Duhaney wrongfully obtained and used property of value, belonging to Giselle Flores, consisting of Samsung phone, with the intent to appropriate the property for his own use and to deprive Giselle Flores of a right to and benefit of the property. **(Second degree theft in violation of 22 D.C. Code Sections 3211, 3212(b) (2001 ed.)**.

The D.C. theft statute defines the offense as follows:

> (b) A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent:
>
> > (1) To deprive the other of a right to the property or a benefit of the property; or
> >
> > (2) To appropriate the property to his or her own use or to the use of a third person.

D.C. Code § 22-3211(b).

Here, the theft charge was based on the allegation by a nightclub patron (Ms. Flores) that, after an altercation over her transgender status with Duhaney, a nightclub security guard, she took a photo of Duhaney on her cellphone, and Duhaney then took her cellphone, erased this photo of him, and returned her cellphone to her. 12/12/2019 Tr. 5.

In closing argument, the prosecution did not identify which of the two bases of theft (intent to deprive under subsection (b)1), or intent to appropriate under subsection (b)(2)) it was relying on to convict Duhaney of theft; the prosecutor stated: "the Government would ask the Court to credit the testimony of Ms. Flores and find the defendant guilty of both theft

2 for the taking of the phone as well as the deletion of the photos that Ms. Flores took, and simple assault for the push that Ms. Flores consistently described." 11/12/19 Tr.109. The prosecution did not mention the verb "to appropriate" during the trial.

In closing argument, the defense argued:

> The case law is clear that the elements of theft cannot be made out. It's not like he was trying to take the phone. It's not like he was trying to do something with her phone or anything like that. It really sounds like Mr. Duhaney was just trying to do his job as a security guard.

12/11/19 Tr. 112.

At the close of trial, the trial court acquitted Duhaney of assault, but convicted him of second-degree theft. [cite to DCCA decision]. As to theft charge, the trial court stated:

> Now, there is the theft two charge and I went back and looked at the information and the information alleges that the property that is the subject of this offense is the Samsung cellphone and this is charged under D.C. code 22-3211. That statute says a person commits the offense of theft if the person wrongfully obtains or uses the property of another with the intent and *the relevant portion of the statute* thereafter is with the intent to deprive the other of a right to the property or a benefit of the property.
>
> In 22-3201 we have a definition of deprive. Deprive is to withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value or to dispose of property or to use or deal with the property so as to make it unlikely that the owner will recover it. So, here the Government would have to prove that Mr. Duhaney wrongfully obtained Ms. Flores' cellphone with the intent to deprive her of the phone itself or to have benefit of the cellphone.

12/12/19 Tr. 4-5 (emphasis added).

Thus, the trial court found that the "relevant" portion of the statute was subsection (1), the subsection that made it unlawful to "deprive" another of property. The trial court recognized that "there was no intention to permanently deprive [Flores] of the cell phone, or to deprive her of the cell phone for such an extended . . . period of time or under such circumstances as to acquire a substantial portion of its value." 12/12/19 Tr. 6. But the trial court found Duhaney guilty of having an "intent to deprive" Flores of a "benefit of property," namely, the photo on the cell phone. 12/12/19 Tr. 9.

On appeal to the Court of Appeals for the District of Columbia (DCCA), Duhaney challenged the sufficiency of the evidence supporting his theft conviction. Duhaney's Initial Brief ("Br.") pointed out that, as the trial court recognized, the D.C. Code defines "deprive" to mean: "To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances *as to acquire a substantial portion of its value*." Br. 12-13 (quoting D.C. Code § 22-3201(2)(A)) (emphasis in Duhaney's brief).[2] Duhaney argued that because theft must involve deprivation of a "substantial portion" of the "value" of property, he should not have been convicted of depriving Flores of the benefit of

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[2] D.C. Code § 22-3201(2) defines the term "deprive":

(2) "Deprive" means:

> (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or
>
> (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

a photo on a cell phone, because there was no evidence of that the deleted photo represented "a substantial portion of the [cell phone's] value." Br. 11, 14. In fact, there was no showing that the photo had "any market value." Br. 17.

In addition, Duhaney argued that the trial court's interpretation of the theft statute was so impermissibly "innovative" that it constituted improper judicial crime creation. Br. 19-20.[3] Finally, Duhaney argued that he was not factually guilty, because, as he testified, he reasonably believed that, as part of his job as a security guard, he was authorized to delete photos of others taken by patrons on premises. At oral argument, Duhaney added that once the trial court found that he had not deprived Flores of a substantial portion of the value of her cell phone, it was inconsistent to construe the term "benefit of property" to mean something less than a substantial portion of the value of property. Br. 19.

In sum, Duhaney argued on appeal that the evidence was both legally and factually insufficient to convict him of theft. In response, "[t]he government maintained that the trial court had not erred, but argued in the alternative that appellant's conviction could be upheld under subsection (b)(2) because the evidence showed that he intentionally appropriated the phone to his own use in order to delete the photo from it." App. A003. "The government suggested that [the DCCA] could remand the record for the trial court to make this determination." A003.

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[3] At this writing, undersigned counsel has not found any case which addresses whether (under any theory) the deletion of a photo, taken of oneself without prior authorization, from another person's cellphone, constitutes theft.

In view of Duhaney's arguments on appeal, the DCCA was in a position to rule that the trial court misinterpreted the statutory term "benefit of property," or that the evidence was factually insufficient in light of Duhaney's reasonable belief defense – in short, to rule that the trial court should have *acquitted* Duhaney of theft, because the evidence was legally, or factually, insufficient.

But the DCCA did not adjudicate the sufficiency of the evidence question presented on appeal. Instead, as the government suggested, it remanded the case to the trial court. Its remand order (Remand Order) noted that the D.C. theft statute provides in subsection (b) that the offense "may be committed in two ways, differentiated by the intent with which the person acted." A009. The Remand Order noted that the Information "charged that [Duhaney] had the intent to violate both subsection (b)(1) and subsection (b)(2)." A010. The Remand Order added that the trial court "did not address whether [Duhaney] also acted with the intent to appropriate the phone for his own use, the intent described in subsection (b)(2)." A010. The Remand Order stated that Duhaney's guilt under subsection (b)(1) presented "unsettled issues of statutory interpretation." A010. The Remand Order further stated that these "interpretative issues . . . would be moot and unnecessary to address if this court were to affirm [Duhaney's] theft conviction under subsection (b)(2)." A010-011. The Remand Order "remand[ed] the record for the trial court" to make the determination whether Duhaney "wrongfully obtained or used the complainant's phone with the intent (described in subsection (b)(2)) to appropriate the phone to his own use." A011. The Remand Order noted that "the parties [at oral argument] disagree[d] as to whether this

court properly can and should affirm [Duhaney's] conviction on an alternative ground." A011.

In response to the Remand Order, Duhaney petitioned for rehearing or rehearing en banc, objecting that the DCCA did not adjudicate Duhaney's challenge to the sufficiency of the evidence, and arguing that its remand violated Double Jeopardy.

The trial court thereafter issued "Supplemental Findings of Fact and Conclusions of Law," which recognized that in its original ruling, the trial court had "focused on whether Mr. Duhaney acted with intent to 'deprive the [person] of a right to the property or a benefit of the property[.]' D.C. Code § 22-3211(b)(1)." A012. The trial court then made 13 supplemental written factual findings, and concluded that Duhaney "also acted with intent to appropriate the property to his own use, in violation of subsection (b)(2)":

> The court previously concluded that Mr. Duhaney wrongfully obtained the cell phone from Ms. Flores when he grabbed it from her. The court now further concludes that Mr. Duhaney did so with intent to make use of the property – here, the cell phone – without authority or right. He intended to use the cell phone to delete the photograph that Ms. Flores had just taken, so that she would not be able to use the photograph. After he did so, he returned the cell phone to her. The evidence that Mr. Duhaney's employer had allegedly authorized him to delete photographs from customers' cell phones was extremely limited and is insufficient to create reasonable doubt regarding Mr. Duhaney's intention when he did so.

A012-014.

At the invitation of the DCCA, the parties filed supplemental briefs to address both the trial court's Supplemental Findings and Conclusions and Duhaney's Rehearing Petition. The DCCA subsequently denied Duhaney's petition for rehearing en banc, without prejudice

to his filing a petition for rehearing/rehearing *en banc* from an adverse final decision issued by the merits division.

On November 17, 2022, the DCCA issued an unpublished decision which affirmed Duhaney's conviction under subsection (b)(2) of the theft statute, finding that when Duhaney "snatched the phone from [Ms. Flores's] hand and proceeded to delete his photograph from it without her permission (and, indeed, against her will) . . . [he] manifested [his] intent to 'appropriate' the phone to his own use . . . for purposes of subsection (b)(2)." App. 006-007.

In so ruling, the DCCA rejected Duhaney's argument that, under Double Jeopardy principles, "the initial basis on which the trial court convicted him is the only theory properly before us." The Order noted that the trial court "found only" that Duhaney in violation of "subsection (b)(1)" of the theft statute, acted "with the intent to deprive [Flores] of her right to a benefit of the phone (namely, a photograph stored on the phone)." Order p. 2. The DCCA noted that "there has been no acquittal," adding: "The trial court did not implicitly acquit appellant of theft under subsection (b)(2), or implicitly find insufficient proof of his guilt under that subsection, by failing to reach and address the issue." Op. 5 & n.11. The Division stated that "appellant's conviction was still on appeal and hence was not yet final when we remanded the record and the trial court augmented it." Op. 5. Noting the DCCA's "broad statutory [remand] authority," and citing "comparable" cases, the DCCA pointed out that it has "often resorted to record remands directing the trial court to 'clarify or amplify some portion of the record, to make additional findings . . . or to explain a ruling." Opinion 5. The DCCA concluded:

> [I]t was within our discretion to order such a remand in this case, in lieu of having to decide the novel and difficult questions of statutory interpretation posed by the trial court's determination that appellant was guilty of theft under subsection (b)(1). We perceive no unfairness to appellant in doing so, for the information plainly put him on notice that we was charged with having violated subsection (b)(2) as well.

A006. In response, Duhaney once again sought rehearing, or rehearing en banc. Duhaney argued that the DCCA's Double Jeopardy ruling conflicted with *State v. Hescock*, 989 P.2d 1251, 1252 (Wash. Ct. Appeals 1999), a decision of the Court of Appeals of Washington State, which held that it violated Double Jeopardy to remand a case for possible conviction under an "alternative" subsection of a criminal statute. On December 13, 2022, the DCCA denied rehearing and rehearing en banc. A008.

REASONS FOR GRANTING THE WRIT

1. On appeal, after a trial court had a full opportunity to convict on an alternative statutory ground but did not do so, and a defendant challenges the sufficiency of the evidence, an appellate court violates Double Jeopardy when it remands the case to the trial court to make new findings of fact and convict the defendant under an alternative subsection of the statute.

Because the procedural background of this case is essential to understanding the question presented, its essential aspects, discussed above, are briefly repeated below.

The evidence in this case established that the defendant, Duhaney, was working at a Washington, D.C. nightclub when he got into an altercation with a transgender nightclub patron. After this altercation, the patron took a photo of Duhaney on her cellphone. Duhaney grabbed the cellphone, deleted the photo, and returned the cellphone to the patron.

12/12/2019 Tr. 5. (noting that the parties disagreed on whether Duhaney handed the phone back or threw it at her chest, but concluding this was not an issue the court needed to resolve to determine whether theft had been proven). Based on this evidence, the trial court convicted Duhaney of second-degree theft under D.C. Code § 22-3211. 12/12/2019 Tr. 9. This statute provides:

> (b) A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent:
>
> > (1) To deprive the other of a right to the property or a benefit of the property; or
> >
> > (2) To appropriate the property to his or her own use or to the use of a third person.

D.C. Code § 22-3211.

The trial court stated that the "*relevant* portion of the statute" was subsection (b)(1)'s provision that made it unlawful to wrongfully obtain the property of another "with the intent to deprive the other of a right to the property or a benefit of the property." 12/12/2019 Tr. 5 (emphasis added). The trial did not address whether Duhaney might be guilty, alternatively, under subsection (2), which makes it unlawful to wrongfully obtain or used the property of another "with intent . . . "[t]o appropriate the property to his or her own use or to the use of a third person."

On appeal, Duhaney challenged the sufficiency of the evidence. Citing D.C. Code § 22-3201, Duhaney noted that the D.C. Code defines the word "deprive," and requires a showing of permanent deprivation of property, or acquisition of a "substantial portion of its value." Here, Duhaney argued, the prosecution did not present evidence of permanent

deprivation, or evidence that the deleted photo represented a "substantial portion" of the value of the cellphone. In response, the government argued that the DCCA should affirm the conviction, but could also, in the alternative, remand the case for the trial court to make new findings under subsection (b)(2) of the statute. App. A003.

After hearing oral argument, the DCCA remanded the case to the trial court. The Remand Order noted that Duhaney's guilt under subsection (b)(1) presented "unsettled issues of statutory interpretation [which] . . . would be moot and unnecessary if this court were to affirm [Duhaney's] conviction under subsection (b)(2)." A010-011. The Remand Order instructed the trial court to make the determination whether Duhaney "wrongfully obtained or used the complainant's phone with the intent (described in subsection (b)(2)) to appropriate the phone to his own use." A011. Duhaney objected to this remand order, claiming that the remand violated Double Jeopardy. A011, A003.

The trial court thereafter entered new findings of fact, and concluded that Duhaney "also acted with intent to appropriate the property to his own use, in violation of subsection (b)(2)." A010. The DCCA thereafter denied rehearing. Later, the DCCA issued a decision which affirmed the trial court's conviction under alternative subsection (b)(2). A001. In its decision, the DCCA rejected Duhaney's argument that Double Jeopardy prohibited its remand for new findings under an alternative subsection of the theft. The DCCA reasoned that "there has been no acquittal" and that "[t]he trial court did not implicitly acquit appellant of theft under subsection (b)(2), or implicitly find insufficient proof of his guilt under that subsection, by failing to reach and address the issue." A005, n. 10.

(a) By failing to address the alternative basis for conviction under subsection (b)(2), the trial court implicitly acquitted Duhaney of this basis for conviction.

The DCCA cited no authority in support of its conclusion that the trial court did not "implicitly acquit" Duhaney under subsection (b)(2) "by failing to reach and address the issue." Persuasive authority holds to the contrary.

In *Terry v. Potter*, the defendant was charged with "wanton" murder (conduct "manifesting extreme indifference to human life") and "intentional" murder, under two subsections of Kentucky's murder statute, Ky. Rev. Stat. 507(1). 111 F.3d 454, 455 (6th Cir. 1997). After a trial, the jury only convicted the defendant of wanton murder, and "left blank" the intentional murder verdict form. *Id*. On appeal, the Kentucky court of appeals found that the evidence did not establish wanton murder. *Id.* The defendant was subsequently convicted of intentional murder. *Id.* On federal habeas review, the Sixth Circuit reversed this conviction, holding that the defendant "may not be retried for intentional murder." *Id*. at 458. Citing this Court's holding in *Green v. United States*, 355 U.S. 184 (1957) that a "silent verdict amounted to an 'implicit acquittal," the Sixth Circuit held that "[w]hen a charge of murder is brought under two separate statutory subsections of a unitary offense . . . jeopardy attaches separately as to each." *Id*. at 457-60. The Sixth Circuit held: "The jury was discharged without convicting Terry of intentional murder, and now the Commonwealth may not again subject him to the same risk of conviction under Ky. Rev. Stat. 507.020(1)." *Id*. at 460 ((citing *Price v. Georgia*, 398 U.S. 323 (1970)).

In *State v. Hescock*, 989 P.2d 1251 (Wash. Ct. App. 1999), the defendant was charged with forgery. The Washington State forgery statute contained two alternative bases for conviction: falsely making or altering a written instrument, or putting off as true a written instrument known to be forged. *Id*. at 1252-1253(citing RCW § 9A.60.020(1)(a) & (1)(b)). After a bench trial, the trial court found the defendant guilty under subsection (1)(a). *Id*. On appeal, the State conceded that the evidence was insufficient to convict the defendant under 9A.60.020(1)(a), but asked the appellate court "to remand for the trial court to determine whether Hescock violated 9A.60.020(1)(b)." *Id*. Denying this request, *Hescock* agreed with the defendant that "double jeopardy prevents a remand for the trial court to consider whether he is guilty under alternative 1(b)." *Id*. Citing *Green*, 355 U.S. at 191, and *Terry v. Potter*, 111 F.3d at 458, *Hescock* reasoned that when the trier of fact "had full opportunity to convict of alternative (1)(b) but failed to do so, and when "[the] appeal is based on insufficient evidence . . . retrial is barred." *Id*. at 1257 (citing *Burks v. United States*, 437 U.S. 1 (1978).

Terry v. Potter and *Hescock* squarely conflict with the holding of the DCCA in this case that "[t]he trial court did not implicitly acquit appellant of theft under subsection (b)(2), or implicitly find insufficient proof of his guilt under that subsection, by failing to reach and address the issue." A005, n. 10.

In *State v. Ben*, the New Mexico Supreme Court stated: "When a defendant is convicted based on one of two alternative means of committing a single crime, which is the situation presented in this case, the near uniform majority of jurisdictions that have

considered the issue have refused to imply an acquittal on the other alternative." 362 P.3d 180, 183 (N.M. 2015) (collecting cases). However, the cases referenced in *Ben* did not involve, as here, and as in *Terry v. Potter*, and *Hescock*, an appeal in which the defendant challenged the sufficiency of the evidence. For example, *Ben* cited the decision of the Washington Supreme Court in *State v. Wright*, 203 P.3d 1027 (2009) (en banc), as holding that "jeopardy attaches to the offense as a whole rather than to the particular form in which it is tried, so that if an individual succeeds in getting a conviction set aside, the defendant's 'continuing jeopardy' applies to any alternative way of committing the same offense." *Ben*, 362 P.3d at 183-84 (citing *Wright*). But *Wright* was not a case, like *Hescock*, involving a challenge on appeal to the sufficiency of the evidence; in its brief on appeal in *Wright*, the State distinguished *Hescock* on the ground that *Hescock* held that "when a conviction is reversed based on insufficient evidence, retrial is barred." Brief of Appellant in *State v. Wright*, 2005 WL 5408570 at * 12 (June 14, 2005). No doubt because *Hescock* was distinguishable on this ground, the opinion of the Supreme Court of Washington in *Wright* did not discuss *Hescock*.

(b) Double Jeopardy protections persisted even though, on appeal, Duhaney's conviction was "not yet final."

The DCCA reasoned that its remand did not violate Double Jeopardy because "appellant's conviction was still on appeal and hence was *not yet final* when we remanded the record and when the trial court augmented it." A005 (emphasis added). This reasoning is at odds with *Terry v. Potter* and *Hescock*, which, as discussed above, hold that jeopardy

ended once a jury, or a trial court, rendered a verdict of guilt without addressing the alternative statutory basis for conviction.

Moreover, the reasoning that a defendant's case can be remanded because, while on appeal, it is "not yet final," fails to account for the fact that, if the appellate court were to agree with the defendant that the evidence was insufficient to support his conviction, this ruling would bring finality to the prosecution, since this ruling would be "for double jeopardy purposes, the equivalent of an acquittal." *Richardson v. United States*, 468 U.S. 317, 325 (1984) (citing *Burks*, 437 U.S. 1). By remanding the case without addressing the defendant's challenge to the sufficiency of the evidence, the DCCA denied Duhaney the defendant the finality of a favorable ruling. This expectation of finality is constitutionally protected, since an appellate court "is obliged to address [a defendant's] sufficiency argument because, if the evidence were insufficient, the Double Jeopardy Clause would bar retrial." *Lyons v. United States*, 606 A.2d 1354, 1361 (D.C. 1992) (the Court of Appeals) (citing *Burks*, 437 U.S. 1).

In addition, even though a case is "not yet final" because it is on appeal, Double Jeopardy protections persist. *See Bustamante v. People*, 317 P.2d 885, 889-890 (Colo. 1957) ("a conviction even though not yet final, due to its appeal, should and does afford the defendant under our laws with a shield against a second or later prosecution for the same offense pending determination of his appeal.").

(c) Double Jeopardy protections preclude a second proceeding, even when the government is not given a second opportunity to present evidence at this second proceeding.

The DCCA reasoned that its remand did not violate Double Jeopardy because the DCCA "did not remand for a second trial and there has been no second prosecution; and the government was not given the opportunity to introduce additional evidence of appellant's guilt." A005. But Double Jeopardy does not turn on whether the second proceeding involves a full-blown presentation of new, additional evidence, or reliance on a pre-existing factual record, or, as here, a fact-finder making new "supplemental" findings and conclusions (after the government suggested this option on appeal). A003. In *Arizona v. Rumsey*, this Court noted that, in one of its precedents, a remand to reinstate a jury's verdict presented no "double jeopardy problem [because] no new factfinding would be necessary." 467 U.S. 203, 212 (1984). This statement implied that "new factfinding" would present a "double jeopardy problem."

Since "jeopardy" refers to "the risk . . . that [is] traditionally associated with actions intended to authorize criminal punishment to vindicate public justice," *Breed v. Jones*, 421 U.S. 519, 530 (1975), it *is* the second *proceeding* that Double Jeopardy protects against. *See id.* at 530 ("a *proceeding* imposes heaving pressures and burdens psychological, physical, and financial – on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once 'for the same offence.'") (emphasis added); *id.* at 538 (Double Jeopardy protects against subjecting defendants "to the expense, delay, strain and embarrassment of two such *proceedings*.") (emphasis added).

(d) A remand for new findings on an alternative subsection of a criminal statute is not "comparable" to remands for clarification of the record.

The DCCA noted that in the past, in the exercise of its appellate authority, it had "often . . . resorted to record remands directing the trial court to 'clarify or amplify some portion of the record, to make additional findings, . . . or to explain a ruling." A005 (citation omitted). Arguably, in the past, this "record remand" procedure may itself on occasion have run afoul of Double Jeopardy principles. But regardless of the permissible scope of "record remands," here, contrary to the DCCA's view, the situation was not "comparable" to these earlier remands, because these prior cases merely involved a clarification of the record, not (a) instructing a trial court to make new findings based on an alternative subsection of the statute of conviction which the trial court had failed to address, while (b) failing to address a defendant's challenge to the sufficiency of the evidence under the statutory subsection applied by the trial court.

(e) Double Jeopardy protects not just against reprosecution for an entirely different offense, but against reprosecution for the same offense under an alternative statutory subsection.

In response to Duhaney's objections to the remand, the government's supplemental brief argued that the remand did not run afoul of Double Jeopardy protections, claiming that Double Jeopardy did not apply because the two subsections of the theft statute did not set forth a different crime, but merely a *mens rea* that could be established by proof that the defendant acted either with intent to deprive, or with an intent to appropriate (or both). In other words, the government appeared to concede that Double Jeopardy prohibits

reprosecution for a different crime, but maintained that the Clause did not prohibit reprosecution for the same crime under different *mens rea* definitions. *Hescock* rightly rejected this view.

Hescock recognized that in *Green* this Court stated: "The vital thing is that [reprosecution] is [for] a distinct and different offense." 989 P.2d at 1256 n. 6 (quoting *Green*, 355 U.S. at 194, n. 14). In context, *Green* was explaining why it was "immaterial" whether one of the two offenses at issue was a "lesser offense" of the other. Green, 355 U.S. at 194, n. 14. Hescock therefore correctly concluded: "[W]e agree with *Terry* [*v. Potter*] that when a crime is charged under 'two statutory subsections of a unitary offense,' the result is the same [as reprosecution for a different offense] because 'continuing jeopardy as to one may not be bootstrapped onto the other.'" 989 P.2d at 1256 n. 6 (quoting *Terry v. Potter*, 111 F.3d at 459).

(f) Because the government, in effect, elected not to prosecute Duhaney under subsection (b)(2), Double Jeopardy barred subsequent conviction under this alternative subsection.

In its Supplemental Brief, the government also claimed that, at trial, it had not "elected" to pursue one theory of guilt (intent to deprive) as distinct from another (intent to appropriate), and, consequently, contrary to Duhaney's argument, Double Jeopardy did not bar the government from seeking to convict Duhaney under an alternative subsection of the statute.

But the prosecution never mentioned the verb "to appropriate" at any time during Duhaney's trial. In closing argument, the prosecution did not argue that Duhaney could be

found guilty under subsection(b)(2) of the theft statute. Moreover, when the trial court made its findings of Duhaney's guilt, and stated that the "intent to deprive" was the only "relevant" portion of the theft statute, the government did not argue that "intent to appropriate" was an alternative basis. The government is bound by its election.

In *People v. Brown*, 217 Cal. Rptr. 3d 589, 592 (Cal. Ct. App. 4th Dist. 2017), after the government "elected to proceed on one factual theory [of forcible rape]," the appellate court held that it was "bound by the prosecution's election." After finding insufficient evidence to support a conviction on this forcible rape theory of prosecution, *Brown* held that Double Jeopardy barred a retrial "under an alternative factual scenario . . . even though there was sufficient evidence of force under an alternative factual scenario." *Id*. at 597 (citing *Burks*, 437 U.S. at 16-18). *Brown* noted that "in light of the prosecution's election" reflected both in its opposition to the defense's motion for acquittal, and in its own closing, a retrial on different theory of rape was barred by Double Jeopardy. *Id*. The same reasoning applies here.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX