S. Hrg. 107–72

NOMINATIONS OF ERIK P. CHRISTIAN AND MAURICE A. ROSS

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON THE

NOMINATIONS OF ERIK P. CHRISTIAN AND MAURICE A. ROSS TO BE ASSOCIATE JUDGES OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

MAY 22, 2001

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NOMINATIONS OF ERIK P. CHRISTIAN AND MAURICE A. ROSS

TUESDAY, MAY 22, 2001

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:03 a.m., in room SD–342, Dirksen Senate Office Building, Hon. George Voinovich, presiding.

Present: Senator Voinovich.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH [presiding]. The hearing will come to order. I would like to welcome our nominees, Erik Christian and Maurice Ross, both of whom have been nominated to serve as Associate Judges for the District of Columbia Superior Court, and I would like to welcome their families and friends, and thank their families in advance for the sacrifice that they are going to make in order for Mr. Christian and Mr. Ross to serve on the court, and I would also like to welcome Delegate Eleanor Holmes Norton. Congresswoman, very happy to have you here with us today.

Let me state for the record that both of our nominees have undergone a very thorough screening process. They were recommended by the District's Judicial Nomination Commission, a group of distinguished individuals who submit to the President of the United States three names, and then the President selects one of those three names. Mr. Christian, Mr. Ross, you are the ones that the President has selected. Then, of course, you each went through an FBI background investigation, and then the President formally nominated you.

Since the nominations were received, the Committee staff has conducted separate background checks and interviews with both of our nominees here this morning. I have also spent a great deal of time reviewing your qualifications, and I am pleased to be holding these hearings today. I am confident that the two of you are both going to be very fine judges.

To present our nominees today, we are honored to have Delegate Norton to introduce you, and we are very glad to have you here this morning.

STATEMENT OF HON. ELEANOR HOLMES NORTON, A DELEGATE IN CONGRESS FROM THE DISTRICT OF COLUMBIA

Ms. NORTON. Thank you very much, Senator Voinovich, and may I just begin by thanking you for your extraordinary service to the

District of Columbia. We have been very fortunate to have a former mayor of Cleveland as the Chair of our Committee here in the Senate. This morning, of course, it is my great honor to appear before you in another capacity, and that is to introduce two very able young lawyers who have been nominated by President Bush to serve on our Superior Court bench.

Erik Christian is a native Washingtonian who comes from a family of educators here in the District. He is a Phi Beta Kappa graduate of Howard University. He attended Georgetown University Law Center. Mr. Christian clerked on the very court to which he has now been nominated, and he has had very extensive trial experience of the kind that suits him especially well to serve on this court. He has been an Assistant U.S. Attorney here in the District, prosecuting complex cases, including homicide cases. He rose to become a Deputy Chief in the U.S. Attorney's Office. He went on to become the second in command at the office of the U.S. Attorney in the Virgin Islands. Most recently, he has served our city as Deputy Mayor for Public Safety, and under his jurisdiction were the police department, the fire and emergency medical services, the Department of Corrections, and the Medical Examiner. His most recent position was as legal counselor to D.C. Mayor Tony Williams.

I am pleased also to introduce Maurice Ross. Maurice Ross has had extensive civil and criminal litigation experience as well. His most recent assignment was as assistant counsel in the Justice Department's Office of Professional Responsibility. Before that, Mr. Ross was senior counsel with the Federal Home Loan Mortgage Corporation, otherwise known as Freddie Mac. He has had extensive civil and criminal experience in Federal and State courts, not only in the District of Columbia, but throughout the United States. Mr. Ross has been a Special Assistant to the Deputy Attorney General of the United States, and an Associate Deputy Attorney General. His legal career began in private practice at a large firm here, Shaw Pittman, where he began to get his litigation experience. Mr. Ross is a graduate, cum laude, from Yale College, and got his law degree from Harvard Law School. He has served as a member of the District Bar's Legal Ethics Committee, and he has been on the board of directors of the Greater Washington Urban League. The District of Columbia is very proud to present these two candidates for your consideration.

Senator VOINOVICH. Thank you very much. I really appreciate your coming here today to introduce both nominees, and I think that their backgrounds are just outstanding. I wish everyone was as qualified. As part of the Committee's normal practice, I would like the nominees to stand and raise their right hand. Do you swear that the testimony that you will give the Committee today is the truth, the whole truth, so help you, God?

Mr. ROSS. I do.

Mr. CHRISTIAN. I do.

Senator VOINOVICH. Please be seated. Let the record show that the nominees answered in the affirmative. Let me now welcome Erik Christian. We are pleased that you are here today, and I know it is a special day for your family. The special day will be when the Senate approves your appointments, but this is a big day in the beginning of this little venture up the ladder, and so we are

very happy that you are here and you have members of your family and friends with you. Would you like to make an opening statement?

TESTIMONY OF ERIK P. CHRISTIAN[1] TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Mr. CHRISTIAN. Yes, thank you, Senator. Good morning. I would first like to introduce my family members. I introduced them earlier to you. However, I would like to introduce them to you and the Committee staff. My father, Charles Christian, is present with me today, along with my sister, Dr. Judy Christian, my mother, Dorothy Christian, and my brother, Gary Christian, and my daughter, Caitlin Erin Christian. They have provided me with support throughout my life, and are here today again to provide that same support.

Just as an aside, my parents are educators here in the District of Columbia. They are retired public school teachers and administrators, and just lived a couple of blocks away from the Capitol. They grew up together on the same street, near North Capital and I Streets, just in the shadow of the Capitol, and I would especially like to thank them for being with me throughout my life and here today. I also have a cousin here, Hallue Clark Wright, who is an employee with the Department of Justice in the area of civil rights. There are several friends and colleagues here with me today, Attorney Lola Ziadie, Ron Walutes, Guy Middleton, Harold Ognelodh, and the Corporation Counsel for the District of Columbia, Robert Rigsby, is present today, sir.

This is indeed an honor and a privilege to have been nominated by President Bush to serve as an Associate Judge to the Superior Court of the District of Columbia. Again, I want to thank your Committee and your staff, who did diligent work in getting this hearing scheduled and yourself having this hearing scheduled. I also would like to thank the D.C. Judicial Nominations Commission and Mayor Anthony Williams for recommending me to the White House, and, of course, the President of the United States, for nominating me to this position.

As you may know, Mayor Williams wanted to be here today. He sends his greetings. However, he is at a conference out in Nevada. Chief Judge Annice Wagner, whom I clerked for in the trial court, is unfortunately unable to make it this morning. She is sitting in an en banc argument in the D.C. Court of Appeals. However, she also sends her greetings. I would just like to follow in the tradition of my family, in the footsteps of those who I learned from, to serve ably on the court. I think I will serve in a proficient manner. As you know, I have basically served throughout the city in various public sector, public government agencies and in the U.S. Attorney's Office for approximately 10–11 years, and then as Deputy Mayor for Public Safety and Justice, and presently as legal counsel to the mayor.

[1] Biographical and financial information with attachments appear in the Appendix on page 9.

I think all those positions and being a native Washingtonian will serve me well on the bench, and I look forward to serving in a proficient manner. Thank you, sir.

Senator VOINOVICH. Thank you. Mr. Ross, welcome.

TESTIMONY OF MAURICE A. ROSS[1] TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Mr. ROSS. Good morning, Senator. I would like to introduce my family. First, my wife, Beverly, and my son, Jeffrey, who are behind me; my parents, Dr. and Mrs. Walter Ross; my oldest sibling, my sister, Margaret; and also with me this morning, Judge George Mitchell of the D.C. Superior Court, who has been a close family friend and mentor; my godfather, Dr. Roy Batiste; and also a close family friend, Ms. Georgina Brown, who is also here. I think I covered everyone who came in.

I would like to thank the Committee first of all for moving so expeditiously on our nominations. I would like to thank the staff. They walked us through the process very quickly; the President, for nominating me; the D.C. Judicial Nominations Commission. I am eager to serve and I am willing to answer any questions that the Committee may have this morning. Thank you.

Senator VOINOVICH. Thank you. I would like to make clear to both of the nominees that I am here by myself this morning. Ordinarily, we have a couple more individuals that are on the Committee that are here, but we were here late last night and several of them were tied up. I want to make clear to you and your families that this is a very important procedure, and a lot of it is all the work that has gone before this hearing this morning. I think sometimes when we have these hearings and they are very short, people think, well, that was not much. But both of you know—you have gone through quite a bit in order to come here this morning. As I say, I know this is a very important day for your family and for your friends.

There are three questions that I am required to ask of each of you, and I would like to read them to you and then have you respond. The first question is are you aware of anything in your background that might present a conflict of interest with the duties of the office to which you have been nominated? Mr. Christian.

Mr. CHRISTIAN. No, sir.

Senator VOINOVICH. Mr. Ross.

Mr. ROSS. No, Senator.

Senator VOINOVICH. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. CHRISTIAN. No, sir.

Mr. ROSS. No, Senator.

Senator VOINOVICH. Do you know of any reason, personal or otherwise, that would in any way prevent you from serving the full term of the office to which you have been nominated?

Mr. CHRISTIAN. No, sir.

[1] Biographical and financial information with attachments appear in the Appendix on page 91.

Mr. ROSS. No, Senator.

Senator VOINOVICH. Those are the formal questions that we have before the Committee. I would like to give each of you an opportunity to answer this question I am interested in, and that is you are both relatively young men, at least from my perspective, and I would be interested, starting with you, Mr. Christian, why is it that you sought this nomination?

Mr. CHRISTIAN. Senator Voinovich, throughout my life I have tried to follow the words and wisdom of my family, my mother and father, sister, and brother. I followed my brother, attorney Gary Christian, into law school, and I followed his advice almost to the letter. I then clerked for Judge Annice Wagner, and began to see how society and the community all would come back to the Superior Court. Seeking this nomination will provide me with the opportunity to continue to contribute back to the community in which I was raised. It will allow me to continue to devote my life, my energy, to make this city a better place.

As you know, I was Deputy Mayor for Public Safety, and I worked extensively in the community through Mayor Anthony Williams' strategic plans of building and sustaining healthy neighborhoods, making the government work. We had a point-by-point strategic plan that is now underway, to bring this community back. I think, through that experience as his legal counsel, as well as now, with the opportunity to serve on the bench if confirmed, I will be able to provide that same devotion, that same caring, that same passion, to the citizens of the District of Columbia.

Senator VOINOVICH. I am sure that the mayor is going to miss your help. I, as you know, am a good friend of the mayor's and try to be as supportive as we can; but, as I have emphasized to him very often, you are only as good as the team that you have around you, and I am sure that he has enjoyed the fact that you have been willing to serve him. When was the first thought that you had, that you someday would like to be a judge? Did this just come on, or have you ever had that thought before?

Mr. CHRISTIAN. Well, believe it or not, and I am not sure whether I shared this with anyone, but my father and mother had bought my brother and me a little Honda Civic, and we had driven down to a nearby car stereo place to get a stereo placed in the car, because we did not have a radio in the car, and my brother decided to take me down to Superior Court, just to watch the proceedings, and we could not have been older than 16- to 18-years-old. So we walked down and sat in the Superior Court at that time, and at that point, it was just so fascinating.

So that is when the first pearl came to me, and then actually being in the U.S. Attorney's Office, one of the finest offices in the District of Columbia, and being able to practice there for an extensive number of years and then to work as First Assistant in the Virgin Islands just brought that back and confirmed my desire to actually be on the bench, to continue to help shape society and our community.

Senator VOINOVICH. Thank you very much. Mr. Ross.

Mr. ROSS. I would join in many of Mr. Christian's sentiments. My parents were government servants here in the city. My older brother is also a lawyer. He could not be here today because he is

in Jamaica on business. But I have grown up in this city. I am committed to public service, and I thought that serving on the Superior Court would be an excellent way to continue in public service, to continue to grow as a lawyer and deal with some of the most complex and difficult issues, not just in the city, but in this country, and they all come through the front door of Superior Court.

As to when it first occurred to me to consider being a judge, approximately 4 years ago, Gloria Johnson, the secretary to the late Chief Judge of the District Court, Judge Aubrey Robinson, for whom my sister clerked, mentioned that there was an opening for a magistrate judge and that I should consider applying, and she encouraged me to apply for that position and to talk to Judge Robinson about service on the court; and it was out of that meeting that I had my initial interest in seeking judicial office. Subsequently, I met many of the judges on Superior Court before whom I appeared. I had the opportunity to meet them off the bench, and I was convinced that it was just an outstanding opportunity, and that is when I decided to apply.

Senator VOINOVICH. Well, as I say, I think it is very good that both of you have decided to make yourself available. This is not an easy life, and, as I say, your families are going to have some sacrifices. One point, and this is a concern that I have, and Senator DeWine, who happens to be on the Appropriations Committee that has the District, and then there are several members of the House, and that is the issue of the family and juvenile judges here in the District, and there has been some talk about creating a special family court slot here in the District. I am not sure that is going to happen, but one thing that we have been assured is that there is going to be a larger emphasis on individuals serving in that capacity.

I would just bring it to your attention today. There is a real need in the District for much more attention to the family court, and, too often, I think judges have a tendency not to want to be part of that, because it does involve, in some instances, a little larger commitment in terms of one's emotions, because you really have to get into the whole situation in a family. I would just bring that to your attention today, in hopes that after you are on the bench, that you would think about maybe taking that on for a couple of years. It is very important today.

One of the things that bothers me about the justice system is, too often, the people that go through it are treated not as human beings, or just as another number, and I think it is really important that, on the bench, you look at people as being in the image and likeness of God, and that they are human beings and they have problems, and that, particularly today in our society, we have some real problems in terms of families. I was governor of Ohio, and we really emphasized the importance of those family courts, where you have people that are really interested.

They get to be familiar with the social service agencies. They take some extra time to find out about the individuals that are appearing before them. They are really able to make a real difference in their lives, and I just—I know sometimes that part of the law is not as appealing to some people as we would like it. But I would say that, as time goes on, I would hope that both of you would look

into that, and perhaps you might take it upon yourself to serve in that capacity and to make a difference for the families that are here in the District. I would like to again thank you for being here today, and hopefully we will move this along. I think we are supposed to have a markup tomorrow, so hopefully that will be done, and then will go over on the calendar, and then we will try and get you up as soon as possible.

Again, thank you for your willingness to serve the District.

The Committee is adjourned.

[Whereupon, at 9:23 a.m., the Committee was adjourned.]

APPENDIX

QUESTIONNAIRE FOR NOMINEES TO THE DISTRICT OF COLUMBIA COURTS COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE

I. BIOGRAPHICAL AND PROFESSIONAL INFORMATION

1. Full name: (include any former names used).

Erik Patrick Christian

2. Citizenship (if you are a naturalized U.S. citizen, please provide proof of your naturalization).

I am a citizen of the United States of America.

3. Current office address and telephone number.

Executive Office of the Mayor
441 4th Street, N.W.
Suite 1036 North
Washington, D.C. 20001
(202) 724-5472

4. Date and place of Birth

Date: November 18, 1960
Place: Washington, D.C.

5. Marital status: (if married, include maiden name of wife, or husband's name.) List spouse's occupation, employer's name and business address(es).

My wife and I have been separated since October 2000.

Wife – Julieanne Himelstein

Occupation – Assistant United States Attorney

Employer- United States Attorney's Office
555 Fourth Street, N.W.
Washington, D.C. 20001

6. Names and ages of children. List occupation and employer's name if appropriate.

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7. Education: List secondary school(s), college(s), law school(s), and any other institutions of higher education attended; list dates of attendance, degree received, and dates each degree was received. Please list dating back from most recent to earliest.

a) Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

August 1983 to May 1986

Juris Doctor Degree – May 1986

b) Howard University
2400 6th Street, N.W.
Washington, D.C. 20059

August 1978 to May 1982

Bachelor of Arts Degree – May 1982

c) Archbishop John Carroll High School
4300 Harewood Road, N.W.
Washington, D.C. 20008

August 1974 to May 1978

High School Diploma – May 1978

8. Employment Record: List all jobs held since college, including the dates of employment, job title or description of job, and name and address of employer. Please list dating back from most recent to earliest.

a) June 1999 to PRESENT

Job Titles – Deputy Mayor for Public Safety and Justice
Legal Counsel to the Mayor

Employer – Executive Office of the Mayor
Washington, D.C.
Eleventh Floor

b) October 1997 to June 1999

Job title- Assistant United States Attorney

Employer- United States Attorney's Office
for the District of Columbia
Washington, D.C.

c) August 1995 to October 1997

Job Title – First Assistant United States Attorney

Employer – United States Attorney's Office
for the District of the Virgin Islands
St. Thomas, U.S. Virgin Islands

d) January 1989 to August 1995

Job Title – Assistant United States Attorney
Deputy Chief, Misdemeanor Trial Division
Superior Court

Employer – United States Attorney's Office
for the District of Columbia
Washington, D.C. 20001

e) December 1986 to December 1988

Job Title – Judicial Law Clerk

Employer- Superior Court of the District of Columbia
Washington, D.C. 20001

e) November 1984 to December 1986

Job title – Law clerk/Associate

Employer- Law Firm of Webster & Fredrickson
Washington, D.C.

f) Summer 1984

Job title – Summer Associate

Employer – The Washington Lawyers' Committee for Civil Rights
Under Law
Washington, D.C.

g) May 1982 to August 1983

Job title – Criminal Investigator

Employer – D.C. Public Defender Service
Washington, D.C. 20001

h) July 1977 to August 1983

Job titles-Usher/Projectionist/Assistant Manager

Employer-Roth's Silver Spring East Theater

Silver Spring, Maryland 20910

9. Honors and awards: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

a) Archbishop Carroll High School

National Merit Semifinalist
Honor Roll Student
President – French National Honors Society
Who's Who Among High School Students
Graduated With Distinction

b) Howard University

Phi Beta Kappa, 1981 (Junior Year)
Pi Sigma Alpha
Magna Cum Laude, 1982
DeWitt Wallace Scholarship Recipient (Reader's Digest)
Academic Scholarship
Dean's List

c) United States Department of Justice

Employee Volunteer Service to Others in the Community Award
1994, 1995, 1999

d) United States Attorney's Office for the District of Columbia

Special Achievement Awards 1993, 1994

Distinguished Service – Homicide Section 1995

Department of Justice – Dedicated Service Award 1995

Judicial Commendation written in the case of
United States v. Joe L. Thomas, 772 F.Supp. 674, 678 (D.D.C. 1991)

e) United States Attorney's Office for the Virgin Islands

Certificate of Appreciation 1996
Instructor, Department of Justice Office of Legal Education
Criminal Trial Advocacy Center

Course Certificate 1997
Advanced Criminal Trial Advocacy

Letter of Commendation – December 8, 1995
Executive Office for United States Attorneys
Office of the Director

Letter of Commendation – April 8, 1996
United States Attorney James A. Hurd, Jr.

Letter of Commendation – May 2, 1996
Executive Office for United States Attorneys
Office of the Director

Dedicated Service Award - 1997

f) Executive Office of the Mayor

Certificate of Award for Participation in American Education Week 1999

Electronic Mail Dated February 25, 2000 from Advisory Neighborhood Commissioner and Georgetown Business Leader, in commendation of efforts to resolve manhole explosion issue

Electronic Mail Dated November 9, 1999, in commendation of efforts to abate neighborhood drug activity.

10. Business relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, or educational or other institution.

None

11. Military Service. Indicate whether you have served in the US military and, if so, list dates of service, branch of service, rank or rate, serial number, and type of discharge received.

I have never served in the U.S. military.

12. Bar associations. List all bar associations, legal or judicial-related committees, conferences, or organizations of which you are or have ever been a member, and provide titles and dates of any offices which you have held in such groups.

Professional Memberships

National Bar Association
Washington Bar Association
Department of Justice Association of Black Attorneys
National Black Prosecutors Association
Trial Lawyers Association of Washington, District of Columbia

Committees

Delegate, District of Columbia Judicial Conferences
Member, District of Columbia Judicial Conference Planning Committee
Chairman (Immediate Past), District of Columbia Court of Appeals Committee (1999-2000) On the Unauthorized Practice of Law
Member, District of Columbia Bar Judicial Evaluation Committee
Member, Hiring Committee – U.S. Attorney's Office for the District of Columbia
U.S. Attorney's Office for the Virgin Islands
Member, Chair of Attorney Promotions Committee (2001) – Corporation Counsel

13. Other memberships. List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, public, charitable, or other

organizations, other than those listed in response to Question 12. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

Affiliations

Member, Prince Hall Masons – Redemption Lodge No. 24
Member, Shiloh Baptist Church Martin Luther King Celebration Committee
Member, Family Member – Carter Barron East Neighborhood Association
Member, American Diabetes Association
Member, Project PACT (Pulling America's Communities Together)

None of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

14. Court admissions. List all courts in which you have been admitted to practice, with dates of admission and lapses in admissions if any such memberships have lapsed. Please explain the reason for any lapse in membership. Please provide the same information for any administrative bodies which require special admission to practice.

1. Supreme Court of Pennsylvania	December 24, 1986
2. United States District Court for the District of New Jersey	June 11, 1987
3. Supreme Court of New Jersey	June 12, 1987
4. District of Columbia Court of Appeals	April 13, 1988
5. United States Court of Appeals for the District of Columbia Circuit	July 1, 1998
6. United States District Court for the District of Columbia	September 12, 1988
7. United States Court of Military Appeals	February 23, 1989
8. Supreme Court of the United States of America	October 15, 1990
9. District Court of the United States Virgin Islands	November 8, 1995

In 1994, my active membership in the Pennsylvania Bar lapsed because of a non-compliance with the requisite number of Continuing Legal Education (CLE) courses. Although I have never practiced law in the Commonwealth of Pennsylvania, I completed the requisite courses to come into compliance. I am presently a non-resident active member of the Pennsylvania Bar, which allows for the deferment of current CLE requirements.

15. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited.

I have not published any writings. I have contributed to the revision of the District of Columbia Criminal Practice Institute Trial Manual. My area of revision focused on the drafting of a criminal indictment. This particular manual was published in the early 1990's.

16. Speeches: List the titles of any formal speeches you have delivered during the last (5) years and the date and place where they were delivered. Please provide the Committee with four (4) copies of any of these speeches.

I have not delivered any formal speeches in the last five years; however, I have appeared in news interviews while as Deputy Mayor for Public Safety and Justice and spoken on criminal justice issues.

17. Legal career.

a. Describe chronologically your law practice and experience after graduation from law school, including:.

1. Whether you served as a law clerk to a judge, and if so, the name of the judge, the court, and the dates of your clerkship;

From December 1986 to January 1989, I served as the judicial law clerk to the Honorable Annice M.R. Wagner, who was then an Associate Judge in the Superior Court of the District of Columbia. As a judicial law clerk, I researched and wrote memoranda of law, as well as drafted orders on Probate, Tax, Criminal and Civil law.

2. Whether you practiced alone, and if so, the addresses and dates;

I have never been employed as a solo practioner.

3. The dates, names, and addresses of law firms, companies, or governmental agencies with which you have been employed.

Law Firm of Webster & Fredrickson
Washington, D.C. 20006

November 1984 to December 1986

While in law school, I served as a law clerk to the firm of Webster & Fredrickson from November 1984 until law school graduation in 1986. Upon graduation from Georgetown Law Center in May 1986, I was hired as an Associate at the firm. While at the firm I concentrated in the area of general business law, bankruptcy and Title VII Employment Discrimination Law. Specifically, I researched and wrote memoranda of law regarding real estate law, wills and trusts, and general business transactions. I also researched and wrote memoranda of law regarding Chapter 7, Chapter 11, and Chapter 13 bankruptcy petitions. I drafted discharge petitions, proposed reorganization plans, filed bankruptcy petitions, and attended bankruptcy hearings and U.S. Trustees Meetings before the bankruptcy court in the District of Columbia. I also researched and wrote memoranda of law on Title VII Employment Discrimination Law and attended trials of clients who sued under the Employment Discrimination Law provisions.

United States Attorney's Office
for the District of Columbia
Washington, D.C. 20001

January 1989 to August 1995

In January 1989, I was appointed an Assistant United States Attorney (AUSA) for the District of Columbia. While there, I completed a three-year rotational assignment by serving respectively in the Criminal Appellate Division, the Superior Court Misdemeanor Trial Division, the Superior Court Felony Trial Division, the

Superior Court Grand Jury Section and the District Court Criminal Division Narcotics Trial Section, and again in the Superior Court Felony Trial Division of the Office.

From January 9, 1989, to August 7, 1989, I served in the Criminal Appellate Division of the office where I briefed approximately thirty (30) cases and argued approximately fifteen (15) cases in the District of Columbia Court of Appeals and in the United States Court of Appeals for the District of Columbia Circuit. Some of the issues that I briefed and argued consisted of evidentiary sufficiency, identification testimony, self-defense claims, sentencing issues regarding guideline adjustments and offense mergers and jury instructions. I argued cases in both courts on their summary and regular calendars.

On August 7, 1989, I served in the Superior Court Misdemeanor Trial Division until February 20, 1990. In the Misdemeanor Trial Division, I tried approximately fifteen (15) jury trials that consisted of cases of marijuana and cocaine possession, carrying a pistol without a license, the possession of a prohibited weapon with the intent to use it unlawfully, unlawful entry to property and cases where threats occurred. I also tried approximately five (5) non-jury cases that included the offenses of shoplifting, taking property without right and solicitation for the purpose of prostitution. In addition to my trial calendar, I performed the assignments of "Papering" at Intake and "Discovery." In "papering", I reviewed the police paperwork generated by arrests to determine whether the cases were sufficient to be prosecuted by the office. In "discovery" I provided defense counsel case jacket documents that had been deemed discoverable pursuant to Superior Court Criminal Rule 16.

From February 20, 1990, to August 27, 1990, I served in the Superior Court Felony Trial Division where I was placed on a team of three AUSAs and assigned to that team's drug cases. In this assignment, I exclusively prosecuted felony drug offenses that included cocaine, heroine, and dilaudid possession and distribution charges. While in this rotation, I tried approximately twenty-five (25) jury trials before various judges in the Superior Court.

After spending approximately six months in the Felony Trial Division, I was assigned to the Superior Court Grand Jury Section from August 27, 1990, to January 29, 1991. In the Grand Jury Section, I investigated felony criminal cases and presented witnesses and evidence before a Superior Court Grand Jury who determined whether an offense was committed and there was probable cause to believe that the subject of the investigation committed the offense. While in the Grand jury Section I presented and obtained indictments in approximately forty-five (45) cases brought before various grand juries. My other assignments in the Grand Jury Section consisted of "Papering" at Intake and presenting cases before Hearing Commissioners and Judges in Courtroom C-10 of the Superior Court when suspects were arrested. I also conducted preliminary hearings in various cases before indictments were obtained.

On January 29, 1991, I transferred to the District Court Criminal Narcotics Trial Division. I prosecuted cases in that division until September 23, 1991. While in the

Narcotics Trial Division, I tried approximately thirty (30) criminal jury trials before various judges in the United States District Court for the District of Columbia. The majority of the cases consisted of arrests generated from the execution of search warrants after purchases by undercover police officers of heroin and cocaine. Some of the arrest-generated cases were a result of interdiction efforts at the Amtrak Station and Bus Terminals in the District of Columbia. Subsequent to many of these trials, I argued several presentencing motions regarding the applicability of the United States Sentencing Guidelines to issues relating relevant conduct and the sentencing disparity of "powder" and "crack" cocaine. Finally, while in the Narcotics Trial Division, I also investigated and presented several cases before grand juries in the United States District Court.

From September 23, 1991, to May 11, 1992, I was assigned as a Senior AUSA to the Superior Court Felony Trial Division. During that time, I was designated as a team leader of three AUSAs and assigned to investigate and try the more serious felony offenses. While in the Superior Court Felony Trial Division, I successfully tried approximately forty (40) cases, with offenses ranging from drug possession and distribution, robberies, mayhem, assaults with a dangerous weapon, assaults with the intent to kill, and second degree murders. My superior achievement was recognized by the United States Attorney, who on May 11, 1992, promoted me to the Homicide Section of the Superior Court Division.

In the Homicide Trial Section, I spent approximately three years successfully trying thirty-five (35) homicide cases. In the Homicide Section, I tried cases ranging from the charges of manslaughter to First Degree Murder while Armed. In each case, I conducted the grand jury investigation, obtained an indictment and tried each case to verdict and allocated at the sentencing hearings. While in the Homicide Section, I was awarded Special Achievement Awards in 1993 and in 1994.

In October 1994, I was appointed Deputy Chief of the Misdemeanor Trial Division, but assumed active duties in February 1995, because of the remaining homicide cases that I had scheduled for trial. As a Deputy Chief of the Misdemeanor Trial Division I supervised approximately twenty-five (25) AUSAs who were assigned to prosecute non-jury and jury demandable offenses. Specifically, I drafted the trial schedule for each week by designating what calendar each AUSA would be assigned. I ensured that each AUSA would be properly prepared for their court assignments by providing counseling regarding trial strategy and courtroom techniques. In addition, I also assured that each AUSA received the necessary litigation and support services. During each week, I conducted courtroom observations, and provided suggestions and trial strategies to the AUSAs who were in trial. I also participated as a trial instructor in training sessions afforded to the Misdemeanor Trial AUSAs. Periodically, I conducted case reviews, and had meetings with the Superior Court trial judges assigned to the Misdemeanor Calendar to determine the trial AUSA's courtroom progress and effectiveness. Finally, I wrote mid-term progress reviews and final evaluations for each AUSA that was assigned to the Misdemeanor Trial Division.

As Deputy Chief of the Misdemeanor Trial Division, I also recruited other agency attorneys as Special Assistant United States Attorneys (SAUSA). I interviewed many applicants who wished to serve as SAUSAs by determining their suitability for work and whether they were able to effectively perform the duties of a trial prosecutor. SAUSAs were assigned to perform the same duties as a regular AUSA.

In August 1995, I was promoted and appointed as the First Assistant United States Attorney for the District of the Virgin Islands.

United States Attorney's Office for
the District of the Virgin Islands
St. Thomas, U.S. Virgin Islands 00801

August 20, 1995 to October 26, 1997

In August 1995, I was appointed First Assistant United States Attorney (FAUSA) for the District of the Virgin Islands, which included the islands of St. Thomas, St. Croix and St. John. The FAUSA, which is the equivalent to a Principal Assistant United States Attorney in other offices, is the second person in charge in the office and reports only and directly to the United States Attorney (USA). When the USA is away from the District, the FAUSA serves as the Acting United States Attorney. While in the Virgin Islands I had the opportunity to serve as the Acting United States Attorney on several occasions.

As the FAUSA in the Virgin Islands, I had many responsibilities. Before I started in the office along with the District's new USA, a component of the Department of Justice's Executive United States Attorney's Office (EOUSA) had previously conducted an evaluation and review of the entire District office, and had made recommendations regarding the operations of the previous administration. Based upon those recommendations, our first priority was to develop an office management structure. To this end we clearly defined the various duties of the office personnel, including attorneys, administrative and support staff. We defined the personnel's duties, delineated responsibilities, and established lines of authority. We reinforced this structure in management and in staff meetings. As a result of the development of the office structure, personnel was able to accomplish office goals in a clearly defined manner.

As FAUSA, I also received and responded to all of the administrative correspondence from EOUSA. The range of administrative correspondence varied from many topics, including some such as deputations of AUSAs; inquiries regarding office investigations of certain subjects conducting activities in multiple jurisdictions; policy issues on statutory enforcement of certain laws; inquiries from Congressional information requests; and personnel and budget allocation issues. The majority of my responses to

these requests included drafting detailed memoranda after researching issues, and meeting with personnel in my office that were affected by these issues.

As FAUSA, I also reviewed the office's budget and participated in the drafting of the requested budget for fiscal years 1997 and 1998. To this end, I assessed the needs of the entire office, from personnel to office supplies to determine exactly what would be requested in each budget submission. In addition to the requested budget submission, I participated in the drafting in each year a budget "wish" list of items that the office could obtain if it were provided all of its resources. In participation in the drafting of the budget, consultation was made with the United States Attorney, the office's administrative officer and its budget analyst.

As FAUSA, I also was tasked with performing disciplinary and adverse actions for performance and conduct problems. Some of the problems that existed consisted of leave abuse and usage, and work performance products. I worked closely with EOUSA and its Legal Counsel Office in the drafting and scheduling of disciplinary and remedial measures for cited employees.

While serving as FAUSA, I also had a dual role as the Criminal Chief of the office. As the Criminal Chief, I supervised AUSAs who prosecuted narcotics, economic crime, public corruption, government fraud, environmental, and immigration cases. I assigned cases to AUSAs to prosecute, and thereafter, monitored their progress during the grand jury investigation stage and trial proceedings. I often conducted case reviews and made courtroom observations during hearings and trial proceedings to determine whether cases were efficiently prosecuted. Finally, I evaluated each AUSA by conducting mid-year progress reviews and final evaluations of their work performance. I also served as the final evaluator for the supervisory AUSAs and the supervisory administrative and support staff.

While serving in the foregoing capacities, I also prosecuted cases in the Virgin Islands. Based upon my trial experience, and through the cross-designation of Special Assistants, I prosecuted two homicide cases in the Territorial Courts of the Virgin Islands, and conducted a major investigation into a third homicide case in the murder by a Territorial Senator on the island of St. Croix. I also prosecuted a carjacking and kidnapping case, as well as a narcotics case in the Federal Court of the District Court of the United States Virgin Islands.

In October 1997, because my immediate family was in Washington, D.C., I returned to the United States Attorney's Office for the District of Columbia.

United States Attorney's Office
for the District of Columbia
Washington, D.C. 20001

October 16, 1997 to June 14, 1999

On October 16, 1997, I returned to the United States Attorney's Office for the District of Columbia where I was assigned to the Homicide Section of the Superior Court Division. While in the homicide section, I was assigned the more complex and high-profiled cases that required extensive grand jury investigations. Some of the cases that I was assigned to prosecute included the cases of United States v. Tomar Locker and United States v. Russell E. Weston, Jr. The defendant in Locker was charged in the fatal shooting of a professional boxer at the Washington Hospital Center. The defendant in Weston was charged in the homicide shooting of two federal police officers in the United States Capitol.

Executive Office of the Mayor
Washington D.C. 20001

June 14, 1999 to Present

I initially served as the Deputy Mayor for Public Safety and Justice, and then was appointed Legal Counsel for the Mayor. As Legal Counsel to the Mayor, I provide oral and written legal advice to the Mayor, and review various legal documents and relevant case law to determine whether execution of proposed actions is in the best interest of the District of Columbia government. I also examine and analyze proposed orders, legislation, and other legal documents from various agencies and sources for legal sufficiency. I am assigned to attend and participate in hearings before committees of the Council of the District of Columbia and the U.S. Congress pertaining to laws or legislation which may affect existing laws of the District of Columbia. I provide the Mayor with sound legal advice on initiatives proposed by the Executive Office of the Mayor.

In addition, I have also been assigned to prosecute criminal cases in the Office of the Corporation Counsel where charges have been brought against landlords who violate housing and building code regulations.

b. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

The general character of my practice has been in the area of criminal law. When I was appointed a judicial law clerk for the Honorable Annice M.R. Wagner in the Superior Court of the District of Columbia in 1986, I researched and wrote memoranda of law, and drafted proposed orders in the areas of civil, criminal, probate and tax laws. Once I was appointed an AUSA in January 1989, my practice was concentrated exclusively in the area of criminal prosecutions.

In January 1989, I was assigned to the Criminal Appellate Division of the Office. In that section I briefed approximately thirty (30) cases and argued approximately fifteen (15) cases in the District of Columbia Court of Appeals and in the United States Court of Appeals for the District of Columbia Circuit. As a trial AUSA I have prosecuted and tried approximately one hundred and fifty (150) criminal cases since 1989. The criminal cases that I have tried have primarily been in the Superior Court of the District of Columbia, and in the United States District Court for the District of Columbia. Between 1995 and 1997, I tried criminal cases in the District Court of the United States Virgin Islands, as well as in the Territorial Court of the United States Virgin Islands. Of the approximately one hundred and fifty (150) cases that I have prosecuted, the criminal trials consisted of non-jury and jury demandable offenses, including those of misdemeanor offenses to complex felony crimes such as robberies, mayhems, assaults with intent to kill, and various degrees of homicide. I have prosecuted United States Code violations, District of Columbia and Virgin Islands Code violations.

In February 1995, I assumed administrative and supervisory duties as the Deputy Chief of the Misdemeanor Trial Section in the Superior Court Division. In August 1995, I was appointed FAUSA in the United States Virgin Islands where I primarily served as an administrative supervisor. I also prosecuted felony cases, including homicides, carjacking, kidnapping, and narcotics offenses in both local and federal courts of the Virgin Islands. In October 1997, I returned to the United States Attorney's Office for the District of Columbia where I resumed the prosecution of local offense and federal criminal cases.

Presently, I serve as the Mayor's Legal Counsel, while also assigned to prosecute criminal cases in the Office of the Corporation Counsel where landlords are charged with housing and building code violations.

c. Describe your typical former clients and describe the areas of practice, if any, in which you have specialized.

As a trial AUSA, my specialized area of practice has been the prosecution of homicide cases, and specifically those in which insanity defenses have been raised as affirmative defenses. In the Superior Court of the District of Columbia before the Honorable Curtis von Kann, I successfully prosecuted the homicide case of United States v. James Kelly, Criminal No. F-2516-90, where an insanity defense was raised in a bifurcated trial. In the homicide case of United States v. Edward Davis, Criminal No. F-7843-93 before the Honorable Fred B. Ugast, I successfully moved to preclude the use of an insanity defense. I also served as co-counsel in the homicide case of United States v. James Swann, (Shotgun Stalker) Criminal No. F-8656-92 before the Honorable Colleen Kollar-Kotelly, where the defendant entered a plea of not guilty by reason of insanity. Finally, I served as co-counsel on the case of United States v. Russell E. Weston, Jr., where the defendant was charged with the killing of two police officers inside the United States Capitol. The defendant raised issues of competency to stand trial.

I have also prosecuted cases where mental issues were raised with other parties of interest. In United States v. David Rowlands, Criminal No. F-3015-92 before the Honorable Cheryl M. Long, the defendant in a homicide case claimed that the decedent had committed suicide. The government secured expert witnesses who performed psychological autopsies into the decedent's life to determine whether she suffered from Post Traumatic Stress Disorder, or from other maladies that would have caused the decedent to commit suicide. The jury in this case rejected the suicide defense and convicted the defendant of voluntary manslaughter while armed.

d. Describe the general nature of your litigation experience, including:

(1) Whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your court appearance has varied over time, please describe in detail each such variance and give applicable dates.

As a federal prosecutor, I appeared in court frequently. From 1989 to 1992, I rotated through various divisions of the U.S. Attorney's Office in the District of Columbia, and appeared in court on a regular basis. Between 1993 and 1995, I was assigned to the Homicide Section where I exclusively prosecuted homicide cases in the Superior Court of the District of Columbia. Between 1995 and 1997, I served as FAUSA for the District of the Virgin Islands. Although I primarily was tasked with administrative and supervisory matters, I prosecuted approximately four cases in the District and Territorial Courts of the United States Virgin Islands. Those cases consisted

of homicide, carjacking, kidnapping and drug offenses. In October 1997, I returned to the District of Columbia office where I exclusively prosecuted homicide cases. While being assigned criminal cases in the Office of the Corporation Counsel, I continue to appear in court on a regular basis.

(2) What percentage of these appearances was in:

(a) Federal courts (including Federal courts in D.C.);

I have appeared in Federal Court twenty percent (20%) of the time.

(b) State courts of record (excluding D.C. courts);

I have appeared in the Territorial Court of the United States Virgin Islands. Those appearances represent approximately five percent (5%) of my time.

(c) D.C. courts (Superior Court and D.C. Court of Appeals only);

I have appeared in D.C. courts seventy-five percent (75%) of my time.

(d) other courts and administrative bodies.

I have not appeared in any other courts or administrative bodies.

(3) What percentage of your litigation has been:

(a) civil;

I have engaged in a small percentage of civil litigation while employed at Webster & Fredrickson.

(b) criminal.

I have engaged in criminal litigation ninety-nine percent (99%) of my time.

(4) What is the total number of cases in courts of records you tried to verdict or judgment (rather than settled or resolved, but may include cases decided on motion if they are tabulated separately), Indicate whether you were sole counsel, lead counsel, or associate counsel in these cases.

I have tried approximately one hundred fifty (150) cases to verdict. Of those, I was sole counsel in approximately one hundred forty (140) cases, lead counsel in approximately five (5) cases and associate/ co-counsel in approximately five (5) cases.

(5) What percentage of these trials was to

(a) a jury

Of the approximate one hundred fifty cases I tried, ninety-five percent (95%) were tried to a jury.

(b) the court (include cases decided on motion but tabulate them separately).

Of the approximate one hundred fifty cases I tried, five percent (5%) were bench trials.

18. Describe the five (5) most significant litigated matters which you personally handled. Provide citations, if the cases were reported, or the docket number and date if unreported. Give a capsule summary of the substance of each case and a succinct statement of what you believe was of particular significance about the case. Identify the party/parties you represented and describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case, (a) the date of representation; (b) the court and the name of the judge or judges before whom the case was litigated;

and (c) the name(s) and address(es) and telephone number(s) of co-counsel and of the principal counsel for the other parties.

TRIAL LITIGATION

1) United States v. James Kelly, Criminal No, F-2516-90 (1990)

Court – Superior Court of the District of Columbia

Judge – The Honorable Curtis E. Von Kann

Defense Counsel – The Honorable Milton C. Lee
Hearing Commissioner
Superior Court of the District of Columbia
500 Indiana Avenue, N.W.
Washington, D.C. 20001-2131
(202) 879-4793
(Formerly with D.C. Public Defender Service)

Prosecutor – Erik P. Christian

Capsule Summary:

After long and sustained bouts with alcoholism and depression, the defendant falsely believed that his landlord had sent "demonic" signals toward the defendant. As a result, the defendant entered the landlord's home and bludgeoned him to death. The defendant was immediately arrested. At trial, the defendant raised an affirmative defense of insanity, claiming that he suffered from a bi-polar disorder.

During pre-trial hearings, the court granted defendant's motion for a bifurcated trial. During the merits phase of the trial, the defendant was found guilty of Second Degree Murder while Armed. During the insanity claim, the defendant failed to prove by a preponderance of the evidence that as a result of a mental disease or defect, the defendant could not conform his conduct to the requirements of the law or appreciate the wrongfulness of his conduct.

Significance:

The significance of this case was that it presented a defense of insanity that is rarely raised in criminal trials. This case represented the only insanity case in the Homicide Section that was successfully prosecuted that year. It was even more significant when the court bifurcated the proceedings into a merits phase

and responsibility phase, which had an affect of prosecuting two trials in one case proceeding. Finally, the addition of competing expert witnesses who were psychiatrists and psychologists provided for complex litigation in this homicide case.

2) United States v. Warren Brown, Criminal No. F-6722-91 (1991)
Warren Brown v. United States, No. 93-CF-1658, (DCCA Oct. 10. 1997)

(A Copy of the District of Columbia Court of Appeals Memorandum Opinion and Judgment is Attached Hereto as Attachment 1)

Court – Superior Court of the District of Columbia

Judge – The Honorable Curtis E. Von Kann

Defense Counsel – James A. Wolf, Esquire
9012 Quarry Street
Manassas, Virginia 22110
703-369-2987

Prosecutor – Erik P. Christian

Capsule Summary:

Based upon the decedent's failure to pay a drug debt, the defendant fatally shot the decedent in an alley in the rear of B Street, S.E., Washington, D.C. The case was tried three times before a jury in the third trial found the defendant guilty of first degree murder and related firearms offenses.

During the prior trials, the government presented witnesses who were engaged in the drug sale with the defendant and decedent, but who at the time of the shooting could only suggest defendant's identity based upon his gestures since a mask was worn. Prior to the third trial, the government discovered a seventy-five year old woman who had seen the defendant moments prior to the shooting as he loaded his weapon. Although reluctant, the witness came forward and was able to identify the defendant in an out-of-court line-up conducted in the courtroom during pretrial hearings. The witness was extensively cross-examined during the trial, but consistently identified the defendant as the person she saw loading his gun before the murder. It is believed that this key witness substantially served to secure the guilty verdict at the third trial.

Significance:

This case was significant because the United States Attorney's Office found it imperative to try the case three times before securing a conviction. This decision was based upon the defendant's history and the nature of the instant offense. Many cases in the homicide section were dismissed if two trials on the same offense resulted in hung juries. The office found need to prosecute a third trial in light of the discovery of a new witness in spite of certain credibility problems.

This case was also significant because it represented a rare and unique moment when the trial judge conducted an out-of-court line-up in the courtroom. The judge had allowed the seventy-five year old witness to view a pretrial line-up in the courtroom when she identified the defendant. Generally, line-ups are conducted out of court, and well in advance of the scheduled trial.

3) United States v. Dominick Graham, Criminal No. F-8843-93 (1993)
Dominick Graham v. United States, 703 A.2d 825 (D.C. 1997)

(A Copy of the District of Columbia Court of Appeals Opinion is attached hereto as Attachment 2)

Court – Superior Court of the District of Columbia

Judge – The Honorable Gladys Kessler

Defense Counsel - W. Gary Kohlman, Esquire
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-833-9340

Prosecutor – Erik P. Christian

Capsule Summary:

The defendant and his two accomplices were charged with First Degree Murder while Armed in the stabbing death of another inmate at the Correctional Treatment Facility of the D.C. Jail. The defendant's accomplices entered guilty pleas to lesser included offenses, and one testified for the government at trial.

At trial, the government called other residential inmates as witnesses. The witnesses were extremely reluctant to testify, and provided scant testimony out of fear for their own safety. Many of the witnesses recanted their grand jury testimony, and refused to make in-court identifications of the defendant. The jury, however, found the defendant guilty of Second Degree Murder while Armed. This case was extremely complex based upon the location of the offense and the inherent problem of witness credibility.

Although there existed a credibility issue with the government's witnesses, along with their reluctance to testify, their testimony and the physical evidence proved sufficient to secure a guilty verdict.

Significance:

This case was significant based upon the conviction secured. Unfortunately, the majority of the cases that are investigated in the grand jury where inmates are assaulted or murdered in a penal institution are either dismissed or result in trial acquittals. Witnesses in general are reluctant to testify for safety concerns. When the offense occurs inside a prison, inmates who are witnesses are more reluctant to testify. In the instant case, I was successful in interviewing inmates who were willing to testify in the grand jury and later at trial. Although the witnesses testified in the grand jury, at trial they became reluctant and attempted to recant some of their testimony that identified the defendant's participation in the murder. Notwithstanding these efforts by key witnesses, I was able to secure defendant's conviction. Parenthetically, this case was affirmed on appeal, when the District of Columbia Court of Appeals found, among other things, that appellant had failed to demonstrate that the trial court abused its discretion in denying a motion for a new trial based upon the recanting affidavit of one of the government's key witnesses.

APPELLATE LITIGATION

4) United States v. Donato Battista, Criminal No.88-000001-01 (Argued 1989)
United States v. Donato Battista, 876 F.2d 201 (D.C. Cir. 1989)

(A Copy of the United States Court of Appeals for the District of Columbia Circuit Opinion is attached hereto as Attachment 3)

Court – United States Court of Appeals
for the District of Columbia Circuit

Judges – The Honorable Patricia M. Wald
The Honorable Spottswood W. Robinson III
The Honorable James L. Buckley

Appellant Counsel – Marvin D. Miller, Esquire
1203 Duke Street
Alexandria, Virginia 22314
703-548-5000

Appellee Counsel - Erik P. Christian

Capsule Summary:

On December 10, 1998, appellant voluntarily consented to the search of his train roomette and locked luggage in his Amtrak cabin by Drug Enforcement Agents and Amtrak Police. When a search of appellant's luggage revealed sealed packages of cocaine, he was arrested. At trial, appellant was found guilty by jury of possession with intent to distribute cocaine. He appealed his conviction challenging, among other things, whether he knowingly and voluntarily consented to the search of his roomette and luggage.

Significance:

This case was significant because the court focused on two important issues. The first issue focused on the scope of a search once consent had been found to have been given. With respect to appellant's suitcase, the court specifically held that after consent was provided to search it, further consent was not needed to search the bags found inside. The court found that a search of the contents of the bag inside the suitcase was reasonably within the confines of the authority appellant provided in his consent. The court indicated that this would obviate the need of seeking continued consent for the search of each item found inside the suitcase.

The second issue of significance was the court's re-emphasis that a narcotics-detection dog's alert, by its identification of illegal drugs in concealed compartments, constituted articulable reasonable suspicion that criminal activity was afoot to justify a brief detention of a suspect. The court further stated that where it was established that the dog had been trained and qualified to detect illegal drugs, and that a drug detection was validly conducted, then that alone could provide probable cause for seeking a warrant to search a compartment. The case of Battista was significant because it established the

parameters of a container search, and confirmed another factor in establishing probable cause when using a narcotics-detection dog.

An additional significant factor was that this appeal in the D.C. Circuit was assigned to me when I first arrived in the office. I was later provided two other appeals that I briefed and argued in this court. The assignment of these appellate cases was provided to AUSAs that the office could rely on to efficiently brief and argue in the favor most advantageous to the United States.

5) United States v. Dennis J. Townsend, Criminal No. M-2990-86 (Argued 1989)
United States v. Dennis J. Townsend, 559 A.2d 1319 (D.C. 1989)

(A Copy of the District of Columbia Court of Appeals Opinion is attached hereto as Attachment 4)

Court – District of Columbia Court of Appeals

Judges- The Honorable James A. Belson
The Honorable John A. Terry
The Honorable George r. Gallagher

Appellant Counsel – Robert E. Sanders, P.C.
7125 Sixteenth Street, N.W.
Washington, D.C. 20012
(Telephone number unknown)

Appellee Counsel – Erik P. Christian

Capsule Summary:

On March 15, 1986, Officers of the Metropolitan Police Department responded to the 4400 block of Georgia Avenue, N.W. for an armed assault of a man with a gun. Upon arriving the officers located appellant in an apartment building. Appellant informed the officers that he had a gun, but that it was inoperable. A Crime Scene Search Officer seized the gun from appellant's apartment and found that it was inoperable because the firing pin and spring mechanisms were not intact. Appellant was arrested and charged, with among other offenses, possession of an unregistered firearm in violation of D.C. Code 6-2311 (a)(1981). Appellant was found guilty of violating the statute, and appealed the conviction claiming that the government failed to prove beyond a reasonable

doubt that he violated the statute since one could not demonstrate that the gun was operable or intended to be used as a firearm. Finding appellant's argument on appeal unpersuasive, the court affirmed the conviction.

Significance:

The significance of this appellate decision was that the court needed in the instant case to reaffirm its holding that registration requirements for firearms were not limited to those that were operable. The court maintained the registration requirement for weapons that could be redesigned, remade or readily converted or restored to operability. Much of the appellate court argument centered on whether the statute could be violated by one being in the possession of a gun frame, or another part of it that could be readily restored to operability. Based upon this decision and the seminal case, our office was able to charge this offense in many other cases where the firearm was found inoperable.

This case was also significant because it was a brief that was transferred to me on short notice, and I was able to draft the brief and successfully argue the case, while being assigned other cases in the Division. At the time I was assigned in the Appellate Division, I averaged approximately one brief a week to draft and prepare for argument.

19. Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation. Describe the nature of your participation in each instance described, but you may omit any information protected by the attorney-client privilege (unless the privilege has been waived).

The most significant legal activity that I have been involved in includes my participation as co-counsel in the case of United States v. Russell E. Weston, Jr., Crim. No. 98-357(EGS). In this case, the defendant was charged in 1998 with the killing of two police officers inside the United States Capitol. As of to date, the defendant has not yet been arraigned on those charges. The issue that is presently before the court involves the defendant's competency to stand trial. The defendant was committed to the custody of the Attorney General for hospitalization and treatment pursuant to 18 U.S.C. 4241(d). The defendant has not received treatment, and has refused medical treatment. Without treatment, the defendant will not regain competency to stand trial.

As co-counsel, I was involved in scores of hearings and conducted numerous investigations in this case. The issue that is directly before the court now is whether the court can force medication upon the defendant in efforts to restore

his competency to stand trial. This appears to be an area of first impression, where it will be determined whether a court can compel medication in a pre-trial stage to restore the competency of a defendant charged with capital crimes.

20. Have you ever held judicial office? If so, please give the details of such service, including the court(s) on which you served, whether you were elected or appointed, the dates of your service, and a description of the jurisdiction of the court. Please provide four (4) copies of all opinions you wrote during such service as a judge.

I have never held judicial office.

a. List all court decisions you have made which were reversed or otherwise criticized on appeal.

I have never made court decisions.

21. Have you ever been a candidate for elective, judicial, or any other public office? If so, please give the details, including the date(s) of the election, the office(s) sought, and the results of the election(s).

Yes, I have been an unsuccessful candidate for judicial office. In December 1996, I applied for the position of Magistrate Judge for the United States District Court for the District of Columbia, and was not selected for appointment to that position.

On September 18, 1998, I submitted my original application to the D.C. Judicial Nomination Commission for an appointment to the bench of the Superior Court of the District of Columbia, and was not selected. On June 29, 1999, I submitted a letter in application to the Judicial Nomination Commission upon notice of a judicial vacancy, but was not selected by the Commission. On June 16, 2000, I submitted a letter in application to the Judicial Nomination Commission upon notice of a judicial vacancy, but was not selected by the Commission.

22. Political activities and affiliations.

(a) List all public offices, either elected or appointed, which you have held or sought as a candidate or applicant.

None

(b) List all memberships and offices held in and services rendered to any political party or election committee during the last ten (10) years.

None

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity during the last ten (10) years.)

i) In 1998, I made a campaign contribution in the approximate amount of $150 to the campaign of Eleanor Holmes Norton, for Washington, D.C. Delegate to Congress.

ii) On July 9, 2000, I was solicited and contributed $150 to the Democratic National Committee for the Presidential election of Al Gore.

23. Have you ever been investigated, arrested, charged, held or convicted (include pleas of nolo contendere) by federal, State, local, or other law enforcement authorities for violations of any federal, State, county or municipal law, regulation, or ordinance, other than for a minor traffic offense?

Yes

On May 27, 1989, I was charged by criminal complaint by my former fiancé for a violation of Maryland law. Following incidents of jealous rages in which my car was scratched and the tires slashed, I advised my former fiancé that I would not marry her. On May 27, she followed me to the White Flint shopping mall in Montgomery County, Maryland. I went into the mall and returned later to my car. As I attempted to exit the mall, she positioned her car and blocked my car to prevent me from leaving the mall. She briefly moved her car away, but returned to block my car when I attempted to leave again. At that point she rammed my car as I exited from the parking lot. Thereafter, she filed a criminal complaint alleging that I had hit her car, claiming that she was assaulted and her car

damaged in the collision. On June 1, 1989, I filed counter charges stating that she had hit my car. (Attachment 5)

The complaint that was filed by my former fiancé served as the charges that were dismissed by the State's Attorney's Office in Maryland. At that time, the United States Attorney's Office in the District of Columbia, with whom I was employed, investigated the matter, determined that the charges were without merit and continued my employment.

24. Have you or any business of which you are or were a officer ever been a party or otherwise involved as a party in any other legal or administrative proceedings. If so, give the particulars. Do not list any proceedings in which you were merely a guardian ad litem or stakeholder. Include all proceedings in which you were a party in interest, a material witness, were named as a coconspirator or co-respondent, and list any grand jury investigation in which you appeared as a witness.

No

25. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, bar or professional association, disciplinary committee, or other professional group? If so, provide the details.

Yes

The District of Columbia Office of Bar Counsel filed a petition on January 17, 1994, charging that I violated Rule 3.4(e) of the D.C. Rules of Professional Conduct, in that, in my closing argument, in the case of United States v. Cornell Foster, 91 CR 266-02 (D.D.C.) (982 F.2d 551 (D.C. Cir. 1993)), I "alluded to a matter that [I] did not reasonably believe was relevant or that was not supported by admissible evidence, ..." On May 9, 1994, an evidentiary hearing was held before a Board of Professional Responsibility Hearing Committee, who on December 4, 1995, found that Bar Counsel had not proven a violation of the disciplinary rules and recommended that the charge be dismissed. On April 22, 1996, the full Board on Professional Responsibility adopted the findings of the Hearing Committee and ordered that the petition be dismissed. (A copy of the Report and Recommendations of the Hearing Committee, and a copy of the Order of the Board of Professional Responsibility are attached hereto as Attachment 6)

II. POTENTIAL CONFLICTS OF INTEREST

1. Will you sever all connections with your present employer(s), business firm(s), business association(s), or business organization(s) if you are confirmed?

   Yes

2. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with your law firm, business associates, or clients.

   As a federal government employee, I participated in the Thrift Savings Plan, which is a retirement and investment plan. I expect to receive income from this plan once I retire from government service. Since my separation from the federal government in 1999, I was no longer eligible to contribute to the plan; however, my account maintains contributions that were made to the plan.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest.

   I was an Assistant United States Attorney who prosecuted criminal cases. As Deputy Mayor for Public Safety and Justice, and Legal Counsel to the Mayor, I was involved in many issues regarding the administration of the government in Washington, D.C., and the delivery of services to various constituents. Should any of the matters that I was intimately and formerly involved with arise while I am a member of the judiciary I will recuse myself from the matter.

4. Describe any business relationship, dealing or financial transaction which you have had during the last ten (10) years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest.

   My wife, Julieanne Himelstein, is an Assistant United States Attorney for the District of Columbia. Should any matters appear before me on the judiciary that my wife has been, or is involved in, I will recuse myself from that matter.

5. Describe any activity during the last 10 years in which you have engaged for the purposes of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

As Deputy Mayor for Public Safety, my office supported the passage of the Sex Offender Registration law. This matter is presently before the Council of the District of the Columbia. My office also supported the expansion of rights for victims of crime, and sought additional funding for this effort.

As Deputy Mayor, my office participated in the Criminal Justice Coordinating Council that consisted of every criminal justice agency in the District of Columbia. One of the concerns of the Mayor included focusing on the management of resources in the courts. The Mayor has sought modification of the current policy of calling police officers to court to testify in criminal cases. This modification is sought to provide for more officers on the street, and in their patrol service areas, rather than their waiting in court for cases to be called for hearings or trials.

As Deputy Mayor, my office also supported the efforts by the Court Services and Offender Supervision Agency to provide for sanction centers, where released defendants and probationers are met with swift and appropriate sanctions should they violate the terms of their conditions of release.

6. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service as a judge? If so, explain.

   No

7. Explain how you will resolve any potential conflicts of interest, including any that may have been disclosed by your responses to the above items. Please provide three (3) copies of any trust or other relevant agreements.

   Should any conflict arise, I will follow the Code of Judicial Conduct and seek the advice of the appropriate ethics officials.

8. If confirmed, do you expect to serve out your full term?

   Yes

III. FINANCIAL DATA

Financial Data maintained on file in Committee offices.

IV. DISTRICT OF COLUMBIA REQUIREMENTS

Supplemental questions concerning specific statutory qualifications for service as a judge in the courts of the District of Columbia pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. Code Section 11-1501(b), as amended.

1. Are you a citizen of the United States?

   Yes

2. Are you a member of the bar of the District of Columbia?

   Yes

3. Have you been a member of the District of Columbia bar for at least 5 years? (Give year in which you became a member.)

   Yes (1988)

4. If the answer to No. 3 is "No" –

   (a) Are you a professor of law in a law school in the District of Columbia? N/A

   (b) Are you an attorney employed in the District of Columbia by the United States or the District of Columbia? N/A

   (c) Have you been eligible for membership in the bar of the District of Columbia for at least 5 years? N/A

   (d) Upon what grounds is that eligibility based? N/A

5. Are you a bona fide resident of the District of Columbia?

   Yes

6. Please list the addresses of your actual places of abode (including temporary residences) with dates of occupancy for the last five (5) years.

   1926 Randolph Street, N.E., Washington, D.C. (January 1993 to October 1997)
   (maintained family abode with additional rental residence in Virgin Islands – 9G Estate St. Peter, St. Thomas, USVI ;10/95 to 10/97)

   5011 16th Street, N.W., Washington, D.C. (October 1997 to October 2000)

   Washington, D.C. (October 2000 to present)

7. Have you maintained an actual place of abode in such area for at least five (5) years?

   Yes

8. Are you a member of the District of Columbia Commission on Judicial Disabilities and Tenure or the District of Columbia Judicial Nomination Commission?

   No

9. Have you been a member of either of these Commissions within the last 12 months?

   No

10. Please provide the committee with four (4) copies of your District of Columbia Judicial Nomination commission questionnaire.

AFFIDAVIT

Erik P. Christian, being duly sworn, hereby states that I have read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

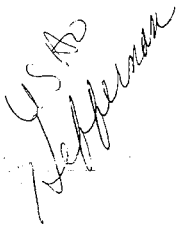
Erik P. Christian

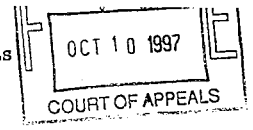
Subscribed and sworn before me this 10th day of April, 2001.

Julia Johnson
Notary Public

JULIA JOHNSON
Notary Public
My Commission Expires March 31, 2005

Attachment 1





DISTRICT OF COLUMBIA COURT OF APPEALS

No. 93-CF-1658

WARREN A. BROWN, APPELLANT,

v. F6722-91

UNITED STATES, APPELLEE.

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

(Hon. Curtis E. von Kann, Trial Judge)

(Submitted October 1, 1997 Decided October 10, 1997)

Before FARRELL, KING and RUIZ, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

Warren A. Brown was charged, by a four-count indictment, of 1) first degree murder while armed in violation of D.C. Code §§ 22-2401 and -3202 (1996); 2) carrying a pistol without a license, in violation of D.C. Code § 22-304 (a) (1996); 3) possession of a firearm during a crime of violence or dangerous offense, in violation of D.C. Code § 22-304 (b) (1996); and 4) assault with a dangerous weapon, in violation of D.C. Code § 22-502 (1996). Brown was tried three times[1] before a jury in the third trial found him guilty of first degree murder while armed and possession of a firearm during a crime of violence. Brown challenges an in-court identification as unreliable on evidentiary grounds. We affirm.

On the night of May 9, 1991, a group of people including the decedent, Roosevelt Bridges, were gathered in an alley adjacent to Benning Road. The alley was a regular "hang-out" where people gathered to drink, buy and use drugs. A person wearing dark clothing and a ski mask, holding a gun, ran up the alley and shot

[1] The first trial, held June 22 - July 6, 1992, ended when Judge Harold Cushenberry granted Brown's motion for judgment of acquittal on the charge of carrying a pistol without a license and granted a mistrial on the remaining charges because the jury was unable to reach a unanimous verdict.

At the conclusion of the second trial, held May 5 - May 25, 1993, Judge Reggie B. Walton accepted a partial verdict from the jury. The jury found appellant not guilty of the charge of assault with a dangerous weapon. Judge Walton granted Brown's motion for a mistrial because the jury could not reach a verdict on the remaining charges.

Roosevelt Bridges four times. Bridges died from the gunshot wounds. During the first two trials the government was unable to establish conclusively that Brown was the shooter.[2] Edna Bennet did not testify at the first two trials, but was called as a government witness for the third trial. Prior to her in-court testimony, she participated in an in-court lineup, out of the presence of the jury, requested by Brown's attorney. She identified Brown as the man who parked his car and loaded a gun, one block from the alley, on the eve of the shooting.

Bennet testified that on the day of the murder she observed Brown drive up and park directly in front of her house. When he first pulled up it was evening, but not yet dark, so that she was able to "see him very well." An altercation ensued where Bennet explained to Brown that he could not park in front of her house because she was disabled. Brown proceeded to circle the block and park across the street from Bennet's house under a lamppost. Bennet pretended to go inside her house, but instead continued to watch Brown through the vines on her porch. She observed him take bullets out of the car's glove compartment and load them into a gun he retrieved from the trunk, put on a long black coat and pull a cap over his face. Bennet then took her medication and fell asleep. She was woken by the sound of gun shots. Five days later, she saw Brown when he drove up in his car and said to her, "Ms. Bennet, you remember me?" She replied, "Yes. I remember your ass . . . I am going in the house to call the police and lock you up." At the trial, Bennet identified Brown as the person she observed from her porch.

A defendant can challenge an in-court identification on two grounds. First, he can challenge the identification as an unconstitutional violation of due process under the *Manson v. Braithwaite* doctrine. 432 U.S. 98 (1977). Second, a defendant may challenge the admission of such testimony on evidentiary grounds by timely objecting on the ground that "under the law of evidence testimony is so inherently weak or unreliable as to lack probative value." *Sheffield v. United States*, 397 A.2d 963, 966 (D.C. 1979) (citing *Reavis v. United States*, 395 A.2d 75, 78 (1978)). Brown does not challenge the in-court lineup, recognizing in his brief that the trial court properly exercised its authority and discretion, at the request of the defense, to hold an informal lineup out of the presence of the jury. Thus, Brown cannot challenge the in-court identification on due process grounds.[3]

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[2] At the first two trials the government presented the testimony of individuals who were in the alley drinking or using drugs, or who were unable to see the assailant's face because he wore a mask.

[3] Brown cannot rely on the *Mason v. Braithwaite* doctrine because the government did not conduct any identification proceedings. *See Sheffield*, *supra*, 397 A.2d at 966 (upholding principle that "pre-

3

Brown claims that the trial court should have excluded Bennet's in-court identification because her identification of Brown during the lineup was so inherently unreliable as to lack probative value. A trial court's determination that proffered evidence is relevant is reviewable only for abuse of discretion. *See Reavis*, *supra*, 395 A.2d at 78 (citing *United States v. Carter*, 173 U.S. App. D.C. 54, 73, 522 F.2d 666, 685 (1975)). In determining whether an in-court identification is admissible under the law of evidence this court applies traditional relevance analysis. *See United States v. Hunter*, 692 A.2d 1370, 1376 (D.C. 1997) (citing *Reavis*, *supra*, 395 A.2d at 78). Identification testimony is relevant if "it has a tendency to establish the proposition sought to be proved, or 'to make the existence or nonexistence of a fact more or less probable than would be the case without that evidence.'" *Id.*

Brown argues that Bennet's identification was unreliable because she was a 75 year old woman, who wore glasses and used medication, and did not have the opportunity to identify Brown until the in-court lineup, two years after the observation. She also took a long time to identify Brown during the lineup. Furthermore, after identifying Brown at the lineup Bennet stated, "You all forgive me if I'm wrong" and "Lord forgive me if I'm wrong."

The trial court did not abuse its discretion in admitting Bennet's in-court identification. Its determination that Bennet's lineup identification and testimony were probative is supported by the record. The judge reviewed Bennet's identification during the lineup to ensure that the ensuing in-court identification was relevant and reliable. After taking into account Bennet's physical attributes, including her age and eyesight, the trial court found that Bennet "has indicated sufficient definiteness about her identification to be permitted to give that testimony for the jury's evaluation." The trial court noted that the "God help me if I am wrong" statement could be interpreted in a number of ways including that Bennet realized the significance of her statement or that she was uncertain. As the trial court correctly noted, these objections go to weight and not to admissibility. *See Hunter*, *supra*, 692 A.2d at 1376 (noting that the types of objections Hunter claimed on appeal pertained to weight and not admissibility). The trial court noted that Bennet's possible lack of certainty could be called to the jury's attention during cross-examination.

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trial identification or recognition of an accused by a witness in the absence of participation by the police or prosecution does not bring such identification within the ambit of the due process principles set forth in *Manson v. Braithwaite*.") The in-court lineup in this case was conducted at the request of the defense. Brown's reliance on *Jackson v. United States*, 623 A.2d 571 (D.C. 1993), *cert. denied*, 510 U.S. 1030 (1993), therefore, is misplaced.

4

At trial, Brown's counsel was unable to elicit all of the circumstances surrounding the in-court lineup identification because Bennet was unresponsive when questioned about the procedure.[4] Although Bennet was a difficult witness, Brown's attorney could have pursued this line of questioning further, but made a strategic decision not to do so. During his closing argument, defense counsel noted that Bennet did not answer his questions about the lineup. Furthermore, the defense fully explored the infirmities in Bennet's testimony on cross examination. Brown's attorney asked if Bennet was wearing her glasses at the time and what medication she was taking. He questioned her about her identification testimony at length, eliciting responses that she was peeping through vines, and it was dark when she saw Brown load his gun. He also asked her why she did not call the police on the night of the incident.

More importantly, defense counsel brought to the jury's attention Bennet's possible bias towards Brown because of the altercation they had concerning parking on the day in question. He elicited testimony that she had an on-going problem with people parking in front of her house. He asked her, "You have a lot of problem [sic] with a lot of people parking in front of your house?" and "Do you fuss with him about where he parks?"

After the in-court lineup, Brown's trial counsel also objected to Bennet testifying and identifying Brown in front of the jury, on the ground that it would be "very suggestive" to have Brown as the only participant of the lineup sitting beside defense counsel in court. He contended that Brown's presence in the courtroom would be suggestive enough to prompt Bennet's in-court

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[4] When counsel asked her how long it took her to identify Brown during the lineup, and how close she had to get to Brown to identify him, the following ensued:

> Q. Okay. Do you remember how long it took you to identify--
> A. Now why? I will tell you why. Ke [sic] keep trying to quinch his eyes up so I couldn't see them. . . .
> Q. Do you know how long it took you to identify Mr. Brown
> A. Listen. Listen I didn't want to put something on somebody that they didn't [sic] done. Just like I said, God forbid me.
> Q. Okay. Ms. Bennet, do you remember how close you were standing when you finially [sic] picked Mr. Brown out?
> A. Listen, everybody open their eyes to let me look in them except Mr. Brown. He tried to push them back up in his head. He even tried to hide his lip. . . .
> Q. Okay. So you came over and do you remember how close before you got a look at his green eyes?
> A. ... but what's eating on you and hurting you so bad is I identified him; didn't I?

During Bennet's direct examination, the government asked no questions about her lineup identification or testimony.

identification. The trial court overruled the objection, finding that the probability of an unreliable in-court identification was lessened by Brown's change of clothing. Brown wore a blue sweatshirt when Bennet identified him during the lineup, but had changed to a white dress shirt when Bennet identified him in front of the jury. The trial court thought the change of clothing minimized the potential that Bennet would identify Brown solely because, moments before, she had picked the man in the blue sweatshirt out of a lineup.

Bennet's identification of Brown was not so unreliable as to be inadmissible on evidentiary grounds. Bennet had sufficient opportunity to observe Brown within a close distance. Moreover, her testimony and identification were highly probative. Her testimony placed Brown near the scene of the shooting a few hours before it happened, controverting Brown's alibi testimony. At the first two trials, no one had been able to positively identify the shooter because he wore a mask. Bennet's testimony made the fact to be proven -- that Brown was the shooter -- more probable than it would have been without her testimony. Nothing illustrates the relevance of her in-court identification more than the ensuing conviction. As Brown recognizes in his brief, it was Bennet's testimony that gave the third jury sufficient evidence of identification to convict.

The judgment in this case is,

Affirmed.

FOR THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

Copies to:

Honorable Curtis E. von Kann

Clerk, Superior Court

David C. Gray, Esquire
3920 47th Street, NW
Washington, DC 20016

John R. Fisher, Esquire
Assistant United States Attorney

Attachment 2

Dominick GRAHAM, Appellant,
v.
UNITED STATES, Appellee.

Nos. 94-CF-912, 96-CO-522.

District of Columbia Court of Appeals.

Argued June 18, 1997.

Decided Dec. 4, 1997.

Defendant was convicted, in the Superior Court, Gladys Kessler and Henry H. Kennedy, Jr., JJ., of second-degree murder while armed. Defendant appealed. The Court of Appeals, Reid, J., held that: (1) defendant did not show actual bias of juror; (2) defendant was not entitled to new trial, though government witness recanted his testimony one year after trial; and (3) trial court did not abuse its discretion in refusing to reinstruct jury or give instruction on lesser included assault offense, in response to question from jury.

Affirmed.

[1] JURY ⇐149
230k149
When juror's impartiality is questioned, burden is on complaining party to demonstrate that juror failed to answer honestly a material question on voir dire, and to further show that a correct response would have provided valid basis for challenge for cause.

[2] JURY ⇐131(18)
230k131(18)
Only reasons for juror's concealing of information which affect juror's impartiality will be considered to affect the fairness of trial. U.S.C.A. Const.Amend. 6.

[3] JURY ⇐149
230k149
Defendant did not meet burden of proving actual bias by juror denied defendant's right to fair trial, though after jury deliberations began juror remembered that she knew government witness; juror had previously seen witness only a couple of times and had not had significant conversations with him, she had not seen him in three to five years, and she told trial judge her prior contacts would not affect her weighing of witness' testimony. U.S.C.A. Const.Amend. 6.

[4] JURY ⇐97(1)
230k97(1)
Mere conjecture and suspicion cannot serve as basis for disqualifying juror for actual bias.

[5] JURY ⇐135
230k135
Defendant was not deprived of right to use peremptory challenge to exclude juror, though juror though did not remember until after jury deliberations began that she knew government witness, as defendant did not show that juror was actually biased.

[6] CRIMINAL LAW ⇐938(1)
110k938(1)
To be entitled to new trial based on newly discovered evidence, defendant must show: (1) evidence was discovered since trial; (2) defendant was diligent in attempting to procure the newly discovered evidence; (3) evidence relied on is not merely cumulative or impeaching; (4) evidence is material to issues involved; and (5) evidence is of such nature that in new trial, it would probably produce acquittal.

[7] CRIMINAL LAW ⇐959
110k959
Generally, hearing is not required on motion for new trial.

[8] CRIMINAL LAW ⇐913(1)
110k913(1)
In deciding whether interest of justice requires new trial, trial court considers ruling from perspective of "thirteenth juror" to determine whether fair trial requires that the claim presented in motion for new trial be made available to jury.

[9] CRIMINAL LAW ⇐1156(1)
110k1156(1)
Court of Appeals reviews trial court's ruling on motion for new trial for abuse of discretion.

[10] CRIMINAL LAW ⇐1158(1)
110k1158(1)
Court of Appeals will sustain trial court's denial of new trial motion if it is reasonable and supported by evidence in record.

[11] CRIMINAL LAW ⇐945(2)
110k945(2)
Defendant was not entitled to new trial, though government witness recanted his testimony one year after defendant was convicted of second degree murder while armed, as defendant did not show that new trial

would probably produce acquittal; jury apparently convicted defendant as aider and abettor, and testimony of three nonrecanting witnesses established that defendant aided in crime by concealing homemade knife used to stab victim. D.C.Code 1981, §§ 22-2403, 22-3202.

[12] CRIMINAL LAW ⚖959
110k959
Motions judge did not abuse discretion in denying defendant's motion for new trial, which was based on recantation of government witness in one-page affidavit one year after defendant's conviction for second-degree murder while armed, though motions judge had not presided over trial and did not hold hearing on motion, as witness offered no evidence for claim he testified under duress, and his claim of not witnessing victim's killing was belied by his pleading guilty to manslaughter while armed in connection with victim's death. D.C.Code 1981, §§ 22-2403, 22-3202.

[13] CRIMINAL LAW ⚖863(1)
110k863(1)
Trial court did not abuse its discretion in refusing to reinstruct jury, in response to jury's question regarding finding defendant guilty of first or second degree murder while armed if jury believed defendant aided and abetted another person without knowing other person had intent to kill; trial court had already provided instructions regarding relevant terms and was concerned that jury's question was so specific that supplemental instruction would dictate outcome of case. D.C.Code 1981, §§ 22-2403, 22-3202.

[14] HOMICIDE ⚖30(1)
203k30(1)
To establish guilt as aider and abettor in murder, it was not necessary to show that defendant knew or could have reasonably contemplated that principal intended to kill the decedent.

[15] CRIMINAL LAW ⚖863(1)
110k863(1)
Trial court did not abuse its discretion by denying defendant's request, made during jury deliberations and after question from jury, for instruction on lesser included assault offense; trial court did not believe such instruction was responsive to jury's question regarding finding defendant guilty of first or second degree murder while armed if jury believed defendant aided and abetted another person without knowing other person had intent to kill. D.C.Code 1981, §§ 22-2403, 22-3202.

*827 Chris Asher, Washington, DC, for appellant.

Elizabeth H. Danello, Assistant United States Attorney, with whom Eric H. Holder, Jr., United States Attorney at the time the brief was filed, and John R. Fisher and Thomas J. Tourish, Jr., Assistant United States Attorneys, were on the brief, for appellee.

Before WAGNER, Chief Judge, and TERRY and REID, Associate Judges.

REID, Associate Judge:

After a jury trial, appellant Dominick Graham was convicted of the lesser included offense of second degree murder while armed, in violation of D.C.Code § § 22-2403, -3202 (1996). [FN1] He filed a timely appeal, contending that (1) the trial court should have declared a mistrial because a juror failed to disclose until jury deliberations that he knew a government witness; (2) his motion for a new trial, based upon the recantation of a government witness, should have been granted; and (3) the trial court erred in failing to give the jury additional instructions during jury deliberations. We affirm.

FN1. Graham was acquitted of first degree murder while armed and carrying a dangerous weapon. He was sentenced to fifteen years to life in prison.

FACTUAL SUMMARY

Graham, an inmate in the Central Treatment Facility of the District of Columbia jail, was charged with carrying a dangerous weapon, and first degree premeditated murder while armed of another inmate, William Thomas. Two other individuals, Christopher Thomas and Edward Williams, also were charged with the murder. Christopher Thomas admitted stabbing the decedent on August 6, 1993, and entered a guilty plea to second degree murder while armed. Williams entered a plea of guilty to voluntary manslaughter while armed, and testified against Graham.

During his testimony at Graham's June 1994 trial, Williams described Graham's role in the murder. He said he was "very certain" that Graham "was involved in [the] incident." On the day of the murder, Williams saw Graham and Christopher Thomas standing together in the day room. He approached the two men and "asked them what was going on." Graham said: "[w]e're about to smash this guy." Subsequently, he saw Graham talking with William Thomas, and

observed Christopher Thomas come up behind the decedent and stab him several times with a "shank", a homemade knife. Williams also saw Graham stab the decedent once with a shank and watched him punch the decedent several times. Williams punched the decedent three or four times in *828 the face and head and "stomped [him] about three times." Soon, Graham left the area of the day room where the murder took place and climbed to the second tier. Christopher Thomas threw his shank up to Graham. Later, Williams and Graham discussed plans to lie about the murder. [FN2]

FN2. On cross-examination, Williams admitted that he told a police detective he was asleep at the time of the murder.

Other witnesses confirmed Graham's involvement in the murder. Inmate Jimmy McGowan saw Graham and the decedent swing at each other. He also heard Christopher Thomas call Graham and saw him throw a knife up to Graham. Juan Butler observed the decedent and Graham together, looked as Graham proceeded to the second tier, and thought he heard Christopher Thomas tell Graham to "put this in my room" as he threw an object up to Graham. Barry Campbell heard someone call the name "Dominick" and say: "get rid of this" as he watched a man on the second tier bend down.

ANALYSIS

The Juror Bias Issue

Graham contends that the trial court should have declared a mistrial because juror number 292 failed to disclose during the voir dire that he knew Williams. The jury began deliberations on the morning of Friday, June 17, 1994. On Monday, June 20, 1994, juror number 292 called the trial court to report that his car had been stolen, and that he was stranded in Richmond, Virginia and unable to return to the District of Columbia. He had several conversations with court personnel, including the trial judge, regarding ways in which he could get back to the District that day. However, he never made it to court that Monday. When he arrived in court on Tuesday, June 21, 1994, the juror reported suddenly remembering that he knew government witness Williams. The trial judge decided to reopen the voir dire to question the juror. The court questioned the witness and offered the prosecutor and defense counsel an opportunity to inquire, but neither had any questions. The juror told the court that he knew "Everett" Williams "through [his] daughter," but did not recognize him until he saw his address on one of the trial exhibits given to the jury at the time deliberations commenced. [FN3] Williams and the juror's daughter were classmates when they were teenagers, but did not date. However, Williams had visited the juror's house on approximately two occasions about three to five years before Graham's trial. The juror stated that he "really didn't know [Williams] that well, ... or even [try] to get to know him that well."

FN3. The record is silent as to why the juror remembered Williams through his address.

When the trial judge asked the juror:

> [d]o you think that the fact that he came by your house a few times and that he was a friend of your daughter's, would that affect you in weighing the believability or the unbelievability of his testimony[,]

the juror replied:

> I don't really think so. It's just that I thought I would mention it, ... that I had been in his company a few times.

The trial court asked government and defense counsel whether they wished to pose any questions to the juror. Both responded in the negative. However, defense counsel pressed for a mistrial, saying, inter alia:

> given who the witness is--and I remain somewhat taken aback by the lateness of the disclosure--that Mr. Graham's position remains the same that the Court strike the juror and declare a mistrial.

Defense counsel also maintained that had the juror's knowledge of Williams been disclosed during the voir dire, defense counsel would have "exercised a peremptory strike if he was not successful in prevailing upon the Court to have this juror removed for cause."

Based upon the trial court's conversations with the juror while he was in Richmond regarding his efforts to get back to the District, the trial judge described the juror as "extremely conscientious" and credited his testimony. The trial judge stated, in part:

> [I] know he's a conscientious person, he's not trying to get out of this jury or else he wouldn't have appeared here this *829 morning and he wouldn't have been so cooperative yesterday. Certainly, I too am taken aback that he didn't recognize Mr. Williams. And I recognize Mr. Williams's central role in this trial. Pretty hard not to. It's not surprising to me that he didn't recognize him by name. That is a very common name.
>
> [I] think when you are the parent of a teenager who is probably bringing a whole slew of young men and women into and out of the house and the teenager

doesn't have a notably bad or good relationship with one of many other teenagers, it is not incredible to me that he wouldn't recognize that young man as just another 17 or 19-year-old who was coming by the house. He obviously didn't have a serious relationship with his daughter and he obviously didn't have a negative relationship with his daughter or the juror would have focused on that. I think he was very clear, when I asked him the question, that his acquaintanceship with that young man--I'm not sure it even rises to the level of an acquaintanceship--would not affect him.

Based on all of these ... facts that I know about this juror, I don't think he has been tainted and I think he has demonstrated both by his conduct yesterday and by bringing this information to my attention that he would be candid with the Court....

The trial judge denied the request for a mistrial and instructed the juror "not to reveal or discuss in any way that you had this brief acquaintanceship with Mr. Williams at [your] home...."

[1][2] We have said previously that "[t]he right to trial by an impartial judge or jury is fundamental and deeply embedded in American jurisprudence." Hughes v. United States, 689 A.2d 1206, 1207 (D.C.1997). Whenever a juror's impartiality is questioned, the trial judge is obligated, at least, "to reopen the voir dire to determine whether actual bias existed." Id. at 1210; see also Smith v. Phillips, 455 U.S. 209, 215, 102 S.Ct. 940, 944-45, 71 L.Ed.2d 78 (1982); Young v. United States, 694 A.2d 891, 894 (D.C.1997). A hearing to determine whether the juror is biased is essential because "[t]he seating of an actually biased juror is a structural error not subject to the harmless error rule." Id. (citing Hughes, supra, 689 A.2d at 1210). The burden is on the complaining party to "demonstrate that a juror failed to answer honestly a material question on voir dire, and then [to] further show that a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984). Only reasons for concealing information which affect a juror's impartiality will be considered to affect the fairness of the trial. Id. Furthermore, " 'following a proper hearing, the determination of juror bias or prejudice lies particularly within the discretion of the trial court, reversible only for a clear abuse of discretion, and the findings of fact underlying that determination are entitled to great deference.' " Young, supra, 694 A.2d at 894 (quoting Hill v. United States, 622 A.2d 680, 683-84 (D.C.1993)).

[3][4] Here, upon learning that juror number 292 suddenly remembered that he knew Williams, the trial court immediately called the juror for questioning. From the juror's responses to the trial judge's questions, it is clear there was no significant relationship between the juror and the witness. Indeed, the record contains no facts to support a finding of actual bias. [FN4] The juror had last seen the witness Williams three to five years before Graham's trial. When asked why he did not recognize Williams, the juror said: "It's been so long since I had seen him." Williams was a classmate of the juror's then teenage daughter, but the juror remembered seeing him at his house only a couple of times and "really didn't know [him] ***830** that well, ... or even [try] to get to know him that well." Significantly, when the trial judge inquired whether the juror's prior contact with Williams would "affect [him] in weighing the believability or the unbelievability of his testimony," the juror stated: "I don't really think so."

FN4. Graham also argues that "[t]he trial judge failed to realize that, if the juror could not recognize the witness by name or by face then, the claim that he recognized him only by his address was suspect and, indeed, dubious." Graham had an opportunity to question the juror, or request that the trial court pose the questions, during the reopened voir dire. However, he chose not to pose any questions to the juror, and there is nothing in the record that suggests any meaningful tie between the juror and the witness. Mere conjecture and suspicion cannot serve as a basis for disqualifying a juror for actual bias.

[5] The trial court credited the juror's responses, characterized him as "conscientious", found no "serious" or "negative relationship" between the juror's daughter and Williams, and concluded that "he has [not] been tainted" as a juror. " 'Our review is deferential because the question of prejudice turns substantially on the judge's appraisal of the juror's demeanor....' " Young, supra, 694 A.2d at 894 (quoting Hill, supra, 622 A.2d at 684). On the record before us, we cannot conclude that the juror, who had previously seen Williams only a couple of times, who had no significant conversations with him, and who had not seen him in three to five years, "failed to answer honestly a material question on voir dire." [FN5] McDonough, supra, 464 U.S. at 556, 104 S.Ct. at 850. Thus, we see no reason to disturb the trial court's findings. Accordingly, we conclude that Graham has not sustained his burden to prove actual bias. [FN6]

FN5. On the record before us, we cannot fault the trial

court for failing to call Williams to question him regarding his prior contact with the juror.

FN6. Graham also complains that he was "deprived ... from exercising his right to peremptory challenge to exclude [the juror]." However, as we said in Lyons v. United States, 683 A.2d 1066 (D.C.1996), "the belated discovery of information about a juror which would have caused the defendant to use a peremptory challenge against her is an insufficient basis for reversing the denial of a motion for a mistrial." Id. at 1072; (citing Harris v. United States, 606 A.2d 763, 765-67 (D.C.1992)). Moreover, "the possible deprivation of the exercise of a peremptory challenge does not mandate reversal because the relevant inquiry is whether the juror was actually biased against the defendant." Id. at 1071 (quoting Harris, supra, 606 A.2d at 766 n. 5). Because we sustain the trial court's finding that the juror was not actually "tainted" or biased, Graham's contention regarding deprivation of his right to exclude Williams by exercising a peremptory challenge must also fail.

The Recanting Witness Issue

Graham argues that the trial court erred in denying his motion for a new trial based upon the recantation of government witness Williams. Almost one year after the jury verdict in his case, Graham moved for a new trial based on the one-page affidavit of Williams. Williams maintained that he was coerced by the government and that his testimony against Graham was not true. He stated in pertinent part:

> The evidence alluded [sic] during the course of the trial was not the factual events that transpired, but something that was orchestrated by the Government and rehearsed by me to aver to during the trial. I was compelled to commit perjury as a result of these fears for my life and the well being of my children. My testimony of Mr. Graham stabbing William Thomas in the chest and my being an eyewitness to these events were not true. I never saw these events, but, however, I was colluded [sic] into saying that I had seen the scenario because, I was also being charged with this crime. I sought to save myself only.

The government opposed Graham's motion for a new trial, stating, inter alia, that the recantation contained conclusory assertions and was unbelievable, and further, that even if the recantation were believed, it would not result in Graham's acquittal. Based upon the motion before it and the government's opposition, the trial court denied the request for a new trial "for the reasons stated by the government."

[6][7][8][9][10] "Absent a clear showing of abuse of discretion, decisions of the trial court regarding the denial of a new trial will not be disturbed on appeal." Smith v. United States, 466 A.2d 429, 432 (D.C.1983) (citing United States v. Johnson, 327 U.S. 106, 111-12, 66 S.Ct. 464, 466-67, 90 L.Ed. 562 (1946) (other citations omitted)). In Heard v. United States, 245 A.2d 125 (D.C.1968), we adopted a five-prong test for determining whether the appellant sustained his or her burden regarding a motion for a new trial based on newly discovered evidence:

> (1) the evidence must have been discovered since the trial; (2) the party seeking the *831 new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.

245 A.2d at 126 (citing Thompson v. United States, 88 U.S.App. D.C. 235, 236, 188 F.2d 652, 653 (1951)). Generally, a hearing is not required for a motion on a new trial. [FN7] Geddie v. United States, 663 A.2d 531, 534 (D.C.1995). In deciding whether the interest of justice requires a new trial, the trial court considers the ruling from the perspective of a " 'thirteenth juror' [to] determine whether 'a fair trial requires that the [claim presented in the motion for a new trial] be made available to the jury.' " Id. at 533 (citations omitted). We review the trial court's ruling on the motion for an abuse of discretion. Id. We will sustain the denial of the new trial motion if it is " 'reasonable and supported by evidence in the record.' " Id. (quoting Townsend v. United States, 549 A.2d 724, 726 (D.C.1988), cert. denied, 490 U.S. 1102, 109 S.Ct. 2457, 104 L.Ed.2d 1011 (1989)).

FN7. Here, we apply the Heard test. In our past opinions, we have also referenced the test or standard for newly discovered evidence set forth in Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir.1928), depending on the circumstances of the case. See, e.g., Herbin v. United States, 683 A.2d 437, 441 n. 4 (D.C.1996); Brooks v. United States, 683 A.2d 1369, 1370 n. 4 (D.C.1995); Young v. United States, 639 A.2d 92, 95 n. 6 (D.C.1994); Johnson v. United States, 537 A.2d 555, 562 n. 10 (D.C.1988); Godfrey v. United States, 454 A.2d 293, 300 n. 22 (D.C.1982).

[11][12] We find it necessary to consider only the fifth prong of the Heard test, whether the presentation of the newly discovered evidence in a new trial "would probably produce an acquittal." [FN8] Based on the evidence presented at trial, Graham could have been convicted either as a principal or as an aider and

abettor. In light of the questions raised to the trial court during its deliberations, the jury apparently convicted Williams as an aider and abettor. [FN9] The evidence presented at Graham's trial, excluding that presented by Williams, was sufficient to sustain Graham's conviction as an aider and abettor. Three inmates, Ivan Butler, Jimmy McGowan and Barry Campbell, gave testimony which demonstrated Graham's participation in William Thomas' murder. McGowan saw Graham and the decedent swing at each other at the time of the murder. He also heard Christopher Thomas call to Graham right after the murder and saw him throw a knife up to Graham. Campbell heard someone call the name "Dominick" and say: "get rid of this" as he watched a man on the second tier bend down. Butler saw the decedent and Graham together just before the murder, watched as Graham proceeded to the second tier after the murder, and thought he heard Christopher Thomas tell Graham to "put this in my room" as he threw an object up to Graham. The testimony of these men did not merely place Graham at the scene of the murder. It also established Graham's role as at least a facilitator of the crime and as a person who aided Christopher Thomas by concealing the shank or homemade knife used to stab the decedent. Consequently, we conclude that Graham has failed to demonstrate that the trial court clearly abused its discretion in denying his motion for a new trial based on the recanting affidavit of Williams.

FN8. Citing Herbin, supra, Graham maintains that the credibility of a recantation is a critical factor in assessing the new trial motion, and that here, it is significant that the judge who disposed of the new trial motion was not the trial judge. We conclude that the motions judge had a sufficient basis on which to resolve the motion for a new trial. Although Williams claimed that he "was under continuous duress by the government because [he] had children on the street," he presented no factual information to support this conclusory allegation. Nor did he present factual support for his allegation that he was not an eyewitness to the murder and did not see Graham stab the decedent. His claim is belied by his participation in the crime as evidenced by his plea of guilty to manslaughter while armed in connection with the decedent's death.

FN9. During its deliberations, the jury sent a note to the trial judge asking:

If we believe that Christopher Thomas committed first degree murder while armed, and if we believe that the defendant aided and abetted Christopher Thomas but did not know or suspect that Christopher Thomas had the intent to kill, is it necessary to find the defendant guilty of first degree murder while armed? Is it possible to find the defendant guilty of second degree murder while armed?

***832** The Jury Instruction Issue

[13] Graham takes issue with the trial court's instruction on aiding and abetting, given before the jury began deliberations. He also challenges the trial court's decisions concerning the jury's request for additional instruction, and he claims that the trial court erred in denying his request, made during the jury's deliberations, for instruction on the lesser included offense of assault.

[14] The trial court gave the aiding and abetting instruction set forth in CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 4.02 (4th ed.1993). Graham finds fault with this instruction, contending that

> the trial court should have made it clear to the jury that in determining the appellant's guilt or innocence, they should look at his state of mind rather than that of either of the two other codefendants. The court should also have instructed the jury that to convict the appellant as an aider and abettor they should be convinced that the appellant committed some overt acts which caused the death.

Part of Instruction No. 4.02, which the trial court read to the jury verbatim, specifies:

> [It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed, or that he have intended to commit the particular crime committed by the principal offender. An aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequence of the crime in which he intentionally participates....]

Graham took no issue with this definition. [FN10] When the jury raised its question to the trial judge during deliberations regarding first and second degree murder and aiding and abetting, see n. 9, supra, the trial court instructed the jury to listen to the tape of its earlier instructions pertaining to first and second degree murder and aiding and abetting.

FN10. Graham argues that to establish his guilt as an aider and abettor, it must be shown that he knew or could have reasonably contemplated that the principal intended a particular crime, here that the principal intended to kill the decedent. Our case law does not support this position. See, e.g., Morriss v. United States, 554 A.2d 784, 788-89 (D.C.1989) (citing Hackney v. United States, 389 A.2d 1336, 1342 (D.C.), cert. denied, 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 95 (1979)).

" 'Decisions regarding reinstruction of a jury are committed to the discretion of the trial court; absent abuse of that discretion we will not reverse.' " Robinson v. United States, 642 A.2d 1306, 1311 (D.C.1994) (quoting Davis v. United States, 510 A.2d 1051, 1052 (D.C.1986)). While the jury posed two very specific questions to the trial judge. Neither question asked for reinstruction regarding aiding and abetting. However, both questions related to first degree and second degree murder as well as aiding and abetting. The trial judge understandably was reluctant to give the jury a specific answer to the questions posed since "their question[s][are] so specific that I fear if I give a yes or a no answer, it virtually commands their verdict...." Because the trial court had already provided instructions regarding these terms, and because of the trial court's concern that it not dictate the outcome of the case, we cannot say the court abused its discretion by responding to the note as follows:

> Please listen to the tape-recorded instructions of first degree murder while armed, second degree murder while armed, and aiding and abetting. If you have any questions thereafter, please feel free to ask them.

Although the trial court advised the jury that it could ask additional questions after listening again to the instructions as specified, no further inquiries were raised.

[15] Later, however, defense counsel informed the trial judge that he "believe[d] that a response to the [jury] note, consistent with the case law, would be to ask for a lesser included instruction...." By this time the jury already had alerted the court that it had reached a verdict. [FN11] The trial ***833** judge responded to defense counsel as follows:

> FN11. Defense counsel was not able to reach the trial judge immediately because she was attending the annual Judicial Conference.

> Well, the primary reason I'm not going to do this and reopen their deliberations is that I don't think the requested instruction is responsive to their question.... There's a secondary reason, although I emphasize that it's not dispositive for me, and that is that at the time I gave instructions, we talked about lesser included offenses, we talked about murder in the second degree while armed. I gave it. There was no request for anything more minor than murder in the second degree while armed. But the overriding reason I'm not going to give it is I don't think it's responsive to their question.

Based upon the record on appeal, and our decision in Robinson, supra, we cannot say that the trial court abused its discretion in declining to give supplemental instruction concerning aiding and abetting or an instruction on the lesser included offense of assault.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

END OF DOCUMENT

UNITED STATES of America, Appellee,
v.
Donato BATTISTA, Appellant.

No. 88-3125.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 28, 1989.

Decided June 2, 1989.

Defendant was convicted, in the District Court for the District of Columbia, Harold H. Greene, J., of possession of cocaine with intent to distribute and he appealed. The Court of Appeals, Wald, Chief Judge, held that defendant voluntarily consented to search of his train roomette and a locked suitcase found under the bed therein.

Affirmed.

[1] ARREST ⇐68(4)
35k68(4)
Law enforcement officers' interview with defendant in defendant's train roomette constituted a "seizure" for Fourth Amendment purposes; officers roused defendant from sleep during stopover that was neither defendant's home nor his ultimate destination, and officers did not return defendant's identification after he had given it to them. U.S.C.A. Const.Amend. 4.
See publication Words and Phrases for other judicial constructions and definitions.

[2] CRIMINAL LAW ⇐1224(1)
110k1224(1)
Law enforcement officer had sufficient reasonable suspicion that defendant was engaged in drug activities to support officers' interview with defendant on train; defendant had paid cash for one way train ticket from a drug "source" city, callback number that defendant gave railroad ticket agent was out of service, and drug dog "alerted" outside defendant's train roomette. U.S.C.A. Const.Amend. 4.

[3] SEARCHES AND SEIZURES ⇐172
349k172
Determination that defendant voluntarily consented to search of his train roomette and a locked suitcase found under the bed therein was not clearly erroneous; defendant allowed search even after law enforcement officers informed him that he did not have to consent, and after officer found locked suitcase and asked defendant whether he knew the combination, defendant opened suitcase for officer. U.S.C.A. Const.Amend. 4.

[3] SEARCHES AND SEIZURES ⇐183
349k183
Determination that defendant voluntarily consented to search of his train roomette and a locked suitcase found under the bed therein was not clearly erroneous; defendant allowed search even after law enforcement officers informed him that he did not have to consent, and after officer found locked suitcase and asked defendant whether he knew the combination, defendant opened suitcase for officer. U.S.C.A. Const.Amend. 4.

[4] SEARCHES AND SEIZURES ⇐186
349k186
After law enforcement officer obtained defendant's voluntary consent to search locked suitcase for drugs, officer did not need defendant's consent to search plastic bags found among clothes contained in suitcase. U.S.C.A. Const.Amend. 4.
***202 **17** Appeal from the United States District Court for the District of Columbia (Criminal No. 88-00001-01).

Marvin D. Miller, Alexandria, Va., for appellant.

Erik Christian, with whom Jay B. Stephens, U.S. Atty., Michael W. Farrell, Helen M. Bollwerk, and Judith E. Retchin, Asst. U.S. Attys., Washington, D.C., were on the brief, for appellee.

Before WALD, Chief Judge, and ROBINSON and BUCKLEY, Circuit Judges.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

Donato Battista appeals his conviction for possession of cocaine with intent to distribute, arguing that the district court erroneously failed to suppress evidence that was obtained in violation of the fourth amendment. The district court found that although the search that revealed the evidence was conducted without a warrant, it was nevertheless lawful, on two separate theories: first, the court concluded that the officers had probable cause and were confronted with exigent circumstances; second, the court found that the entire search was authorized by Battista's voluntary consent. Because the record amply reflects the correctness of the latter ground, we find no error in the district court's

decision to admit the evidence at Battista's trial. [FN1] Battista's conviction is accordingly affirmed.

FN1. Since we find that the search was justified by Battista's consent, it is not necessary for us to address the issues of probable cause and exigent circumstances. Moreover, our finding that Battista voluntarily authorized the search of his suitcase obviates the need to discuss whether the law enforcement officers had a duty to seize the bag and obtain a warrant. Compare United States v. Tartaglia, 864 F.2d 837, 843 (D.C.Cir.1989) (finding on facts similar to these that such a duty does not arise).

I. BACKGROUND

The relevant factual background was set out in the uncontradicted testimony of William Pearson, an officer in the drug enforcement unit of the Amtrak police department, at the suppression hearing held prior to Battista's trial. Pearson testified that Battista made a one-way Amtrak reservation on December 8, 1987, for Train 98 leaving the following day from Fort Lauderdale, Florida, and travelling to Newark, New Jersey. His reservation was for a sleeping compartment, or "roomette." At the time he made his reservation, Battista gave the ticket agent a "call-back" number--a telephone number at which he presumably could be reached prior to departure. On the morning of December 9, Battista appeared at the Fort Lauderdale train station and paid for his ticket with cash approximately 40 minutes prior to the train's scheduled departure time.

While Train 98 was en route from south Florida, Battista's presence on the train did not go unnoticed. Certain of the facts just recounted--notably, that Battista paid cash just prior to departure for one-way travel from a so-called "source city " for illicit drugs to the Northeast--first drew Officer Pearson's attention to Battista, for these *203 **18 evidently are factors that he has come to associate with possible drug courier activity. Pearson's suspicion was heightened when he called the telephone number given by Battista and it was out of service. [FN2] Pearson decided to "attempt to interview" Battista when the train made its scheduled 25-minute stopover at Union Station in Washington, D.C. See Suppression Hearing Transcript ("Tr.") at 16. In preparation for this interview, Pearson testified that he contacted Special Agent John Robinson of the Drug Enforcement Administration's ("DEA") Mass Transportation Group, to request his assistance the following day. During this conversation, Pearson asked Robinson if the latter would make a "drug dog" available. Tr. at 17.

FN2. In fact, when Officer Pearson dialed the number, he got a recording informing him that he had reached a number that had been changed to an unpublished number. Officer Pearson subsequently testified that he learned from the local sheriff's office in Florida that the new number was not listed to anyone named "Battista."

The following morning, when Train 98 arrived at Union Station, Pearson was accompanied by DEA Special Agents Robinson and Bill Dionne, and Detective Sam Grey of the Virginia state police to greet it. According to Pearson's testimony, Detective Grey "had a drug dog with him...." Tr. at 17. The officers boarded the train car on which Battista was supposed to be present. The "drug dog" (whose qualifications have been challenged in this appeal) was taken down the corridor of the car, and it "alerted" at the door of Battista's roomette (number 11), "indicating the presence of a controlled substance." Tr. at 19. At that time, Detective Grey and the dog left the train and waited on the platform.

Pearson and Robinson knocked on the door of roomette 11. When Battista opened the door, Officer Pearson, who was in plainclothes and whose gun was not visible, displayed his badge and identified himself, saying, "I would like to talk to you for a minute." Tr. at 19. According to Pearson, Battista responded, "Sure," closed the door, and then opened the door again. Pearson asked Battista for identification, and Battista produced a New Jersey driver's license. He stated that he had driven from New Jersey to Florida with a friend.

Pearson then informed Battista that a "trained drug detection dog" had given an alert on his compartment, indicating the presence of a controlled substance. Tr. at 21. "Based on the alert by the drug detection dog," Pearson continued, "I would like your permission to search your room and that suitbag," pointing to a suitbag on a luggage rack visible from where he was standing. Tr. at 21. Battista responded, "Sure." When told that he did not have to allow a search, he said, "That's okay," and then took the suitbag down from the rack and placed it out in the hallway. Tr. at 21. The search of the suitbag revealed nothing but an airplane ticket for one-way travel from Newark to Fort Lauderdale on December 8. Battista changed his original story, indicating without explanation that he had in fact flown--not driven--to Fort Lauderdale. Tr. at 22.

Pearson asked Battista to step outside the

compartment. Pearson then conducted a search of the roomette, discovering under the bed a suitcase with a combination lock. When he asked Battista if he knew the combination to the lock, Battista "indicated that he did, came inside of the compartment, manipulated the numbers on the combination, and unlocked it." Tr. at 22. Inside the suitcase, Pearson discovered a plastic bag that was wrapped inside a pair of blue jeans. The bag itself contained two smaller packages which, upon penetration with the nail-file component of a pocketknife, were discovered to contain a white powder that later field tested positive for cocaine. Battista was placed under arrest and was taken to the Amtrak police office. This prosecution ensued.

The district court ruled that the evidence seized by the officers on the train was admissible against Battista. First, the court found that the officers had probable cause to search the room, [FN3] and that given *204 **19 the exigent circumstances present in this case--notably, the fact that Battista's train was scheduled to remain at Union Station for only 25 minutes--the officers were justified in searching the compartment without a warrant. See United States v. Battista, Crim. No. 88-1, mem. and order (D.D.C. May 2, 1988), at 3. Alternatively, the court concluded that the search could be upheld "on the basis of defendant's consent to the presence of the officers in the roomette, and their search of the suitcase." Id. at 3 n. 1. Following a bench trial, the district court found Battista guilty of possession with intent to distribute in excess of 500 grams of cocaine, pursuant to 21 U.S.C. §§ 841(a) and 841(b)(1)(B)(ii), and possession of cocaine, pursuant to 21 U.S.C. § 844(a).

FN3. The district court's opinion states, apparently inadvertently, that once the police officers were alerted to the presence of controlled substances in Battista's compartment, "they had probable cause to arrest him. United States v. Fulero, 498 F.2d 748 (D.C.Cir.1974)." United States v. Battista, Crim. No. 88-1, mem. and order (D.D.C. May 2, 1988), at 3 (emphasis added). In context, however, it is clear that the officers had only probable cause to search the compartment. That this is what the district court in fact concluded is confirmed by reference to the cited authority, which deals exclusively with the issue whether a dog sniff gave rise to probable cause for the search of a suitcase.

II. ANALYSIS

The fourth amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." In determining whether the search at issue violated the precepts of the fourth amendment, this court faces a two-part inquiry. First, we must inquire whether the initial contact between Battista and the officers was justified. Next, we must determine whether the ensuing search conducted by the officers was within the scope of their authority--in this case, whether Battista voluntarily consented to a search, and if so whether the search that was conducted stayed within the scope of the consent given.

A. The "Interview"

As a preliminary matter, we must determine whether the encounter between the law enforcement officers and Battista amounted to a detention that requires fourth amendment protections. The relevant test for assessing whether a "seizure" has occurred focuses on "whether a reasonable person would conclude from the circumstances, and the show of authority, that he was not free to leave the officer's presence." United States v. Brady, 842 F.2d 1313, 1314 (D.C.Cir.1988) (citing Gomez v. Turner, 672 F.2d 134, 141 (D.C.Cir.1982)). In evaluating claims of seizure, the Brady court pointed to several factors typically found to induce persons to think that they have no choice but to remain present for an "interview" such as the one at issue here, including displayed weapons, physical intimidation, or threats--factors that were not present in this case. 842 F.2d at 1314. The court went on, however, to acknowledge that other less plainly coercive factors, such as "unusual setting or time," id., can nevertheless create an environment in which a reasonable person would feel that he had no practical choice but to stay.

[1] In reviewing the facts of this case, we believe that the convergence of several subtle factors would cause a reasonable person to conclude that he was not free to leave the officers' presence, and that the officers did in fact effect a "seizure" as that term is understood under fourth amendment jurisprudence when they conducted their "interview" with Battista. The officers apparently roused Battista from his bed at 6:30 a.m., causing him to answer their knock on the door of his roomette in some partial state of undress. A reasonable person, roused early in the morning while wearing only his underwear in a city that is neither home nor ultimate destination might rightly doubt what he could do if he did not wish to remain in the officers' presence. His only conceivable retreat would be to close the door on the officers and remain in the roomette--but we have recently held that there is no heightened expectation of

privacy in a train roomette, see Tartaglia, 864 F.2d at 841, and thus it would be small solace to direct our reasonable person back inside if what *205 **20 he wishes is simply to be left alone. And while the unique facts of this scenario may not be enough to render the contact a seizure at its inception, it surely became one after Battista was asked for his identification and upon perusal the identification was not returned. It is well established that the mere request for identification does not inevitably give rise to a seizure, see Gomez v. Turner, 672 F.2d 134, 142-44 (D.C.Cir.1982). But once the identification is handed over to police and they have had a reasonable opportunity to review it, if the identification is not returned to the detainee we find it difficult to imagine that any reasonable person would feel free to leave without it. There is no evidence in the record suggesting that Battista's papers were returned to him (and we therefore assume that they were not), so to the extent a reasonable person would have felt free to leave the officers' presence prior to the request for his papers, this freedom evaporated for the duration of the exchange following the request. Cf. Florida v. Royer, 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983) (plurality opinion) (noting that a seizure occurred when, among other things, police "retain[ed] [the suspect's] ticket and driver's license ... without indicating in any way that he was free to depart ..."). Although none of these factors taken individually is necessarily determinative, due regard for the totality of the circumstances leads us to conclude that the "interview" with Battista constituted a "seizure."

[2] We hasten to add, however, that the seizure at issue in this case was not an "arrest," which would require a showing of probable cause. Rather, the contact between Battista and the officers took the form of what has previously been called an investigative stop. The Supreme Court recently explained, relying on the doctrine first announced in Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968), that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (emphasis added). In Terry, the Court noted that the officer must be able to show that he or she had more than an "inchoate and unparticularized suspicion or 'hunch.' " 392 U.S. at 27, 88 S.Ct. at 1883. "In evaluating the validity of a stop such as this, we must consider 'the totality of the circumstances-- the whole picture.' " Sokolow, 109 S.Ct. at 1585 (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 694, 66 L.Ed.2d 621 (1981)). The facts in this case demonstrate that the officers clearly had such reasonable suspicion to approach Battista.

First, in Sokolow the Supreme Court found that officers had reasonable suspicion to detain a traveler in an airport on the basis of certain characteristics that were consistent, in the view of the trained officers, with drug trafficking behavior. In that case,

> the agents knew, inter alia, that (1) [the defendant] paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

109 S.Ct. at 1583. The Court engaged in what is inevitably a fact-specific inquiry and determined that the enumerated factors did give the officers sufficiently reasonable suspicion to detain the defendant. In the present case, the factors known to Pearson were not as suspect as those present in Sokolow: although Battista paid for his ticket in cash, there is no evidence that this mode of payment was as conspicuous as the peeling off of more than $2,000 from a wad of $20s; moreover, there is no evidence that Battista looked peculiarly nervous or otherwise displayed suspicious demeanor during any part of his trip, and we have no information regarding Battista's clothes or luggage. Nevertheless, **21 *206 it cannot be gainsaid that the information known to Pearson prior to the morning of December 9 at least formed a reasonable basis for further inquiry.

If there were no more grounds for an investigative detention of Battista beyond this limited information, we might be reluctant to find that the detention was justified. But Pearson's inquiry went much further before he actually approached Battista in his compartment. Pearson arranged with a DEA officer to have a "drug dog" present to conduct a sniff of the train car. The following morning, Detective Grey arrived with "Gabe," which Pearson evidently believed to be a "trained drug detection dog," and the dog alerted at Battista's door. [FN4] Regardless of whether the testimony at the suppression hearing pertaining to Grey and Gabe would have satisfied a probable cause inquiry, [FN5] which requires the court itself to conclude that probable cause exists to believe that a crime is being or is about to be committed, there can be

no serious dispute that Pearson's testimony fully supports his reasonable suspicion to approach Battista. It was reasonable for Pearson, having asked a DEA official to provide a trained dog, to rely on the dog that was present the next morning at Union Station. Any other holding would implicitly require officers in the field to make background and reliability checks on drug dogs-- indeed, on all sources of information--in the field before forming and acting on their "reasonable suspicions." But it was the need to get away from such overly formalized procedures that created the impetus for the reasonable suspicion standard in the first place. See Terry, 392 U.S. at 20, 88 S.Ct. at 1879 (focusing on "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat"). Once the dog alerted at Battista's door, the officers had reasonable suspicion to make an investigative detention. [FN6]

FN4. Battista does not challenge, and therefore we do not address, the use of a drug dog to conduct a sniff in circumstances such as these.

FN5. Battista argues that there is no evidence in the record to show "that this dog had been trained or qualified to detect anything." Br. for Appellant at 12. Compare United States v. Spetz, 721 F.2d 1457, 1464 (9th Cir.1983) ("A validly conducted dog sniff can supply the probable cause necessary for issuing a search warrant only if sufficient reliability is established by the application for the warrant."). We do not address this challenge, because only the issue of reasonable suspicion--not probable cause--is before us.

FN6. Indeed, were it not for the dispute over the qualifications of the drug dog, the facts of this case would in all relevant respects be identical to the facts outlined in Tartaglia, 864 F.2d 837 (D.C.Cir.1989), in which this court found that the officers had probable cause to conduct a search of a train compartment.

B. The Search

Having determined that the officers effected an investigatory detention when they confronted Battista, we must still ascertain whether the consent given by Battista while he was being detained validly authorized the search that the officers proceeded to conduct. The mere fact that Battista was temporarily "seized" for fourth amendment purposes does not undermine his ability voluntarily to consent to a search. See Florida v. Royer, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[H]ad Royer voluntarily consented to the search of his luggage while he was justifiably being detained on reasonable suspicion, the products of the search would be admissible against him."). [FN7] Although the district *207 **22 court did not expressly address the seizure question, it did find voluntary consent to search. This ruling, grounded as it is in factual findings, may be reversed only upon a determination that it was clearly erroneous. See United States v. Lloyd, 868 F.2d 447, 451 (D.C.Cir.1989). We conclude that the district court did not err on this point.

FN7. Battista relies on the plurality opinion in Royer for the proposition that "[o]nce an individual is seized without sufficient legal justification, any consent which follows is involuntary." Br. for Appellant at 15. This contention loses all force in this case, because we have determined that the limited seizure of Battista was fully supported by legal justification. Moreover, the seizure in this case was not so infected with the show of police authority that no consent would be possible. Cf. United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976) ("[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search."). Rather, the finding of a seizure in this case flows from the combination of the minimal show of police authority with the peculiar time and setting of the encounter and the retention of the suspect's identification. These factors must be refocused and analyzed anew to answer the qualitatively different question whether a reasonable person who did not feel free to leave would nonetheless feel comfortable declining to authorize a search of his roomette and luggage.

[3] This court has recently reiterated the test for assessing the voluntariness of a consent to search:

> To determine whether consent is voluntary, a court must apply a "totality of all the surrounding circumstances" test, considering factors such as the accused's age, poor education or low intelligence, lack of advice concerning his constitutional rights, the length of any detention before consent was given, the repeated and prolonged nature of the questioning, and the use of physical punishment.

Lloyd, 868 F.2d at 451 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973)). Battista does not point to any of these factors as indicating a lack of voluntariness on his part, and we do not find any of them to be particularly applicable in this case. Rather, by all accounts the encounter was marked by its civil, conversational tone, and the cooperative attitude of Battista. Indeed, after Battista first consented to a search of his room and suitbag, he was informed by the officers that he did not have to consent to such a search, but he responded, "That's okay." While the law does not

require officers to give suspects such a warning, [FN8] its presence can be probative of the voluntariness of consent. The evidence in this case simply does not support a finding that Battista's will was in any way overborne. Rather, the available testimony fully supports the district court's finding of voluntariness.

FN8. See Schneckloth v. Bustamonte, 412 U.S. 218, 231-33, 93 S.Ct. 2041, 2050, 36 L.Ed.2d 854 (1973).

Moreover, the search that the officers conducted stayed within the scope of the consent granted. As was noted in Walter v. United States, 447 U.S. 649, 656, 100 S.Ct. 2395, 2401, 65 L.Ed.2d 410 (1980) (opinion of Stevens, J.), "When an official search is properly authorized--whether by consent or by the issuance of a valid warrant--the scope of the search is limited by the terms of its authorization." Battista makes two arguments in this regard. First, he contends that he was never asked permission, and hence could never give it, to search the suitcase that was found to contain the cocaine. The record, however, will not support this line of argument, for it appears clear to us that under any reasonable reading of the events related by Officer Pearson, he had authority to search the suitcase: the record plainly shows that he was authorized by Battista to search the room in the first instance by express consent, and when he discovered the second locked suitcase under the bed, his question to Battista--namely, whether Battista knew the combination--and Battista's response--i.e, to enter the roomette and open the bag for him-- clearly and unambiguously signalled Battista's further express consent to a search of the suitcase. Cf. United States v. Griffin, 530 F.2d 739, 742 (7th Cir.1976) (consent may be in the form of words, gesture, or conduct).

[4] Battista's second contention regarding the scope of his consent relates to whether Pearson, once inside the suitcase, needed further consent to probe the plastic packages he discovered therein. In effect, Battista would turn the search of this bag into a game of "Mother-may-I," in which Pearson would have to ask for new permission to remove each article from the suitcase to see what lay underneath. We decline to impose such an unrealistic restriction on an officer's ability to make a search that is reasonably targeted, within the confines of his authority--here, consent to search the suitcase--to uncover the object of the search. Early on in the encounter, Battista was informed that he was suspected of carrying illegal drugs. When he voluntarily opened his suitcase and consented to its search, he did not authorize a search in the abstract. Rather, he authorized a ***208 **23** search for drugs. Pearson was therefore justified in probing the contents of the suitcase, within reasonable limits, as was necessary to uncover this particular contraband. See United States v. Dyer, 784 F.2d 812 (7th Cir.1986) ("The consent to search luggage validates the search both of the luggage and of containers within the luggage."); see also LaFave, Search and Seizure § 8.1(c) (1987) ("Ordinarily, it would appear that [a general consent permits the opening of closed but unlocked containers found in the place as to which consent was given], particularly if the police have indicated they are searching for a small object which might be concealed in such a container.").

III. CONCLUSION

In view of the foregoing, we conclude that Battista's consent to the search of his compartment and his luggage fully justified the officers' search. We therefore affirm the district court's ruling and sustain the conviction.

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Dennis J. TOWNSEND, Appellant,
v.
UNITED STATES, Appellee.

No. 86-1411.

District of Columbia Court of Appeals.

Argued May 9, 1989.

Decided June 16, 1989.

Defendant was convicted in the Superior Court, Reggie B. Walton, J., of possession of unregistered firearm, and he appealed. The Court of Appeals, Belson, J., held that statute prohibiting possession of unregistered firearms was not limited to firearms that were operable.

Affirmed.

WEAPONS ⚿4
406k4
Statute that prohibits possession of unregistered firearms is not limited to firearms that are operable; statute clearly includes within its scope inoperable weapons that may be redesigned, remade or readily converted or restored to operability. D.C.Code 1981, § 6-2311(a).
***1319** Robert E. Sanders, appointed by the court, for appellant.

Erik P. Christian, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty., and Michael W. Farrell, Glenn A. Fine, Washington, D.C., and Gregory E. Jackson, Asst. U.S. Attys., were on the brief, for appellee.

Before BELSON and TERRY, Associate Judges, and GALLAGHER, Senior Judge.

BELSON, Associate Judge:

Appellant challenges his conviction for possession of an unregistered firearm in violation of D.C.Code § 6-2311(a) (1981) [FN1] on the basis that the government did not prove beyond a reasonable doubt that the object possessed by appellant was a "firearm." Finding appellant's contention unpersuasive, we affirm. [FN2]

FN1. The charging information mistakenly referred to D.C.Code § 6- 1811(a) (1981). In the 1978 District of Columbia Code, the Firearms Control Regulations Act was placed in Chapter 18 of Title 6 on "Health and Safety." It was later amended and moved to Chapter 23 of Title 6 in the 1981 D.C.Code. It is clear from the colloquy between counsel and the court, and from the references in the colloquy and in jury instructions to the controlling statute, that all concerned were aware that appellant was charged with a violation of Chapter 23, rather than Chapter 18, of Title 6 of the D.C.Code. Appellant raises no issue in this regard.

FN2. Appellant was also charged with assault in violation of D.C.Code § 22-504 (1981) and possession of a prohibited weapon ("PPW") in violation of D.C.Code § 22-3214(b) (1981). Because appellant was acquitted of assault and raises no contention of error in regard to his conviction of PPW, we do not address any issues in connection with these charges.

The evidence at trial disclosed that around 1:30 a.m. on March 15, 1986, Officer Brian Presley responded to a radio run concerning a man with a gun at 4431 Georgia Ave., N.W. Officer Presley entered the apartment building and arrested appellant. After being advised of his rights, appellant admitted that he possessed an inoperable gun and led Officer Presley to it. Crime scene search officer Richard Hobson testified that he had examined the gun and found it inoperable because the firing pin and spring mechanisms were not intact. He testified that with the necessary parts and expertise he was able to render a similar gun operable in about two minutes. A "Certificate of No Registration" was also admitted into evidence.

Appellant contends that in order to establish a violation of D.C.Code § 6- 2311(a), the government was required to prove beyond a reasonable doubt that the object possessed by appellant was a "firearm" within the definition established by D.C.Code § 6-2302(9) (1981). Appellant maintains that in order to accomplish this the government was required to demonstrate ***1320** either that the gun was operable or that appellant intended it to be useable as a firearm. [FN3] Specifically, appellant relies on the definitional language in § 6-2302(9) which states, inter alia, " '[f]irearm' means any weapon which will, or is designed or redesigned, made or remade, readily converted or restored, and intended to, expel a projectile or projectiles by the action of an explosive...." (emphasis added).

FN3. Appellant also contends that the evidence was insufficient because the expert used a "similar" gun rather than the actual gun seized from appellant in performing his test to demonstrate ready convertibility. The witness testified that he had used a pistol of the

> same make and model to take those steps necessary to restore the weapon in question to operability. We deem the evidence sufficient for submission to the jury.

In Curtice v. United States, 488 A.2d 917 (D.C.1985), this court reversed a conviction for a different weapons offense, carrying a pistol without a license ("CPWL"), D.C.Code § 22-3204 (1981), because the weapon was inoperable. In its opinion, the court observed, by way of contrast, that a violation of D.C.Code § 6-2311 does not require proof that the weapon is operable. Id. at 917 n. *. Appellant argues that this observation was not "the holding of the case and is certainly not a pronouncement of a comprehensive principle of D.C. law." While admitting that the Curtice footnote is correct, appellant argues that what he possessed was not a firearm. He maintains that where there is no showing of operability, D.C.Code § 6-2302 requires proof that the weapon in question was readily convertible to operating condition, and also proof that the defendant intended the weapon to be useable as a firearm, matters which he maintains we did not address in Curtice.

We reaffirm our statement in Curtice that the registration requirements of D.C.Code § 6-2311(a) are not limited to firearms that are operable. It is true that we have construed § 22-3204, the statute that prohibits the carrying of a "pistol" without a license, to require a showing of operability. Anderson v. United States, 326 A.2d 807, 811 (D.C.1974). But that statute, unlike § 6-2311(a), is not accompanied by a definitional section that unmistakably dispenses with the need for such a showing. See D.C.Code § 22-3201 (1981). In the absence of a definition of the term "firearm" applicable to § 22-3204, we looked to the common usage of that term and observed that it was a "device capable of propelling a projectile by explosive force." Lee v. United States, 402 A.2d 840, 841 (D.C.1979) (emphasis added).

Turning to the statute that prohibits the possession of an unregistered firearm, D.C.Code § 6-2311(a), we see that its reach is illuminated by the language we quoted in part above:

> "Firearm" means any weapon which will, or is designed or redesigned, made or remade, readily converted or restored, and intended to, expel a projectile or projectiles by the action of an explosive; the frame or receiver of any such device; or any firearm muffler or silencer....

D.C.Code § 6-2302(9) (1981). Thus, the statute clearly includes in its definition of a "firearm" inoperable weapons that may be redesigned, remade, or readily converted or restored to operability.

We interpret the words "intended to" as referring to the design or purpose of the object in question rather than the state of mind of the person who possesses it. We deem this the plain meaning of those words in the context of the statute. The statute does not prohibit the possession of an object that was designed and intended for an innocent purpose, yet could be used somehow to expel a projectile by explosion. Accordingly, we hold that the phrase "intended to" in § 6-2302(9) imposes no substantive requirement that the government prove that appellant specifically intended the weapon to be useable as a firearm.

Our interpretation of the statute, and in particular our view that it gives the term "firearm" a broad meaning, is buttressed by the legislature's intent in enacting the *1321 Firearms Control Regulations Act, D.C.Code §§ 6- 2301 through 6-2380, and our case law interpreting this comprehensive statutory scheme. See McIntosh v. Washington, 395 A.2d 744 (D.C.1978). In McIntosh we observed that the provisions of the Firearms Control Regulations Act were intended primarily as regulatory measures adopted pursuant to the District's local "police power," as distinguished from alterations of the existing criminal code. Id. at 750, 756. [FN4] Further, the Act was intended to broaden and increase the limitations on firearms within the District above and beyond the existing criminal code provisions contained in Title 22. Indicative of that legislative intent is the absence of any scienter element in the provisions requiring firearms to be registered. Id. at 756. In contrasting the two statutes, we also take into account the obvious purpose of § 22-3204 to prohibit the carrying of weapons that are in fact dangerous, which differs from the broader purpose of § 6-2311.

> FN4. Presumably this accounts for the Act's placement in Title 6 of the D.C.Code regarding "Health and Safety" rather than Title 22 which addresses criminal offenses.

Finally, we observe that in instructing the jury on a count charging violation of § 6-2311(a), it is appropriate for the trial court to quote or paraphrase the definition of "firearm" set forth above, as the trial court did in this case. It would also be in order, especially where the concept of operability has been put in issue in connection with another charge, for the court to clarify that the government has the alternative under § 6-2311(a) of proving either that the weapon is

operable, or that it otherwise satisfies the definition of "firearm" set forth in § 6-2302(9).

Affirmed.

END OF DOCUMENT

Attachment 5

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AUG 26, 1998              DISTRICT COURT OF MARYLAND                    08/26/98
'EDNESDAY     CRIMINAL SYSTEM INQUIRY CHARGE/DISPOSITION DISPLAY        DIST: 06

CASE: 00639091D5 CR  STATUS: C  CHG DATE: 89/08/28  CC:              DIST: 06 01
TRACKING NO: 0000639091D5      LOCAL ID:              DOC: SUM  ISSUED: 89/05/27
NAME: CHRISTIAN, ERIK P              DOB: 60/11/18 HT/WT: 601 200 SEX/RACE: M1
ADDR:                                DISP: TRL 89/08/08   CNSL: B   DEF:
      1493 JUNIPER ST NW             TRIAL DATE:                TIME:
      WASHINGTON        DC 000020011  ROOM:     TYPE:          DATE SET:
DPAY:         DUE:         FINAL:         CICF:         COSTS:         SUSP:

------------- CHARGE ------------- --------------- DISPOSITION ----------------
001 ASSAULT                        PLEA:      DISP: STET 89/08/08   ACS:
    CJIS: 1 -1313 AR: 639091D5     FINE: 000000 COST:          PBJ END:
    AMENDED:           MO/PLL:     CICF:         SUSP:        PROB END:
    CAUSE:                         TERM:                   SUSP TERM:
                                   CREDIT TIME SERV:           REST:

002 MAL/DEST-PROP OF ANOTHER       PLEA:      DISP: STET 89/08/08   ACS:
    CJIS: 1 -2900 AR: 639091D5     FINE: 000000 COST:          PBJ END:
    AMENDED            MO/PLL:     CICF:         SUSP:        PROB END:
    CAUSE:                         TERM:                   SUSP TERM:
                                   CREDIT TIME SERV:           REST:
END OF DISPLAY                     P/1                              PAGE 001
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Attachment 5

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AUG 26, 1998              DISTRICT COURT OF MARYLAND                    08/26/98
WEDNESDAY     CRIMINAL SYSTEM INQUIRY CHARGE/DISPOSITION DISPLAY        DIST: 06

CASE: 00641376D1 CR  STATUS: C  CHG DATE: 89/08/28  CC:              DIST: 06 01
TRACKING NO: 0000641376D1       LOCAL ID:              DOC: SUM  ISSUED: 89/06/01
NAME: LATTIMORE, VERA R                DOB: 63/09/21 HT/WT: 501 145 SEX/RACE: F1
ADDR:                                   DISP: TRL 89/08/08    CNSL: B    DET:
      1220 EAST WEST HWY 1015           TRIAL DATE:              TIME:
      SILVER SPRING          MD 000020910  ROOM:      TYPE:      DATE SET:
DPAY:         DUE:         FINAL:          CICF:         COSTS:         SUSP:

------------- CHARGE ------------- --------------- DISPOSITION ----------------
001 BATTERY                       PLEA:       DISP: NP   89/08/08   ACS:
    CJIS: 2 -1313 AR: 641376D1    FINE: 000000 COST:          PBJ END:
    AMENDED:            MO/PLL:   CICF:         SUSP:       PROB END:
    CAUSE:                        TERM:                   SUSP TERM:
                                  CREDIT TIME SERV:           REST:

002 MAL/DEST-PROP OF ANOTHER      PLEA:       DISP: NP   89/08/08   ACS:
    CJIS: 1 -2900 AR: 641376D1    FINE: 000000 COST:          PBJ END:
    AMENDED             MO/PLL:   CICF:         SUSP:       PROB END:
    CAUSE:                        TERM:                   SUSP TERM:
                                  CREDIT TIME SERV:           REST:
END OF DISPLAY                    P/1                              PAGE 001
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Attachment 6

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER SIX

In The Matter Of:	:	
	:	
CONFIDENTIAL,	:	
	:	
Respondent.	:	Docket No. 79-93
	:	
A Member of the Bar of the District of Columbia Court of Appeals	:	

REPORT AND RECOMMENDATIONS OF HEARING COMMITTEE

HEARING COMMITTEE NUMBER SIX

Mary Lou Soller
Charles Duncan
Morton Gluck

Dated: December 4, 1995

I. INTRODUCTION

This matter is before Hearing Committee Number Six on a one-count petition charging Respondent with a violation of Rule 3.4(e) of the D.C. Rules of Professional Conduct ("Rules"). In sum, Respondent was an Assistant United States Attorney, who prosecuted the case of United States v. Cornell Foster, 91 CR 266-02 (D.D.C.), in the United States District Court for the District of Columbia. Mr. Foster was convicted, but the United States Court of Appeals reversed Mr. Foster's conviction, based in part on Respondent's closing argument. 982 F.2d 551 (D.C. Cir. 1993). The Office of Bar Counsel ("Bar Counsel") filed a petition on January 27, 1994, charging Respondent with a violation of Rule 3.4(e) of the D.C. Rules of Professional Conduct, in that, in his closing argument,

> Respondent alluded to a matter that he did not reasonably believe was relevant or that was not supported by admissible evidence, asserted personal knowledge of facts in issue when not testifying as a witness, or stated a personal opinion as to the justness of a cause, the credibility of a witness or the guilt or innocence of an accused.

Respondent filed his answer on February 23, 1994.[1]

[1] Respondent also filed a Motion to Strike and Exclude Evidence. Specifically, he sought a ruling that the appellate opinion in the Foster case was inadmissible in the disciplinary proceeding against him. Bar Counsel opposed this motion, and arguments were heard on March 30, 1994. This Hearing Committee issued a written opinion on May 5, 1994, finding that it would consider the appellate decision, but would determine what weight to give it later.

On May 9, 1994, the evidentiary hearing on the charges was held.[2] Wallace E. Shipp, Jr., represented the Office of Bar Counsel, and Charles F. Flynn represented Respondent. Bar Counsel introduced eleven (11) exhibits and rested. Respondent testified and presented one (1) exhibit. Bar Counsel later introduced one additional exhibit. No evidence in mitigation or in aggravation was offered.

Bar Counsel submitted its proposed Findings of Fact, Conclusions of Law, and Recommended Sanctions on June 13, 1994. Respondent filed his response on June 27, 1994.

After consideration of the evidence and the arguments, the Committee finds that Bar Counsel has not proven by clear and convincing evidence that Respondent violated the disciplinary rules of the District of Columbia. We recommend that the charge against Respondent be dismissed.

II. FINDINGS OF FACT

1. Respondent is a member of the District of Columbia Bar, having been admitted on April 13, 1988. (Registration Statement.)

2. In July 1991, Respondent was employed by the United States Attorney's Office in the District of Columbia as an Assistant United States Attorney and prosecuted the case of United States v. Cornell Foster (No. 91-266-02) in the United

[2] The transcript of the proceedings is cited as "Tr." Bar Counsel's exhibits are cited as "Bar Ex." Respondent's exhibit is cited as "Resp. Ex."

States District Court for the District of Columbia. (Bar Ex. B; Tr. at 19, 22, 91-92.)

3. Mr. Foster and a co-defendant, Robert McGee, were indicted on a charge that they possessed with intent to distribute more than five grams of "crack" cocaine. (Bar Ex. 2; Tr. at 22-24.) On the eve of trial, Mr. McGee accepted a plea offer from the government, pleaded guilty, and testified against Mr. Foster. (Id.; Bar Ex. 8 at 182-83; Bar Ex. 9 at 375-79.)

4. At trial, the government called five police officers and Mr. McGee as witnesses. (Bar Ex. 7, 8, and 9.)

5. The principal witness, Officer Hebron, testified that he was in an observation post and watched Mr. Foster for a twenty-minute period beginning at 2:12 a.m. on April 9, 1991. (Bar Ex. 8 at 189 ; Tr. at 37, 40-41, 46-47, 74-75, 92, 94-95, 97-98.) This time and the twenty-minute time period are the only times mentioned during the trial. (Tr. at 98.)

6. Officer Hebron further testified that, during his period of observation, Mr. Foster engaged in two drug transactions and Mr. McGee made three others. (Bar Ex. 8 at 190-96; Tr. at 25-26, 37, 92.) Officer Hebron radioed this information to other officers, who arrested Mr. Foster and Mr. McGee. (Bar Ex. 8 at 197-99; Tr. at 27.)

7. Mr. McGee testified that Mr. Foster engaged in eight drug transactions, but he did not specify a time period. (Bar Ex. 9 at 382-86: Tr. at 38, 40-41, 97.) However, Mr.

McGee also admitted at trial that he had lied under oath at a hearing on a motion to suppress evidence.[3] (Bar Ex. 9 at 415-17.)

8. During Mr. Foster's arrest, police officers claimed to observe him discard packets of cocaine. (Bar Ex. 8 at 272-76; Tr. at 47.) The police also recovered other packets from the area in which Mr. McGee was arrested. (Bar Ex. 313-14, 321.) The total weight of all drugs seized on April 9, 1991, from or near Mr. Foster and Mr. McGee was approximately nineteen (19) grams. (Bar Ex. 8 at 324-26, 343-44; Tr. at 28-30.)

9. Officer Joseph Brenner, an expert witness for the government on the packaging, sale, and street distribution of cocaine, testified that the packaging of the drugs found in this case was consistent with an intent to distribute the drugs, rather than individual usage. (Bar Ex. 8 at 343-44, 357; Tr. at 29-30.)

10. Respondent did not possess or produce any evidence of any other criminal conduct by Mr. Foster. (Tr. at 68, 115-16.)

11. Mr. Foster's defense was one of mistaken identity and general denial. (Bar Ex. 9 at 434-80, Tr. at 48.) He testified that he had been inside the house for

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[3] Respondent also argues that this Committee should consider testimony to which an "objection was sustained, although the testimony was not stricken." (Respondent's Brief and Proposed Findings of Fact ("Respondent's Brief"), at 7, ¶ 19.) The Hearing Committee does not find this evidence reliable and declines to do so.

thirty minutes when the police arrived and arrested him. (Bar Ex. 9 at 468-71.) He admitted he used drugs, but he denied selling them. (Bar Ex. 9 at 475-76, 480; Tr. at 49-50.) He testified that he was "on cocaine very hard" and that he had used cocaine and alcohol on April 9, 1995. (Bar Ex. 9 at 479 80; Tr. at 50.)

12. In his closing argument, Respondent argued that the government's evidence proved that Mr. Foster and Mr. McGee had drugs in their possession and sold them. (Id. at 498-502.) He characterized the evidence as proving a "joint operation" between Mr. Foster and Mr. McGee, and thus joint possession of all the drugs seized. (Id. at 502, 504.)

13. During his closing arguments, defense counsel argued that neither the police officers nor Mr. McGee were credible. (Bar Ex. 10 at 3, 15-16, 18-19.) He also argued:

> It's July 3rd. It's the day before Independence Day, and since April 9th Mr. Foster has been living under a cloud of fear caused by the charges in this case, and as a result of your actions today, your actions and your deliberations, and consistent with the evidence that's been produced in trial, tomorrow will be Mr. Foster's independence day. Tomorrow will be the first day these charges will no longer be hanging over his head.

(Id. at 3-4; see also Bar Ex. B, 2 at 3, 5 at 3-4; Tr. at 58-59, 102.)

14. Respondent interpreted this argument as a defense appeal for jury nullification and leniency. (Tr. at 58-59, 82-83, 104-05, 109, 128-29.) Respondent did not believe this was a proper argument. (Id. at 105-06, 128, 136-

37.) He did not object, however, because he did not want to draw attention to it and believed "it was something [he] could basically address in [his] rebuttal." (Id. at 135-36.) Respondent made a note of the cloud concept "apparently because it was a plea for . . . sympathy." (Tr. at 58-59.)

15. Thus, in his rebuttal argument, Respondent responded to defense counsel's argument by arguing the following:

> And when the dark clouds come above, the cloud of fear, the only clouds in this case is when Mr. Foster was out there selling drugs. He brought upon his own cloud, his own cloud of fear. It's not the cloud now since we're in trial. The cloud started long, long before, and perhaps the cloud started long before April 9th.

(Bar Ex. 11 at 513.)

16. Respondent said he made this argument

> basically equating dark clouds with Mr. Foster's own problems. The only clouds in this case are where Mr. Foster created his own problems. . . . [I]t is not the government here today who has created this cloud by having Mr. Foster arrested . . . . It was Mr. Foster himself that created this dark cloud. I indicate that he basically brought upon his own cloud of fear basically his own self, perhaps long before, referring back to his admission of his cocaine use.

(Tr. at 59-60.)

17. Respondent also argued that Mr. Foster was

> . . . Drinking, dope, selling drugs -- that was what was going on. Dealing all day long, all morning long.

(Bar Ex. 11 at 514.)

18. Respondent explained this latter comment as a mistake. (Tr. at 72-73.) He said he realized that he misspoke when he said "all day long," so he immediately corrected it to "all morning long." (Id.) Respondent explained his misstatement as due to time pressures from the judge and because he was arguing "from the top of [his] head." (Id. at 73-76.) Nonetheless, he believes the jury knew he was making a correction. (Id. at 76.)

19. At the time of the trial in the Foster case, Respondent had considerable trial experience before the Foster trial. (Tr. at 85-88.)

20. At that point, Respondent had also handled approximately 32 appeals while in the United States Attorney's Office. (Id. at 69-70.) Most of these cases involved allegations of prosecutorial misconduct, and many involved issues raised by closing arguments. (Id. at 83-85.) Respondent was aware of the general rules governing a prosecutor's conduct in closing argument, as well as Rule 3.4(e). (Tr. at 89-91.)

21. On appeal, the United States Court of Appeals for the District of Columbia Circuit held that Respondent's remarks set forth above did not have a foundation in the record, and thus were improper and potentially prejudicial. (Bar Ex. 1 at 2, 8-9; Bar Ex. 2 at 1, 4; Tr. at 68.) In part because of this error, and in part because it found a judicial error, the Court reversed Mr. Foster's conviction and remanded

the case for a new trial (United States v. Foster, 982 F.2d 551 (D.C. Cir. 1993)). (Bar Ex. 1 at 9; Bar Ex. 2 at 1, 92.)

III. CONCLUSIONS OF LAW

1. Rule 3.4(e) lists a litany of actions that are proscribed for lawyers in trial. Specifically, the Rule states that a lawyer shall not:

> [i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

2. In neither its Petition or its Proposed Findings has Bar Counsel specified which of these individual prohibitions was allegedly violated by Respondent. However, in its oral argument at the hearing, Bar Counsel argued that the evidence would show that "Respondent had strayed from the facts and that the argument should have been limited to the facts in evidence and that . . . he insinuated that he had knowledge of prior instances not supported by the record." (Tr. at 6.)

3. Bar Counsel relied exclusively on the written record of the Foster trial to prove its case. This record shows what words were spoken, but no more.

4. The Court of Appeals found that Respondent strayed from "the facts in evidence" when he made these comments. (Bar Ex. 1 at 7.) In reaching this conclusion, the

Court of Appeals appeared to place reliance on the government appellate attorney's concession that the "cloud" statement "could be read to refer to prior drug dealing." (Id. at 8.) The Court also did not evidence any awareness that defense counsel's argument had contained an allusion to a "cloud."[4] (Id.) In addition, the Court apparently rejected the appellate attorney's sole attempt to justify Respondent's "all morning long" remark as founded in the evidence. (Id.) The Court of Appeals did not have before it any explanation from Respondent as to why he made these remarks. Thus, the Court noted that it could "detect no purpose for the comments other than an impermissible one." (Id.)

5. In his defense at the hearing in this matter, Respondent did provide credible explanations. In sum, he testified that he intended the "cloud" argument to rebut the "cloud" argument made by defense counsel. His testimony about his "all day long" argument was that he had retracted this by making an immediate correction when he misspoke. He believes that this correction was more obvious to the jury than it is on the written record.

6. Although Rule 3.4(e) does not explicitly provide that a prosecutor's improper actions be made knowingly, we find that this requirement is implicit in the

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[4] During the hearing in this matter, Respondent noted that the defense closing argument was not transcribed until after the briefs had been submitted. (Tr. at 58, 62-66, 123-25.) Although this point was raised in oral argument, the Court's opinion does not mention the defense reference to "cloud" at all. (Id.)

Rule. The purpose of the Rule is to punish prosecutorial behavior if he

> alluded to a matter that he did not reasonably believe was relevant or that was not supported by admissible evidence, asserted personal knowledge of facts in issue when not testifying as a witness, or stated a personal opinion as to the justness of a cause, the credibility of a witness or the guilt or innocence of an accused.

See In re Confidential, Bar Docket No. 517-86 (Oct. 27, 1988).

7. Bar Counsel asserts that "Respondent had no evidentiary basis" for his "cloud" argument. (Proposed Findings of Fact, Conclusions of Law and Recommended Sanction Submitted by the Office of Bar Counsel ("Bar Counsel Brief") at 3, ¶ 6.) This position is based on Bar Counsel's presumption that Respondent's comment that "[t]he cloud started long, long before, and perhaps the cloud started long before April 9th" must "imply the sale of drugs beyond the scope of the evidence." (Id. at 3, ¶ 5.)

8. On the surface -- without the benefit of explanation -- these words may "convey to the jury that the prosecution knew of crimes other than the one charged." (See Bar Ex. 1 at 8.) However, Respondent provided an explanation for these remarks, which the Hearing Committee credits. (See Tr. 58-60.) He testified that he was trying to make it clear to the jury that the government did not have any information about any other criminal activity. (Id. at 131.) He pointed to the other parts of that statement to support his position. Taken in the context of the entire comment, he stated:

> I think I'm trying to stress to [the jury], I'm only talking about Mr. Foster, his own problems and what occurred on April 9, and don't get me wrong, I don't have any information of any prior drug behavior.

(Id. at 131-32.)

9. Although Respondent could have been more careful in his choice of words, the Hearing Committee does not find by clear and convincing evidence that Respondent was making an argument he did not "reasonably believe [was]. . . supported by admissible evidence."[5]

10. Similarly, the "all morning long" comment was analyzed by both the Court of Appeals and by Bar Counsel as being intended to imply that Mr. Foster engaged in drug transactions for longer than either Officer Hebron or Mr. McGee observed. (See Bar Ex. 1 at 7-9; Bar Counsel Brief at 2-3, ¶¶ 3-6.) At the hearing in this matter, Respondent did not attempt to defend this comment. Rather, he testified that he had misspoken and immediately corrected it. He believes

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[5] In his Brief, Respondent argues that "Rule 3.4(e), by its very terms, cannot be applied to final arguments of counsel." (Respondent's Brief, at 16 n. 5.) Alternatively, he appears to seeks to "excuse" his conduct because it occurred in the heat of a trial. (Id. at 15-16.) The Hearing Committee does not agree with either of these arguments.

The Hearing Committee believes the Rule was intended to address statements made in closing argument. See, e.g., State v. Smith, 554 So. 2d 676, 682 (La. 1989). As to an "excuse" from compliance with Rule 3.4, we note that subsection (e) of Rule 3.4 is addressed entirely to conduct that occurs in trial. If Respondent were correct, his argument would excuse all violations of the Rule. This cannot be accurate.

that this immediate correction was obvious to the jury. The Hearing Committee credits Respondent's explanation.[6]

11. Again, although Respondent could have been more careful in his choice of words, the Hearing Committee does not find by clear and convincing evidence that Respondent was making an argument he did not "reasonably believe [was]. . . supported by admissible evidence."

IV. CONCLUSION

The Hearing Committee does not find by clear and convincing evidence that Respondent violated Rule 3.4(e). Thus, we recommend the Petition be dismissed.

HEARING COMMITTEE NUMBER SIX

Mary Lou Soller

Charles T. Duncan

Morton Gluck

December 4, 1995

[6] In his Brief, Respondent also argued that it would have been a permissible argument to deliberately suggest to the jury that Mr. Foster "was dealing or intending to deal all day long." (Respondent's Brief at 14, ¶ 34.) He argues that the jury "was free to conclude" that Mr. Foster was involved in additional drug transactions. (Id. at 13-14, ¶¶ 32-34.) Based on our reading of the trial transcript, the Hearing Committee does not agree with this argument.

Attachment 6

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In Re:

CONFIDENTIAL,

Respondent.

Dkt. No. 79-93

ORDER OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

This case presents the question of whether a prosecutor's rebuttal argument violated Rule 3.4(e) of the Rules of Professional Conduct which prohibits a lawyer at trial from alluding to any matter that will not be supported by admissible evidence. Hearing Committee Number Six, which heard the evidence in this case, concluded that there was not clear and convincing evidence that the rule had been violated and recommended a dismissal. We adopt the findings of fact made by the Hearing Committee and order that the petition be dismissed.

1. Facts

Respondent is an Assistant United States Attorney for the District of Columbia and a member of the D.C. Bar. In July, 1992 he prosecuted the case of United States v. John Doe[1] in the United States District Court for the District of Columbia. Doe was charged with possession with intent to sell more than five grams of "crack" cocaine.

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[1] Because this proceeding was commenced before the effective date of the recent amendments to Rule XI, it remains a confidential matter until discipline other than an informal admonition is recommended. We have not referred to the underling criminal case by the defendant's real name in order to preserve Respondent's anonymity.

A police officer testified that he observed Doe and Robert McGee for about 20 minutes during the early morning house of April 9, 1991 engaging in five apparent drug transactions -- two by Doe, and three by McGee. The officer radioed other policemen who arrested Doe and McGee. The arresting officers recovered 19 grams of crack cocaine, packed in individual plastic bags, from the vicinity where Doe and McGee were arrested. An expert testified that the packaging was consistent with intent to distribute, rather than individual usage. McGee pleaded guilty and testified that Doe had engaged in eight drug sales over an unspecified period of time on April 9.

Doe's defense was mistaken identity and general denial. He admitted drug and alcohol use on the morning of his arrest and testified that he had a serious addiction to cocaine. But he claimed that he had been inside the house where he was arrested for some time prior to the arrest and not on the street selling crack.

During his closing argument, Doe's lawyer said:

> It's July 3rd. It's the day before Independence Day. Tomorrow is Independence Day, and since April 9th Mr. [Doe] has been living under a cloud of fear caused by the charges in this case, and as a result of your actions today, your actions and your deliberations, and consistent with the evidence that's been produced in trial, tomorrow will be Mr. [Doe's] independence day. Tomorrow will be the first day these charges will no longer be hanging over his head.
> (BX 10, 3-4).

In rebuttal, Respondent replied to defense counsel's apparent plea for sympathy:

> And wher the dark cloud s above, the cloud of fear, the only clouds in this case is when Mr. [Doe] was out there selling drugs. He brought upon his own cloud his cloud of fear. It's not the cloud now since we're in trial. The cloud started long, long before, and perhaps the cloud started long before April 9th.
> (BX 1 at 513).

At another point in his rebuttal, Respondent argued that Doe was:

> Drinking dope, selling drugs -- that was what was going on Dealing all day long, all morning long.
> (BX 11 at 514).

Doe was convicted, and he appealed. The United States Court of Appeals for the District of Columbia Circuit reversed his conviction and remanded the case for a new trial. The D.C. Circuit cited two errors. The first error, an evidentiary ruling by the District Court, is irrelevant to this case. The second error was a holding that the comments in rebuttal quoted above were not justified by the evidentiary record and were prejudicial to the defendant.

Bar Counsel's petition was filed in January, 1994, following Respondent's rejection of an informal admonition. In finding that Bar Counsel had failed to prove a violation of Rule 3.4(e) by clear and convincing evidence, the Hearing Committee relied on Respondent's testimony, which it explicitly found to be credible. With respect to the "dark clouds" references, Respondent testified that he was seeking to reply to the defense counsel's reference in his "Independence Day" statement to the cloud of fear cast over Doe's life because of his arrest in this case. He testified that he was not, as the D.C. Circuit had concluded, suggesting that Doe had sold drugs prior to April 9, 1991, but

was rather suggesting that Doe's fear and the dark cloud he was living under resulted from his drug addiction, which had existed before his arrest. (Tr. at 67-8)

With respect to the "all morning long" comment, Respondent denied that this was a suggestion that Doe had been engaged in the sale of drugs longer that morning than the officer had observed. Rather, he testified, that when he first said that Doe was dealing "all day long" he realized that he had misspoken. He corrected his statement by adding the words "all morning long," which he believed the jury understood as a correction. (Tr. 7:-4).

The Hearing Committee noted that the D.C. Circuit opinion showed no recognition that the "dark cloud" comment in rebuttal was a response to the cloud metaphor that defense counsel had used in his closing. The defense closing was not originally part of the record on appeal, although the record was supplemented after the briefs were submitted. The Hearing Committee also noted that the D.C. Circuit had not had the opportunity to hear Respondent's explanation for these statements, an explanation that it found to be credible. Finally, the Hearing Committee interpreted Rule 3.4(e), which prohibits alluding to a matter not supported by admissible evidence, as requiring that the lawyer act knowingly. While it concluded that Respondent could have been more careful in his choice of words, the Hearing Committee could not find that he was making an argument that he did not reasonably believe was supported by admissible evidence.

2. Respondent's Arguments

Although Bar Counsel has noted an exception to the Hearing Committee Report, we first turn to two arguments raised by Respondent. First, Respondent argues that, read literally, Rule 3.4(e) does not apply to him. The rule prohibits a lawyer from alluding to a matter that "will not be supported by admissible evidence . . . ." (Emphasis added.) In this instance, the evidence had already been taken. To apply literally to a closing or rebuttal argument, the rule should read "will not be or has not been supported by admissible evidence."

There is more force to Respondent's position than mere grammatical precision. When a lawyer alludes to a matter before the evidence is in, his opponent and the court may be incapable of knowing that the evidence will not support the lawyer's assertion. On the other hand, once the evidence has been taken, neither the court nor the opposing counsel are helpless. If a lawyer inaccurately claims that the evidence has shown a fact for which no proof was offered, his opponent can object, and the court can rule. Moreover, a lawyer who engages in such conduct risks a serious embarrassment to his case. Nothing so damages a lawyer's credibility with a jury as an instruction from the court to disregard the lawyer's comment because there is no evidence to support it. Finally, once the evidence is in, the existence of a fact may still be in dispute, particularly in a long trial where memories have faded. A simple instruction that the jury's recollection controls may be all that is necessary to prevent any

prejudice. In this case, defense counsel did object to both statements, but the trial judge, who had heard the testimony, allowed the argument to continue, and ruled that "the jury's recollection of the evidence will control." (BX11 at 513-16)

In light of our resolution of this case, we need not decide this issue. What little case law there is does not support Respondent's position. See State v. Smith, 554 So.2d 676, 681 (La. 1989). Were we to adopt Respondent's interpretation, we would be concerned about the case where a lawyer deliberately makes a highly prejudicial, but unsupported statement in a closing argument. On the other hand, other rules might apply to such conduct, e.g., Rules 3.5(a), 8.4(d). Assuming that Rule 3.4(e) applies to statements made in closing or rebuttal argument, for the reasons discussed below no such violation has been prover here.

Second, Respondent argues that it was error for the Hearing Committee or for this Board to consider the opinion of the D.C Circuit reversing Doe's conviction. Were we to give res judicata or collateral estoppel effect to the D.C. Circuit's opinion, Respondent would be severely prejudiced. He was a lawyer in, not a party to, the Doe case. He was given no opportunity to testify or defend himself. But we do believe that both the Hearing Committee and the Board can consider the D.C. Circuit opinion as evidence and give it whatever weight it may bear. See Board Rule 11.2. First, we are not bound by the same rules of evidence that govern a civil or criminal suit. Second, as the result both

before this Board and the Hearing Committee demonstrates, we are capable of requiring an independent evaluation of Respondent's conduct.

3. Bar Counsel's Argument

We turn at last to Bar Counsel's argument. Bar Counsel accepts the findings of fact made by the Hearing Committee. In other words, he accepts that Respondent did not knowingly allude to matters not of record or did not allude to matters which he did not reasonably believe were supported by the evidentiary record. Bar Counsel's position is that, as a matter of law, Respondent's belief in the accuracy of his statements or his intent when he made the statement is irrelevant. Bar Counsel reads Rule 3.4(e) to be a per se rule; if the statement in rebuttal is not supported by the evidence, the rule has been violated.

Bar Counsel's position is based on a literal parsing of the rule. Rule 3.4 provides:

> A lawyer shall not:
>
> . . . . .
>
> (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence
>
> . . .

The phrase "reasonably believe" modifies only the clause about relevance, not the clause about not supported by evidence. It is the second "that" which Bar Counsel contends is fatal to the Hearing Committee's interpretation that to violate the rule, a lawyer must have no reasonable belief that the record supports

his statement in rebuttal. If the Hearing Committee were correct, the rule should read:

> (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or will not be supported by admissible evidence.

If we were to read the rule literally, we might conclude, as we discussed above, that it does not apply at all to closing argument or rebuttal since it refers to evidence that "will be" admitted, not "has been" admitted. Moreover, Bar Counsel's interpretation brings about unjust results that the drafters of the Rules cannot have intended. If a lawyer in opening statement claims that a witness will testify to a specific set of facts after having been told by the witness that she will invoke the privilege against self-incrimination, he would seem to have violated the rule of alluding to a matter that would not be supported by admissible evidence. But surely a lawyer would not have committed an ethical breach if he claimed in his opening that a witness would testify a certain way based on his interview of the witness, and it turned out that the witness surprised him by invoking the privilege or changing her testimony.

At oral argument, Bar Counsel suggested that there might be a difference between opening statement and closing argument because in the latter instance there was no possibility of surprise. But this position is too tortured. Bar Counsel is saying (1) that even though the rule does not literally apply to closing argument, it should be read to so apply; (2) the rule should otherwise be read literally to exclude the element of

reasonable belief; (3) except when applied to opening statement, in which case an element of reasonable belief should be read into the rule. We conclude that applied to opening statement, where Rule 3.4(e) clearly applies, a lawyer cannot be found to have violated the rule unless he had no reasonable belief that the fact alluded to would be supported by admissible evidence. What little precedent there is supports this interpretation. In re Confidential, Bar Docket No. 517-88 (Oct. 27, 1988), dismissed a petition, brought under DR 1-102(A)(5) (conduct prejudicial to the administration of justice), against a prosecutor who commented on missing witnesses in his closing without prior approval of the trial judge:

> In our view, in order for trial conduct to rise to [the level of disciplinary violation], it should at least be accomplished with knowledge or awareness of its wrongfulness or impropriety, or at least with reckless disregard for applicable law or rules of conduct. Any lesser standard would run the risk of penalizing a lawyer for zealous advocacy. Id. at 4.

It follows, therefore, that assuming arguendo that it applies to closing or rebuttal argument, a lawyer has not violated Rule 3.4(e) if he reasonably believed that the facts alluded to in his argument were supported in the record.

From that conclusion it is a quick step to find that no violation has been proven here, particularly in light of the unchallenged findings of fact made by the Hearing Committee. Even in the absence of Respondent's explanation, however, we would be hard pressed to find a violation in this case. But for the D.C. Circuit opinion, we find it hard to believe that a

reasonable reading of Respondent's rebuttal argument would lead to the conclusion that he alluded to facts that he had no reason to believe were part of the record. We give very little weight to the D.C. Circuit opinion. First, the standard applied there is not necessarily the same one applied in a disciplinary proceeding. If a prosecutor alludes to a prejudicial matter in closing, the fact that he did so by mistake may not make a difference once the jury has heard the statement. The prosecutor's state of mind is irrelevant to the question of prejudicial effect on the jury. In the context of a disciplinary proceeding, however, the lawyer's state of mind may be crucial. Second, the opinion is essentially an exercise in a fortiori. For example, it never acknowledges that Respondent's use of the cloud metaphor was a response to defense counsel's use of the same metaphor. Third, for disciplinary purposes, it is inappropriate to fly-speck spontaneous statements like an English professor deconstructing a work of literature. There must be appreciation for the oral context in which argument occurs and consideration of the probable effect of passing ambiguous remarks on a jury's deliberation.

If one puts to one side the D.C. Circuit's interpretation and looks at Respondent's words afresh, it is difficult to understand Bar Counsel's concern. Take the second statement first, Doe was

> Drinking, dope, selling rugs -- that was what was going on. Dealing all day long, all morning long.

This remark is said to imply that Respondant had been dealing drugs on the morning of his arrest for longer than he was observed by the police. Assuming that this is the only interpretation a jury could make of these cryptic remarks, made spontaneously in a rebuttal argument, the inference that Doe had sold or was intending to sell more drugs than the two transactions that the officer observed was a fair one. There was testimony from McGee that Doe had sold more drugs, and there was testimony to suggest that he revisited the house where he was arrested from time-to-time to replenish his supply. (Tr. 42) When he was arrested, 53 bags of drugs, packaged for sale, were seized. (Tr. 37-8) The inference that he had sold and/or was intending to sell more drugs than he was observed selling was a fair one. The phrases "all day long, all morning long" were at worst obvious hyperbole, which the jury could not have understood to be literally true since Doe was arrested at about 9:30 a.m. Hyperbole is a legitimate form of argument, e.g., "How could the witness have seen the robber's face when it was blacker than the inside of a cow that night." This was not argument for which there was no record basis.

The "dark clouds" comment is virtually unintelligible. The full effect is best observed by reading the comments aloud:

> And then the dark clouds above, the cloud of fear, the only clouds in this case is when Mr. [Doe] was out there selling drugs. He brought upon his own cloud, his cloud of fear. It's not the cloud now since we're in trial. The cloud started long, long before, and perhaps the cloud started long before April 9th.

Cicero this is not. What it is is a prosecutor attempting to respond to defense counsel's "cloud" reference and getting himself entangled in his own syntax. Bar Counsel wants to treat these spontaneous remarks as some sort of prose poem. The first sentence, Bar Counsel says, defines the clouds as selling drugs and the later statement, "perhaps the cloud started long before April 9th" means perhaps Doe was selling drugs before April 9th.

Perhaps Lionel Trilling, after some study, might have interpreted these written words the same way, but does anyone think that a juror who heard, not read these words, and heard them only once, would reach that same conclusion? Read aloud the entire passage is close to gibberish.

In recent years, the legal press has suggested that complaints about prosecutorial misconduct have significantly increased. Whether actual prosecutorial misconduct, as opposed to complaints, has increased is beyond our knowing. Nevertheless, we believe that Bar Counsel is correct in scrutinizing the conduct of all segments of the bar, including that of prosecutors. But trials are semi-spontaneous events, not scripted plays. Some consideration of the heat of the moment and the fact that these are oral, not written proceedings is appropriate. Words spoken may not always have the same meaning as words written. Nor may the same words be necessarily understood the same way in an oral, as opposed to written context. Finally, in a trial, if a lawyer strays in closing from the evidence, there is an adversary to challenge him and a judge to correct him if

necessary. It is noteworthy that the trial judge did not do so in this case.

It is not uncommon for those who try cases to find themselves expressing inartfully constructed sentences and thoughts. To parse, fly-speck, deconstruct and interpret a written transcript of those words is not a fair way to understand the meaning of a lawyer inflicted with a temporary case of tanglemouth. We cannot find that this record approaches clear and convincing evidence that Respondent breached Rule 3.4(e).

For the reasons stated above, this matter is hereby DISMISSED.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Hamilton P. Fox, III
Hamilton P. Fox, III
Chair

Date: April 25, 1996

All members conclude in this Order, except Ms. Christensen and Ms. Brannan, who did not participate.

QUESTIONNAIRE FOR NOMINEES TO THE DISTRICT OF COLUMBIA COURTS
COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Maurice Anthony Ross.

2. Citizenship (if you are a naturalized U.S. citizen, please provide proof of your naturalization).

   United States of America.

3. Current office address and telephone number.

   United States Department of Justice
   Office of Professional Responsibility
   950 Pennsylvania Avenue, N.W.
   Room 3335
   Washington, D.C. 20530
   (202) 514-3365

4. Date and place of Birth.

   January 3, 1961, Washington, D.C.

5. Martial Status (if married, include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   I am married to Beverly Janine Ross, whose maiden name was Beverly Janine Slaughter. She is employed as a Product Manager by the Federal Home Loan Mortgage Corporation ("Freddie Mac"), 8250 Jones Branch Drive, McLean, Virginia 22102.

6. Names and ages of children. List occupation and employer's name if appropriate.

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7. Education: List secondary school(s), college(s), law school(s), and any other institutions of higher education attended; list dates of attendance, degree received, and dates each degree was received. Please list dating back from most recent to earliest.

   Harvard Law School, September 1983 - June 1986, J.D. (June 1986); Yale College, September 1979 - May 1983, B.A. (May 1983); St. John's College High School, September 1975 - May 1979, Diploma (May 1979).

8. Employment record. List all jobs held since college, including the dates of employment, job title or description, and name and address of employer. Please list dating back from recent to earliest.

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   Assistant Counsel, August 11, 1997 - Present.

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   Senior Counsel, February 16, 1993 - August 8, 1997.

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   United States Attorney's Office
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   Assistant United States Attorney, September 30, 1991 - February 12, 1993.

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Associate Deputy Attorney General, May 5, 1991 - September 27, 1991; Special Assistant to the Deputy Attorney General, September 10, 1990 - May 4, 1991.

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Adjunct Professor of Law, August 1990 - December 1990.

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Assistant United States Attorney, July 24, 1989 - September 7, 1990.

Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
Associate, August 18, 1986 - July 21, 1989.

Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
Summer Associate, June 1985 - August 1985.

Kirkpatrick & Lockhart
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Summer Associate, June 1984 - August 1984.

Harvard Law School
1563 Massachusetts Avenue
Cambridge, Massachusetts 01238
Teaching Assistant (to Prof. David Rosenberg), January 1984 - May 1984.

Temporaries Incorporated
1141 Connecticut Avenue, N.W.
Washington, D.C. 20036
Summer Clerk, June 1983 - August 1983.

9. Honors and awards: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   In 1998, 1999, and 2000, I received cash awards from the United States Department of Justice for outstanding performance.

10. Business relationships. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

    Director, Greater Washington Urban League; Chairperson, Greater Washington Urban League Urban Roundtable; Vice-President, Greater Washington Urban League Thursday Network; Membership Chairperson, Greater Washington Urban League Thursday Network.

11. Military service. Indicate whether you have served in the US Military and, if so, list dates of service, branch of service, rank or rate, serial number, and type of discharge received.

    I have never served in the US Military.

12. Bar Associations: List all bar associations, legal or judicial-related committees, conferences, or organizations of which you are or have been a member, and provide titles and dates of any offices which you have held in such groups.

    District of Columbia Bar Association (1988 - Present)

    American Bar Association (1987 - 1990)

    Department of Justice Association of Black Attorneys (1989 - 1993) and (1997 - Present)

    District of Columbia Bar Association Legal Ethics Committee (1999 - Present)

Washington Bar Association (2000 - Present)

National Bar Association (2000 - Present).

13. Other Memberships: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, public, charitable, or other organizations, other than those listed in response to Question 12. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

The Colony Foundation (1982 - Present)

Greater Washington Urban League (1992 - Present)

Greater Washington Urban League Thursday Network (1992 - 1996), Chairperson of the Membership Committee (February 1992 - May 1992), Vice-President (May 1994 - May 1995)

Greater Washington Urban League Urban Roundtable (1997 - Present), Chairperson (1997 - Present)

Greater Washington Urban League Board of Directors (1998 - Present)

Greater Washington Urban League Executive Committee (1999 - Present)

Saint Augustine Catholic Church (1995 - Present)

Chevy Chase Citizens' Association (1995 - Present)

National Urban League Young Professionals Advisory Committee (1996 - 1997)

Yale Alumni Fund Class Agent (1983 - 1995)

Yale Alumni Schools Committee (1990 - 1994)

Carol Schwartz Mayoral Campaign (1994)

United States Presidential Transition Team (1988)

None of the above listed organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

14. Court Admissions. List all courts in which you have been admitted to practice, with dates of admission and lapses in admission if any such memberships lapsed. Please explain the reason for any lapse of membership. Please provide the same information for administrative bodies which require special admission to practice.

Supreme Court of Pennsylvania, May 6, 1987.

District of Columbia Court of Appeals, March 7, 1988.

United States Court of Appeals for the Third Circuit, September 28, 1988.

United States District Court for the District of Columbia, May 3, 1993.

United States District Court for the Northern District of Texas (pro hac vice) July 1, 1994 and November 2, 1994.

United States District Court for the Central District of California (pro hac vice) May 12, 1995.

United States Court of Appeals for the Fifth Circuit, December 16, 1996.

United States Court of Appeals for the Ninth Circuit, February 25, 1997.

15. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited.

None.

16. Speeches. List the titles of any formal speeches you have delivered during the last five (5) years and the date and place where they were delivered. Please provide the

Committee with four (4) copies of any of these speeches.

None.

17. Legal Career.

a. Describe chronologically your law practice and experience after your graduation from law school, including:

(1) Whether you served as law clerk to a judge, and if so, the name of the judge, the court, and the dates of your clerkship;

(2) Whether you practiced alone, and if so, the address and the dates;

(3) The dates, names and addresses of law firms, companies or governmental agencies with which you have been employed.

b. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

c. Describe your typical former clients and describe the areas of practice, if any, in which you have specialized.

d. Describe the general nature of your litigation experience, including:

(1) Whether you have appeared in court frequently, occasionally, or not all. If the frequency of your appearances has varied during over time, please describe in detail each such variance and give applicable dates.

(2) What percentage of these appearances was in:

(a) Federal courts (including Federal courts in D.C.);
(b) State courts of record (excluding D.C. courts);
(c) D.C. courts (Superior Court and D.C. Court of Appeals only);

(d) other courts and administrative bodies.

(3) What percentage of your litigation has been:
(a) civil;
(b) criminal.

(4) What is the total number of cases in courts of record you tried to verdict or judgment (rather than settled or resolved, but may include cases decided on motion if they are tabulated separately). Indicate whether you were sole counsel, lead counsel, or associate counsel in these cases.

(5) What percentage of these trials was to
(a) a jury;
(b) the court (include cases decided on motion but tabulate them separately).

Since August 11, 1997, I have held the position of Assistant Counsel in the Office of Professional Responsibility at the United States Department of Justice. My current office address is: United States Department of Justice, Office of Professional Responsibility, 950 Pennsylvania Avenue, N.W., Room 3335, Washington, D.C. 20530.

In my capacity as an Assistant Counsel, I investigate allegations of professional misconduct by Department of Justice attorneys, report on the same to supervisory attorneys within the Department, and recommend disciplinary sanctions for professional misconduct. Investigations cover the varied components of the Department and the subject matters which those components address.

As an Assistant Counsel with the Office of Professional Responsibility, I do not appear in court or litigate on behalf of the government.

From February 16, 1993 until August 8, 1997, I employed by the Freddie Mac Legal Division as a Senior Counsel. My business address was: Freddie Mac, Legal Division, 8200 Jones Branch Drive, McLean, Virginia 22102.

During my tenure at Freddie Mac, I acted as the corporation's counsel in all aspects of numerous commercial,

real estate related, and personal injury cases in federal and state courts across the United States. My most significant cases on behalf of Freddie Mac were three lender liability actions. They are: Larry Siegel v. Federal Home Loan Mortgage Corp., 145 F.3d 1340 (9th Cir. 1998)(unpublished opinion reported) and 143 F.3d 525 (separate published affirming the district court's grant of summary judgment); Federal Home Loan Mortgage Corp. v. John Walker, 134 F.3d 369 (5th Cir. 1997)(affirming summary judgment in favor of Freddie Mac); and Federal Home Loan Mortgage Corp. v. Chapel Creek Partnership, No. CA3:93-CV-0696P (N.D. Tex. Dec. 30, 1994) (related case to Walker where jury returned a deficiency judgment for Freddie Mac).

I personally have handled all aspects of the Siegel case except the oral argument before the Ninth Circuit (because I was no longer with Freddie Mac). In the Walker and Chapel Creek cases, I served as co-lead counsel with Texas attorneys. However, I wrote and submitted the appellate brief on behalf of Appellee Freddie Mac to the United States Court of Appeals for the Fifth Circuit. At Freddie Mac, three-quarters of my practice was devoted to civil litigation with occasional (3 or 4 times a year) state and federal court appearances. Most significantly, I served as co-counsel during the 3-day during trial of the Chapel Creek case. The remaining twenty-five percent (25%) of my time was spent on multifamily real estate transactions. My real estate practice consisted principally of multifamily loan workouts, foreclosures, receiverships, and real estate sales.

Prior to coming to Freddie Mac, I was an Assistant United States Attorney in the District of Columbia from July 24, 1989 to September 1990 and from September 1991 to February 12, 1993. My business address while I was an Assistant United States Attorney was: United States Attorney's Office, 555 4th Street, N.W., Washington, D.C. 20001.

While at the United States Attorney's Office, I served in the following sections: (1) misdemeanor trial; (2) grand jury; (3) felony trial; and (4) federal narcotics trial, and I appeared in the Superior Court of the District of Columbia and the United States District Court for the District of Columbia on a daily basis as an Assistant United States Attorney assigned to felony cases. I also represented the

United States in more than 50 trials (to verdict) in the Superior Court of the District of Columbia and the United States District Court for the District of Columbia.

My most significant trial victories included: (1) convicting a D.C. correctional officer of unlawful entry and destruction of property after a one-week jury trial before Judge Noel Kramer; (2) convicting co-defendants of drugs and weapons charges after a two-week jury trial before the late Judge Oliver Gasch; (3) convicting a D.C. correctional officer of drug trafficking after a three-day jury trial before the late Judge Gerhard Gesell; (4) convicting co-defendants of a drug-related homicide after a two-week jury trial before Judge Herbert Dixon; and (5) convicting a D.C. police officer of using excessive force after a one-week jury trial before Judge Gregory Mize.

In between two postings at the United States Attorney's Office, I worked in the Office of the Deputy Attorney General of the United States ("ODAG"). The business address for the ODAG was: United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

My responsibilities in the ODAG included: (1) reviewing and recommending law enforcement special deputization requests; (2) coordinating communications between the ODAG and the Executive Office for Asset Forfeiture; (3) coordinating communications between the ODAG and the Organized Crime Drug Enforcement Task Forces; (4) coordinating compilation of the Attorney General's Report on Crime; and (5) assisting in the formation and implementation of the "Weed and Seed" program.

In the fall of 1990, while serving in the ODAG, I taught "Legal Writing, Research and Analysis" as an Adjunct Professor of Law at George Mason University School of Law, 3401 N. Fairfax Drive, Arlington, Virginia 22201.

I began my legal career as an Associate with Shaw, Pittman, Potts & Trowbridge, 2300 N Street, N.W., Washington, D.C. 20037. There, I conducted or defended over 30 depositions, drafted motions and briefs, including a brief for the United States Court of Appeals for the Third Circuit, and worked on all aspects of three lengthy Nuclear Regulatory Commission proceedings.

Over the fifteen years I have practiced law, approximately 70% of my court appearances of record have been in state courts and the remaining 30% have been in federal courts. However, I would estimate that the litigation matters I have handled are evenly divided between civil and criminal cases.

Finally, a summary of the cases that I have tried to verdict or judgment is provided below.

In November of 1994, I was the associate counsel in a three-day civil, jury trial before Judge Jorge Solis in the Northern District of Texas.

From May 1992 until February 1993, I was the sole counsel for the United States in 11 jury trials and one bench trial of felony matters, including 3 homicides, in the Superior Court of the District of Columbia.

From October of 1991 until April 1992, I was the sole counsel for the United States in 16 jury trials and one bench trial of felony matters in the United States District Court for the District of Columbia.

In addition, I had multiple trials or extended appearances before Judges Gerhard Gesell, Louis Oberdorfer, and Royce Lamberth in federal court and Judges Gregory Mize, Herbert Dixon, Bruce Beaudin, Noel Kramer, and Robert Tignor in Superior Court. Overall, as an Assistant United States Attorney, I appeared before approximately 15 federal judges, 3 federal magistrates, 20 local judges, and 10 local commissioners.

18. Describe the five (5) most significant litigated matters which you personally handled. Provide citations, if the cases were reported, or the docket number and date if unreported. Give a capsule summary of the substance of each case and a succinct statement of what you believe was of particular significance about the case. Identify the party/parties whom you represented and describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case, (a) the date of representation; (b) the court and the name of the judge or judges before whom the case was litigated; and (c)

the name(s) and address(es) and telephone number(s) of co-counsel and of the principal counsel for the other parties.

1. In Larry Siegel v. Federal Home Loan Mortgage Corp., No. CV94-6865 (C.D. Cal. Dec. 12, 1996), the plaintiffs, Larry Siegel and Selwyn Gerber, sued Freddie Mac, J.I. Kislak Mortgage Corporation ("Kislak"), and various Freddie Mac and Kislak employees for breach of contract and covenant of good faith and fair dealing; breach of fiduciary duty; tortious breach of covenant of good faith and fair dealing; negligent and intentional interference with prospective economic advantage; and negligent and intentional interference with contract relationships. In two separate opinions, the District Court granted summary judgment on all claims to the defendants. Specifically, the District Court held that Siegel's claims against Freddie Mac were barred by the res judicata effect of his prior bankruptcy, in which he failed to object to Freddie Mac's proof of claim. The Court also held that Siegel was liable for attorney's fees incurred by Freddie Mac subsequent to Siegel's bankruptcy discharge.

I handled the entire Siegel case on behalf of Freddie Mac and its employees. The case was litigated in the United States District Court for the Central District of California before Judge James Ideman. The plaintiffs were represented by Gary Kurtz, Esquire, Sherman & Kurtz, 16255 Ventura Boulevard, Encino, California 91436, telephone (323) 965-7696. Co-defendant Kislak and its employees were represented by R. Douglas Donesky, Esquire, Covington & Crowe, 1131 West Sixth Street, Ontario, California 91762, telephone (909) 983-9393.

2. In Federal Home Loan Mortgage Corp. v. John Walker, No. CA3:92-CV-2635P (N.D. Tex. Sept. 29, 1994), Freddie Mac sued the Walker family of Waltham, Massachusetts, for breach of contract, and the Walkers counterclaimed for fraud, statutory fraud in a real estate transaction, negligent misrepresentation, Texas Deceptive Trade Practices - Consumer Protection Act ("DTPA") violations, and intentional and reckless infliction of mental anguish. The District Court granted summary judgment in Freddie Mac's favor on all claims. The case was significant because the Court's opinion was a precursor of the Texas Supreme Court opinion in Prudential Ins. v. Jefferson Associates, 896 S.W.2d 156 (Tex. 1995). Both cases held that a sophisticated buyer of real

estate, who disclaims reliance upon any representations of the seller in the sales contract, cannot subsequently prove the causation element of a fraud or DTPA claim. The District Court also held that Freddie Mac, as a federal instrumentality, cannot be held liable for any sort of punitive or exemplary damages.

In the Walker case, I drafted 50% of the dispositive motions below, including Freddie Mac's motion to strike the claims for punitive damages. I also submitted the appellate brief on behalf of Freddie Mac. On December 17, 1997, the United States Court of Appeals for the Fifth Circuit affirmed the District Court without issuing a formal opinion at 134 F.3d 369.

The Walker case was litigated in the Northern District of Texas before Judge Jorge Solis. Freddie Mac's Texas co-counsel is Sally C. Helppie, Esquire, Bell & Nunnally, PLLC, 1400 One McKinney Plaza, 3232 McKinney Avenue, Dallas, Texas 75204-2429, telephone (214) 740-1400. The Walkers' trial counsel was J. Robert Forshey, Esquire, Cantey & Hanger, LLP, 2100 Burnett Plaza, 801 Cherry Street, Fort Worth, Texas 76102, telephone (817) 877-2881. The appellate counsel for the Walkers was Frank L. Broyles, Esquire, Goins, Underkofler, Crawford & Langdon, 1601 Elm Street, Suite 3300, Dallas, Texas 75201, telephone (214) 969-5454.

3. In U.S. v. David Lee and Reginald Spears, the defendants were charged with second-degree murder while armed, possession of a firearm during a crime of violence, and carrying a pistol without a license. Lee also was charged with obstruction of justice and threats to do bodily harm to witnesses. Both defendants were convicted of manslaughter while armed and the firearms offenses. In addition, Lee was convicted of several counts of obstruction and threats. Subsequently, the trial court vacated the convictions for manslaughter while armed, holding that the latter offense was not a lesser-included offense of second-degree murder while armed. Thereafter, the trial court's ruling was reversed by the District of Columbia Court of Appeals, which held that manslaughter while armed is a lesser-included offense of second-degree murder while armed in the District of Columbia. Lee v. United States, 668 A.2d 822 (D.C. 1995).

The Lee case was tried before Judge Herbert Dixon in the Superior Court of the District of Columbia. I was the sole trial counsel for the United States. Lee was represented at trial by Russell Canan, now Associate Judge, Superior Court of the District of Columbia, 500 Indiana Avenue, N.W., Washington, D.C. 20001, telephone (202) 879-1952. Spears was represented by Samuel Delgado, Esquire, Federal Public Defender Service, 100 South Charles Street, Suite 1100, Baltimore, Maryland 21201, telephone (410) 962-3962.

4. In U.S. v. Keith Holden, the defendant, a Metropolitan Police Officer, was charged with assault with a deadly weapon. Specifically, the Government alleged that Holden used excessive force by repeatedly striking a female patron with a slapjack during an arrest at the Tracks nightclub. After a jury trial before Judge Gregory Mize of the Superior Court of the District of Columbia, Holden was convicted of simple assault. Holden was represented by Leroy Nesbitt, Esquire, who is now deceased. I served as sole trial counsel for the United States in this matter.

5. In U.S. v. Milton Poole, the defendant, an off-duty D.C. Department of Corrections officer, was charged with unlawful entry and destruction of property. At trial, the government had no eyewitnesses to the entry or the destruction of property. Instead, the government relied on circumstantial evidence, including evidence of prior occasions when the defendant broke into the victim's apartment and destroyed her property. After a jury trial before Judge Noel Kramer of the Superior Court of the District of Columbia, Poole was convicted of unlawful entry. Poole was represented by Clark U. Fleckinger II, 10010 Colesville Road, Suite B, Silver Spring, Maryland 20901, telephone (301) 593-7768. I served as sole trial counsel for the United States in this matter.

19. Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation. Describe the nature of your participation in each instance described, but you may omit any information protected by the attorney-client privilege (unless the privilege has been waived).

My responsibilities in the ODAG included: (1) reviewing

and recommending law enforcement special deputization requests; (2) coordinating communications between the ODAG and the Executive Office for Asset Forfeiture; (3) coordinating communications between the ODAG and the Organized Crime Drug Enforcement Task Forces; (4) coordinating compilation of the Attorney General's Report on Crime; and (5) assisting in the formation and implementation of the "Weed and Seed" program.

20. Have you ever held judicial office? If so, please give the details of such service, including the court(s) on which you served, whether you were elected or appointed, the dates of your service, and a description of the jurisdiction of the court. Please provide four (4) copies of all opinions you wrote during such service as a judge.

    a. List all court decisions you have made which were reversed or otherwise criticized on appeal.

    I have never held judicial office.

21. Have you ever been a candidate for elective, judicial, or any other public office? If so, please give the details, including date(s) of the election, the office(s) sought, and the results of the election(s).

    On December 20, 1996, I applied for the position of United States Magistrate Judge in the United States District Court for the District of Columbia. Although I was a finalist for the position, I was not selected.

    I also previously applied for judicial vacancies on the Superior Court on: April 28, 1997; September 14, 1998; June 22, 1999; November 19, 1999; March 14, 2000; and June 27, 2000.

22. Political activities and affiliations.

    a. List all public offices, either elected or appointed, which you have held or sought as a candidate or applicant.

    b. List all memberships and offices held in and services

rendered to any political party or election committee during the last ten (10) years.

c. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity during the last ten (10) years.

a. None.

b. In the fall of 1994, I volunteered in the District of Columbia Mayoral Campaign of Carol Schwartz. I hung up campaign posters, attended campaign rallies and forums, and distributed campaign literature on election day.

c. 1/11/01 - Republican National Committee - $65.00
1/10/01 - Republican National Committee - $50.00
12/8/00 - Republican National Committee - $75.00
10/13/00- Republican National Committee - $75.00
1/1/00 - Republican National Committee - $50.00
11/21/99- Bush for President, Inc. - $100.00
2/16/98 - Sauerbrey Campaign Committee - $150.00
6/16/96 - Friends of Richard Cullen - $100.00

23. Have you ever been investigated, arrested, charged, held or convicted (include pleas of nolo contendere) by federal, State, local, or other law enforcement authorities for violations of any federal, State, county or municipal law, regulation or ordinance, other than a minor traffic offense?

No.

24. Have you or any business of which you are or were an officer ever been involved as a party or otherwise involved as a party in any other legal or administrative agency proceedings. If so, give the particulars. Do not list any proceedings in which you were merely a guardian ad litem or stakeholder. Include all proceedings in which you were a party in interest, a material witness, were named as a coconspirator or co-respondent, and list any grand jury investigation in which you appeared as a witness.

In the mid-1980's, I filed a complaint against Trio's Restaurant in the District of Columbia before the D.C. Human Rights Commission. I charged the restaurant with discriminatory treatment of Black customers by failing to render timely service to the same and charging a mandatory gratuity fee. The matter was resolved through conciliation when the owner of the restaurant agreed to end the discriminatory practices and post signs affirming the restaurant's commitment to comply with the equal accommodations laws.

25. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, bar or professional association, disciplinary committee, or other professional group? If so, please provide the details.

During my tenure in the United States Attorney's Office, I represented the United States in the prosecution of David Lee. As a result of my role in prosecuting Mr. Lee, I was asked by Bar Counsel to respond to an inquiry apparently resulting from the opinion rendered by the District of Columbia Court of Appeals in David Lee v. United States, 668 A.2d 822 (D.C. 1995). Attached please find a copy of the Court's opinion, the inquiry from Bar Counsel, my response, and the relevant portion of the trial proceedings. I also have attached Bar Counsel's letter concluding that there was no clear and convincing evidence of an ethical violation and terminating the matter without instituting disciplinary proceedings.

II. POTENTIAL CONFLICTS OF INTEREST

1. Will you sever all connections with your present employer(s), business firm(s), business association(s), or business organization(s) if you are confirmed?

Yes.

2. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with your law firm, business associates, or clients.

   I have and will continue to hold a 401K account administered by Freddie Mac and a Thrift Savings Plan account administered by the federal government. In addition, at age 55, I will be eligible for a monthly pension from Freddie Mac.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest.

   My wife and I own Freddie Mac stock. Although the federal courts have original jurisdiction over legal matters involving Freddie Mac, in the event a case involving Freddie Mac arises in the District of Columbia Superior Court, I will recuse myself.

4. Describe any business relation, dealing or financial transaction which you have had during the last ten (10) years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest.

   I presently am employed by Office of Professional Responsibility within the United States Department of Justice. Should any matter that was under consideration during my tenure with the Office of Professional Responsibility arise in the District of Columbia Superior Court, I will recuse myself.

   Similarly, my wife is employed by Freddie Mac. Should any matter involving Freddie Mac arise in the District of Columbia Superior Court, I will recuse myself.

5. Describe any activity during the last ten (10) years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or pubic policy.

Since January 1998, I have been a member of the Board of Directors of the Greater Washington Urban League. From time to time, the Greater Washington Urban League has endorsed certain public initiatives which are consistent with the League's goals and objectives. Towards those ends, the League endorsed the voter referendum in 2000 to reform the District of Columbia Board of Education.

6. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service as a judge? If so, explain.

I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service as a judge.

7. Explain how you will resolve any potential conflicts of interest, including any that may be disclosed by your responses to the above items. Please provide three (3) copies of any trust or other relevant agreements.

Should any conflicts arise, I will follow the Code of Judicial Conduct and seek the advice of the appropriate ethics officials.

8. If confirmed, do you expect to serve out your full term?

Yes.

III. FINANCIAL DATA

Financial Data maintained on file in Committee offices.

IV. DISTRICT OF COLUMBIA REQUIREMENTS

Supplemental questions concerning specific statutory qualifications for service as a judge in the courts of the District of Columbia pursuant to the District of Columbia Reform and Criminal Procedure Act of 1970, D.C. Code Section 11-1501(b), as amended.

1. Are you a citizen of the United States?

   Yes.

2. Are you a member of the bar of the District of Columbia?

   Yes.

3. Have you been a member of the District of Columbia bar for at least 5 years? Please provide the date you were admitted to practice in the District of Columbia.

   Yes, I became a member of the D.C. bar on March 7, 1988.

4. If the answer to No. 3 is "No"--

   a. Are you a professor of law in a law school in the District of Columbia?

   b. Are you an attorney employed in the District of Columbia by the United States or the District of Columbia?

   c. Have you been eligible for membership in the bar of the District of Columbia for at least 5 years?

   d. Upon what grounds is that eligibility based?

   Not applicable (see answer 3 above).

5. Are you a bona fide resident of the District of Columbia?

   Yes.

6. Please list the addresses of your actual places of abode (including temporary residences) with dates of occupancy for the last five (5) years.

   Since March 30, 1995, I have resided at
   Washington, D.C.

7. Have you maintained an actual place of abode in such area for at least five (5) years?

   Yes.

8. Are you a member of the District of Columbia Commission on Judicial Disabilities and Tenure or the District of Columbia Judicial Nomination Commission?

   No.

9. Have you been a member of either of these Commissions within the last 12 months?

No.

10. Please provide the committee with four (4) copies of your District of Columbia Judicial Nomination commission questionnaire.

District of Columbia:

AFFIDAVIT

Maurice Anthony Ross being duly sworn, hereby states that he has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his knowledge, current, accurate, and complete.

Maurice A. Ross

Subscribed and sworn before me this 9th day of April, 2001.

D.C. Notary Public

My Commission Expires September 14, 2003.

District of Columbia Court of Appeals

Nos. 93-CO-714, 93-CF-730,
93-CO-761, 93-CO-769

DAVID LEE, APPELLANT/CROSS-APPELLEE,

v.

UNITED STATES, APPELLEE/CROSS-APPELLANT.

Nos. 93-CF-770 & 93-CO-855

UNITED STATES, APPELLANT/CROSS-APPELLEE,

v.

REGINALD C. SPEARS, APPELLEE/CROSS-APPELLANT.

Appeals from the Superior Court of the
District of Columbia

(Hon. Herbert B. Dixon, Jr., Trial Judge)

(Argued September 7, 1995 Decided December 14, 1995)

Jonathan Zucker, with whom *Patricia Daus*, was on the brief for appellant/cross-appellee David Lee.

Richard S. Stolker for appellant/cross-appellee Reginald C. Spears.

Roy W. McLeese, III, Assistant United States Attorney, with whom *Eric H. Holder, Jr.*, United States Attorney, and *Laura Leedy Gansler*, Special Assistant United States Attorney, and *John R. Fisher*, *Barbara A. Grewe*, *Margaret M. Lawton*, and *S. Hollis Fleischer*, Assistant United States Attorneys, were on the brief, for appellee/cross-appellant.

Before WAGNER, *Chief Judge*, and SCHWELB and REID, *Associate Judges*.

SCHWELB, *Associate Judge*: A jury convicted appellants David Lee and Reginald C. Spears, defendants below, of second degree murder while armed (SDMWA),[1] but convicted each man of voluntary manslaughter while armed (VMWA) and of several associated offenses.[2] In a post-trial order, the trial judge set aside appellants' convictions of VMWA and substituted therefor convictions of unarmed manslaughter. He held that VMWA was not a lesser included offense (LIO) of SDMWA and that the jury therefore should not have been permitted to consider VMWA.

In a separate post-trial order, the judge denied a motion by Lee for a new trial on the basis of newly discovered evidence. Lee's motion was based on the alleged recantation by a prosecution witness of certain testimony incriminating Lee.

The government has appealed from the judge's order vacating appellants' VMWA convictions. It contends that VMWA is a lesser included offense of SDMWA, and that the jury was properly permitted to consider VMWA. We agree with the government and direct that appellants' VMWA convictions be reinstated.

Each defendant has appealed, on various grounds,[3] from all of his convictions. Lee has filed a separate appeal from the

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1 D.C. Code § 22-2403, -3202 (1989). Unless otherwise specified, all references in this opinion to the District of Columbia Code are to the 1989 Replacement Edition.

2 Each man was found guilty of possession of a firearm during a crime of violence (PFCV) in violation of D.C. Code § 22-3204 (b), and of carrying a pistol without a license (CPWOL), in violation of § 22-3204 (a). Lee was also convicted of obstruction of justice, in violation of D.C. Code § 22-722, and of felony threats, in violation of § 22-2307.

3 Both appellants contend that the trial judge abused his discretion by admitting into evidence a photograph of the

(Footnote continued on next page.)

order denying his motion for a new trial. We affirm all of the defendants' convictions and conclude that the judge did not abuse his discretion in denying Lee a new trial.

I.

THE EVIDENCE

This case had its genesis in a disagreement over the quality of a batch of cocaine. On March 2, 1990, John Bivens, who was originally appellants' codefendant, purchased this cocaine from the decedent, Kenneth Adams, for the purpose of resale to Bivens' customers. When Bivens began to sell small bags of the cocaine in his own neighborhood, several purchasers complained that the merchandise was defective. Bivens returned these customers' purchase money, and decided to seek a refund from Adams.

Three of Bivens' associates — appellants Lee and Spears and a man named Marvin Jennings — had been with Bivens when he bought the cocaine from Adams. After Bivens' customers complained, all four men returned to Adams' neighborhood. When they made contact with Adams, the latter insisted that the cocaine which he had sold to Bivens was of good quality, and he refused to return Bivens' money. Adams and Bivens eventually agreed to have the quality of the drugs "tested" by Kathleen Washington, a "pipehead" who was apparently able to assess the quality of the cocaine. Ms. Washington went downstairs in order to determine whether the drugs were defective.

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3 (Continued)

decedent's head. Lee also claims that the trial court committed prejudicial error by overruling his objection to improper prosecutorial argument by admitting hearsay evidence, by declining to find and failing to sanction a "Jencks Act" violation, and by denying his motion for judgment of acquittal on one obstruction of justice count. Spears contends that the trial judge abused his discretion by denying Spears' motion for a severance of defendants. See Part III of this opinion and notes 25 and 26, *infra*.

Although different witnesses provided sharply conflicting accounts of the events that followed and of the roles of the various participants,[4] it appears that Spears and Lee became embroiled in a dispute with Adams. The quarrel escalated, and Adams was ultimately shot at close range, once in the head and once in the groin area. Adams died immediately.

According to two of the witnesses, at least one of these shots[5] was fired by Spears. Bivens, who had entered an *Alford*[6] plea to manslaughter, and who was subsequently called as a witness for the prosecution, testified that Lee had passed a pistol to him, and that he (Bivens) then passed the weapon on to Spears. Bivens also stated that Lee had another handgun in his possession. Although there was no direct testimony that Lee shot Adams, the prosecution's theory of the case, based on the circumstantial evidence, was that Lee was the second shooter.

Appellants were ultimately acquitted of SDMWA, but convicted of VMWA and of other offenses as described above. These appeals and cross-appeals followed.

II.

THE GOVERNMENT'S APPEALS

At the time Adams was shot to death, the maximum penalty for SDMWA was imprisonment for from fifteen years to life. D.C. Code §§ 22-2404, -3202. The maximum penalty for VMWA was imprisonment for from fifteen years to life and a $1,000 fine. D.C. Code §§ 22-2405, -3202.[7] Both appellants

[4] Most of these conflicts are essentially irrelevant to the issues on appeal. We confine our factual recitation to matters germane to those issues.

[5] The prosecution's ballistic evidence showed that several shots had been fired from two different .45 caliber weapons.

[6] *North Carolina v. Alford*, 400 U.S. 25 (1970).

[7] The statute fixing the penalty for manslaughter has since been amended, and no longer provides for a fine. *See* D.C. Code § 22-2405 (Supp. 1995).

contend, and the trial judge held, that by virtue of the authorized $1,000 fine, the maximum penalty for VMWA is greater than the maximum penalty for SDMWA, and that the former offense therefore cannot be a lesser included offense of the latter. Appellants' argument, which both the trial judge and counsel for Lee candidly described as "counter-intuitive," has a measure of surface plausibility in light of some of this court's precedents. We conclude, however, that Lee and Spears were properly convicted of VMWA, and that their convictions of that offense must therefore be reinstated.

The Supreme Court and this court have traditionally employed an "elements" test to determine whether one offense is a lesser included offense of another, without any discussion of the provisions in the respective statues relating punishment. *See, e.g., Schmuck v. United States*, 489 U.S. 705, 716 (1989); *Price v. United States*, 602 A.2d 641, 644 (D.C. 1992); *Pendergrast v. United States*, 332 A.2d 919, 924 (D.C. 1975). It is undisputed that under an "elements" analysis, VMWA is an LIO of SDMWA. *Comber v. United States*, 584 A.2d 26, 42-43 (D.C. 1990) (en banc); *Price, supra*, 602 A.2d at 644-45; *Coreas v. United States*, 585 A.2d 1376, 1380 (D.C.) (*Coreas II*), *cert. denied*, 502 U.S. 855 (1991); *Branch v. United States*, 382 A.2d 1033, 1035 n.1 (D.C. 1978). The two offenses have identical elements, except that SDMWA requires proof that the defendant acted with malice, but VMWA does not. *Comber, supra*, 584 A.2d at 36. Indeed, the doctrine that voluntary manslaughter is a lesser included offense of second degree murder is of ancient vintage. *See, e.g., Stevenson v. United States*, 162 U.S. 313, 314-15 (1896).

We recognize, and the government concedes, that the precise question raised by appellants in this case was not addressed in *Comber* or in any of the other VMWA decisions cited above. Because "the judicial mind has [not] been applied to and passed upon [that] question," *see, e.g. Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994), those decisions are not controlling. Nevertheless, a holding today that voluntary

manslaughter while armed is not a lesser included offense of second degree murder while armed would shatter expectations grounded in many years of history.

A. Rule 31 (c).

Rule 31 (c) of the Superior Court's Rules of Criminal Procedure, entitled "*Conviction of a lesser included offense,*" provides in pertinent part that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . ." The comment to the Rule discloses that, with exceptions not affecting sub-section (c), local rule 31 is "identical to Federal Rule of Criminal Procedure 31."[8] Accordingly, absent some compelling reason to the contrary, we should construe the local rule in a manner consistent with the federal rule. *Montgomery v. Jimmy's Tire & Auto Ctr.*, 566 A.2d 1025, 1027 (D.C. 1989).

The "lesser included offense" doctrine "originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Beck v. Alabama*, 447 U.S. 625, 633 (1980); *see also Kelly v. United States*, 125 U.S. App. D.C. 205, 207, 370 F.2d 227, 229 (1966), *cert. denied*, 388 U.S. 913 (1967). In conformity with this history and with the language of federal Rule 31 (c), which permits conviction of any offense "necessarily included" in the offense charged (without any reference to punishment), the Supreme Court of the United States has explicitly applied an "elements" analysis in construing the Rule. *Schmuck*, *supra*, 489 U.S. at 716. Specifically, the Court has held that the determination whether an offense is a "lesser included" offense of an allegedly "greater" offense is made by comparing the statutory elements of the two offenses. *Id.* A lesser included offense charge is proper when "the elements of the lesser of-

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8 "Like the federal rules, the Superior Court rules (at least where substantially identical to the federal rules) have the force of law." *See, e.g., Cooper v. United States*, 353 A.2d 696, 701 n.11 (D.C. 1975).

fense are a subset of the elements of the charged offense." *Id.* Accordingly, in the words of the United States Court of Appeals for this Circuit, "[w]e see no reason to create the additional and novel requirement that the penalty for the lesser offense be lower than that for the greater." *United States v. Harley*, 301 U.S. App. D.C. 70, 74, 990 F.2d 1340, 1344, *cert. denied*, 114 S. Ct. 236 (1993).

"[T]he adjective 'lesser' in Criminal Rule 31 (c) refers to the relation between the elements of an offense [and] not [to] the relation between their penalties." *Nicholson v. State*, 656 P.2d 1209, 1212 (Alaska App. 1982); *see also Schmuck, supra*, 489 U.S. at 716 (the language of the rule "suggests that the comparison to be drawn is between offenses"). "The terms 'lesser' and 'greater' actually refer to the number of elements in the respective crimes, because the offense charged must contain all the elements of the included offense plus at least one additional element." *State v. Caudillo*, 604 P.2d 1121, 1123 (Ariz. 1979) (en banc) (citing *Sansone v. United States*, 380 U.S. 343 (1965)).[9]

Authorities in this jurisdiction which predate *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971), are to the same general

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[9] *See also State v. Gilman*, 673 P.2d 1085, 1089 (Idaho App. 1983) ("the doctrine of the lesser included offense is not limited to an offense less serious than the crime charged"); *State v. Gallup*, 500 N.W.2d 437, 442-442 (Iowa 1993) (under elements test, "it makes no difference that the lesser included offense here carries a higher penalty than the greater"); *State v. Young*, 289 S.E.2d 374, 376 (N.C. 1982) (applying "elements test" to statute authorizing conviction of "the crime charged [in the indictment] or of a lesser degree of the same crime"); "[t]here is no requirement in our law that an included offense must also be one which is subject to less punishment than the 'greater offense' charged in the indictment"); *Johnson v. State*, 828 S.W.2d 511, 515-16 (Tex. App. 1992) ("The determination of whether an offense is a lesser-included offense of the offense charged is made without regard to punishment . . . . The word 'lesser' does not refer to the punishment range but to the factor that distinguishes the included offense from the offense charged.")

effect. In *Crosby v. United States*, 119 U.S. App. D.C. 244, 339 F.2d 743 (1964) (Burger, J.), the court construed Rule 31 (c) "to mean that a chargeable lesser offense must be such that the greater offense cannot be committed without also committing the lesser." *Id.* at 245, 339 F.2d at 744 (citations omitted). Three years later, the court, quoting *Crosby*, reiterated the same conclusion. *Kelly*, 125 U.S. App. D.C. at 206, 370 F.2d at 228.[10]

Although the question whether the LIO must have a lesser penalty than the greater offense was not raised in *Schmuck*, *Crosby*, or *Kelly*, the court's analysis in each of those cases precludes an affirmative answer to that question. Indeed, the United States Court of Appeals for the District of Columbia Circuit recently relied on *Schmuck*, *Crosby*, and *Kelly* in declining to impose a requirement that the penalty for the LIO be less than the penalty for the greater offense. *Harley*, *supra*, 301 U.S. App. D.C. at 74, 990 F.2d at 1344. Accordingly, absent binding precedent to the contrary, affirmance of appellants' VMWA convictions is required both by Rule 31 (c) and by the traditional approach to the lesser included offense doctrine.

B. The Case Law.

In his post-trial order vacating those convictions, the trial judge relied primarily on *Ball v. United States*, 429 A.2d 1353 (D.C. 1981) and *Craig v. United States*, 523 A.2d 567 (D.C. 1987). We stated in *Ball* that the legislature could not have intended one offense to be a lesser included offense of a second where "the offense with the seemingly fewer constituent elements . . . carries a much more severe penalty than an alleged greater offense." 429 A.2d at 1360. We subsequently held in *Craig* that defacing of property was not a lesser included offense of malicious destruction of property (MDP)

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10 Although the courts in these cases were construing the *federal* rule and not the local one, they were interpreting the very language from which the local rule was taken.

because, although both offenses were punishable by imprisonment for one year, the maximum fine for defacing was $5,000, while the maximum fine for MDP was only $1,000.

The opinion in *Ball* appears on its face to lend some support to appellants' position, but that support evaporates on closer analysis. *Ball* was a "multiple punishment" or "merger" case, and neither Rule 31 (c) nor the lesser included offense doctrine was directly implicated.[11] The question in *Ball* was whether the defendant, who was convicted both of threats and of obstruction of justice as a result of the same unlawful acts, was being punished twice for the same offense, in violation of the Double Jeopardy Clause. Ball contended that what he characterized as the "lesser" offense of threats, which carried a maximum penalty of imprisonment for twenty years and a fine of $5,000, merged into what he claimed was the "greater" offense of obstruction of justice, which was punishable by imprisonment for three years and a fine of $1,000.

Rejecting Ball's position, this court concluded that each of the two offenses required proof of a fact which the other did not, *id.* at 1358-59 (citing *inter alia*, *Blockburger v. United States*, 284 U.S. 299 (1932)), and that there was therefore no merger. The court stated that this conclusion was strengthened by the disparity in punishment for the two offenses. *Ball*, 429 A.2d at 1360. The court's subsequent articulation of a purported requirement that the punishment for the LIO must also be less than the penalty for the "greater" offense[12]

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[11] The court briefly discussed the LIO doctrine, *Ball*, 429 A.2d at 1360 n.13, but did not mention Rule 31 (c).

[12] In *Ball*, we quoted from *United States v. Cady*, 495 F.2d 742, 747 (8th Cir. 1974):

> A lesser included offense must be both lesser and included. These requirements can only be met where the included offense involves fewer of the same constituent elements as the charged greater offense *and where the claimed lesser offense has a*

(Footnote continued on next page.)

was not necessary for the disposition of the case, and thus constituted "dictum" not binding on us under the doctrine of *M.A.P. v. Ryan*. *See, e.g. Punch v. United States*, 377 A.2d 1353, 1360 (D.C. 1977), *cert. denied*, 435 U.S. 955 (1978). Moreover, the striking difference in *Ball* between the penalties for threats and for obstruction of justice — twenty years and $5,000 for the "lesser offense," three years and $1,000 for the "greater" —provides a compelling distinction from the present case, in which both offenses were punishable by life imprisonment and the only difference between their maximum penalties was the $1,000 fine for VMWA.[13]

Craig presents a more difficult problem. In *Craig*, as in this case, the supposedly greater and lesser offenses were subject to identical maximum prison terms. In that case, as in this one, a person convicted of the "lesser" offense was subject to a fine larger than that which could be imposed for the greater offense.[14] The court held that

> [b]ecause the maximum fine for defacing property is greater than the maximum fine for malicious destruction of property, *Ball* compels us to rule that the former is not a "lesser" offense than the latter.

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12 (Continued)

> lighter penalty attached to it than does the charged offense.

429 A.2d at 1360 (emphasis added). Lee relies heavily on the emphasized language.

13 The court in *Ball* also reasoned that "the offenses of threats and obstruction of justice lack the 'inherent relationship' required to apply the doctrines of merger and lesser included offenses." 429 A.2d at 1360 (citing *inter alia*, *United States v. Whitaker*, 144 U.S. App. D.C. 344, 349, 447 F.2d 314, 319 (1971)). Since *Ball* was decided, the Supreme Court, after quoting from *Whitaker*, explicitly rejected that decision's "inherent relationship" test, and adopted the "elements" test instead. *Schmuck*, *supra*, 489 U.S. at 715-16.

14 In the present case, no fine could be imposed for SDMWA.

Craig, supra, 523 A.2d at 569. This was the sole ground upon which the court decided the case, and it thus represented the court's square holding.[15]

Craig, however, has been superseded by events.[16] In *Schmuck*, decided two years after *Craig*, the Supreme Court explicitly adopted an "elements" approach to LIO analysis. Such an analysis has nothing to do with punishment. Still more recently, in *Byrd v. United States*, 598 A.2d 386 (D.C. 1991) (en banc), this court likewise adopted an "elements" test as appropriate for determining issues of Double Jeopardy, and we specifically noted the Supreme Court's decision in *Schmuck* "resolving a split among the circuits and applying an 'elements' test to the determination whether a lesser-included offense instruction should be given under FED. R. CRIM. P. 31 (c)." *Id.* at 389 n.5. Notwithstanding the fact that the "lesser punishment" requirement was not at issue in *Schmuck* or *Byrd*, we do not believe that *Craig* can be reconciled with these decisions.[17]

This court will not lightly deem one of its decisions to have been implicitly overruled and thus stripped of its precedential authority. "We do not believe, however, that *M.A.P. v. Ryan*, *supra*, obliges us to follow, inflexibly, a ruling whose philosophical basis has been substantially undermined by subsequent Supreme Court decisions," *Frendak, supra*, 408 A.2d at 379 n.27; *see also Abney v. United States*, 616 A.2d 856, 861

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15 The court found it unnecessary to decide "the separate issue of whether defacing property is 'included' within malicious destruction of property." *Id.* at 569 n.6 (citations omitted).

16 We note that in *Craig*, the court, viewing itself as bound by *Ball*, did not address Rule 31 (c) at all. *Cf. Frendak v. United States*, 408 A.2d 364, 379 n.27 (D.C. 1979); *Murphy, supra*, 650 A.2d at 205.

17 Recently, in *Hicks v. United States*, 658 A.2d 200 (D.C. 1995), we raised the question whether the authority of the cases on which *Craig* relied had survived *Byrd*, but we found it unnecessary to resolve that issue. *Id.* at 204 n.9.

(D.C. 1992), or by our own supervening rulings en banc. The legal basis for *Craig* has, in our view, been "substantially undermined" by *Schmuck* and *Byrd*.

Our disposition of this case is also supported by *United States v. Pearson*, 202 A.2d 392 (D.C. 1964). In *Pearson*, the defendant was charged with attempted petit larceny. The "attempt" statute, D.C. Code § 22-103 (1961), provided for a maximum penalty of imprisonment for one year and a $1,000 fine. The petit larceny statute, D.C. Code § 22-2202 (1961), provided that a completed petit larceny was punishable by imprisonment for one year and a fine of no more than $200. The trial judge dismissed the information, apparently holding that attempted petit larceny was not a prosecutable offense because an attempt to commit an offense could not carry a heavier penalty than the offense itself. *Pearson*, *supra*, 202 A.2d at 392.

This court reversed. The court recognized that "[i]t never could be the intention of the legislature to punish with greater severity an abortive attempt than a successful issue or leave it in the power of the court to do so." *Id.* at 393 (quoting *Rogers v. Commonwealth*, 5 Serg. and R. 463 (Pa. 1819)). The court invited Congress to take corrective legislative action. *Id.* at 394. The incongruity in the maximum penalties, however, did not warrant dismissal of the information, because

> there is no invalidity in the law as it now stands. As a practical matter this problem, if problem there be, can easily be handled in each case when the time for sentence arrives. This, like many other situations, may safely be entrusted to the reasonableness, understanding and common sense of the trial judges. Until a defendant is subjected to a sentence for an attempted crime that is greater than the maximum penalty for the completed crime, it cannot be said that the statutes have been misapplied. We are satisfied that there is no reason for holding that the attempt statute is invalid or inoperative.

Id.

Although *Pearson* was not technically a "lesser included offense" case, *id.* at 392, the quoted reasoning applies with equal force to the present case. Here, as in *Pearson*, any perceived problem can be avoided at the time of sentencing. If no fine is imposed, then "it cannot be said that the statutes have been misapplied." *Id.* at 394. *Pearson* is consistent with the law in other jurisdictions[18] and provides a common sense resolution of the issue before us.

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Having addressed the doctrinal considerations implicated by the interplay of *Craig* with *M.A.P. v. Ryan*, we must also consider the practical consequences of the decision we make in this case.[19] Donald S. Craig was charged with malicious

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[18] *E.g.*, in *Hobbs v. State*, 252 N.E.2d 498 (Ind. 1969), the court held that a defendant may be convicted of any LIO, regardless of the maximum penalty therefor, but that

> if, as in the case at bar, the lesser included offense carries a greater maximum sentence than the greater offense originally charged, the trial court has jurisdiction to sentence for a period not exceeding the maximum covered under the original charge.

Id. at 501. In *State v. Kost*, 290 N.W.2d 482 (S.D. 1980), a case very similar to this one, the court sustained Kost's conviction for voluntary manslaughter as a lesser included offense of murder. The two offenses were both punishable by life imprisonment, but manslaughter also carried a $25,000 fine, while there was no fine for murder. Kost was sentenced to life imprisonment, but no fine was imposed. The court held that Kost "has failed to show that his constitutional rights were violated either by the sentence imposed or through the alleged unconstitutionality of the statutes." *Id.* at 487.

[19] "[W]e do not believe that the law is or should be so preoccupied with theory that practical consequences must be disregarded." *Helm v. United States*, 555 A.2d 465, 469 (D.C. 1989).

destruction of property for writing the words "Fool's Gold" and two dollar signs on the wall of the shelter of a Metro bus stop. Given the nature of the conduct which precipitated the prosecution, the issue in *Craig* involved the interplay between two relatively minor misdemeanors. The trial judge, on his own initiative, instructed the jury on the purported LIO of defacing public property. He relied on D.C. Code § 22-3112.2 (a) (1986), which carried the heading "*Defacing or burning cross or religious symbol; display of certain emblems,*" but which also contained language prohibiting defacement of public property. This court, as we have seen, held that defacing public property was not a lesser included offense of MDP, but it did so without discussing either the provisions of Rule 31 (c) or our prior decision in *Pearson.*

The Supreme Court recognized a century ago that voluntary manslaughter is a lesser included offense of second degree murder. *See, e.g., Stevenson, supra,* 162 U.S. at 314-15. Under conventional analysis, it necessarily follows that VMWA is also an LIO of SDMWA. *Coreas II, supra,* 585 A.2d at 1380; *Stewart v. United States,* 383 A.2d 330, 331-33 (D.C. 1978). A decision that *Craig* — a case about scrawling "Fool's Gold" on a bus stop — has changed all that would have implications which the court in that case had no occasion to consider. Application of *Craig's* reasoning here would preclude a defendant charged with armed murder who claimed that he acted in the heat of passion and without malice from obtaining consideration by the jury of the lesser included offense of armed manslaughter, notwithstanding the undisputed fact that armed murder contains all of the elements of armed manslaughter and requires proof of malice as well. The drafters of Rule 31 (c) could not have intended such a result, and the court in *Craig* could not have contemplated it.

III.

THE PROSECUTOR'S REBUTTAL ARGUMENT

Both Lee and Spears have raised a number of contentions in support of their respective appeals. See notes 25 and 26, *infra*. Of these, only Lee's claim of improper prosecutorial argument requires plenary consideration.

At the commencement of his rebuttal, the prosecutor told the jurors:

> You heard from Kathy Washington and Booker Rowe and Lamont Wilson and Arthur Richardson, and why did you hear from them? Because those are the people who saw David Lee and Reggie Spears shoot and kill Kenneth Adams.

Lee's attorney stated "Objection." The judge responded that "the objection is overruled. This is argument of counsel." Spears' attorney remained silent. Nether defense counsel raised the issue again in the trial court, and only Lee raises it on appeal.

The judge's charge to the jury included the customary instructions that the verdict must be based solely on the evidence and that the statements of counsel were not evidence. The judge then inquired of counsel whether they were requesting any additional instructions. Both defense attorneys responded in the negative.

Lee now contends, and the government acknowledges, that none of the witnesses named by the prosecutor during rebuttal testified that he or she saw Lee shoot Adams. We therefore conclude that the prosecutor argued facts not in evidence, and that the opening of his rebuttal argument was improper. *E.g., Coreas v. United States*, 565 A.2d 594, 602-03 (D.C. 1989) (*Coreas I*). Moreover, "[i]mproper prosecutorial comments are looked upon with special disfavor when they appear in the rebuttal because at that point defense counsel has no opportunity to contest or clarify what the prosecutor

has said." *Id.* at 605 (quoting *Hall v. United States*, 540 A.2d 442, 448 (D.C. 1988)).

Because Lee's attorney objected to the prosecutor's misstatement, we will assume, without deciding, that Lee has preserved the issue notwithstanding his failure to address it further in the trial court.[20] Upon that assumption, the *Kotteakos*[21] test applies, and the question is

> whether we can say with fair assurance, after all that has happened, *without stripping the erroneous action from the whole*, that the judge was not substantially swayed by the error.

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20 After the trial judge had overruled his objection, Lee's attorney could have moved for a mistrial —the equivalent of the relief he now seeks. Had he done so, we would have the benefit of the trial court's considered judgment as to the effect, if any, of the misstatement.

Lee's attorney may perhaps have viewed a motion for a mistrial as futile, for the judge had already overruled the objection. But even if we view that overruling, which avoided interruption of the closing argument, as vindicating counsel's failure to demand a mistrial later, when the issue could be discussed with more deliberation, counsel was free to request a corrective instruction when the judge inquired as to whether further instructions were desired. Counsel did not do so.

In *Hunter v. United States*, 606 A.2d 139 (D.C.), *cert. denied*, 113 S. Ct. 509 (1992), we emphasized that

> [l]itigants should not be permitted to keep some of their objections in their hip pockets and to disclose them only to the appellate tribunal; one cannot take his chance on a favorable verdict, reserving a right to impeach it if it happens to go the other way.

Id. at 144 (citations and internal quotation marks omitted).

21 *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Dixon v. United States, 565 A.2d 72, 75 (D.C. 1989) (emphasis added; citations omitted). The italicized language is of critical significance, for

> [i]n reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.

United States v. Young, 470 U.S. 1, 16 (1985) (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)). Moreover, closing arguments, and especially rebuttal arguments, are "seldom carefully constructed *in toto* before the event; improvisation often frequently results in imperfect syntax and planning." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974); *Dixon, supra*, 565 A.2d at 79. Accordingly, courts should not attach the most sinister possible interpretation to the prosecutor's remarks. *Irick v. United States*, 565 A.2d 26, 33 (D.C. 1989) (citing *Donnelly, supra*, 416 U.S. at 643-44).

With these considerations in mind, we examine the prosecutor's misstatement not in isolation, but in reference to the entire record. Specifically, we must consider, in context, "the gravity of the [improper argument], its relationship to the issue of guilt, the effect of any corrective action by the trial judge, and the strength of the government's case." *Dixon, supra*, 565 A.2d at 75. We address each of these factors in turn.

A. Gravity.

The prosecutor's misstatement at the outset of rebuttal could reasonably be viewed as very serious. If the most plausible reading of the entire record were that the prosecutor deliberately lied to the jury about what the witnesses in question had seen, such conduct would be altogether inexcusable.

Contrary to the prosecutor's statement, none of the four witnesses named by him saw Lee shoot Adams.

Viewing the record as a whole, however, and bearing in mind the Supreme Court's caution against attaching sinister meanings to the prosecutor's statements, *see Donnelly, supra*, 416 U.S. at 647, we are not prepared to treat the isolated (but most unfortunate) comment by the prosecutor as a deliberate falsehood. Earlier, in his initial closing argument, the prosecutor had gone over the government's evidence, witness by witness. During that recitation, he mentioned at least briefly three of the four persons he later named during rebuttal as having seen Lee and Spears kill Adams. He stated, correctly, that Booker Rowe had identified Spears and *Bivens* (not Lee) as the gunmen. The prosecutor mentioned the testimony of Lamont Wilson and Arthur Richardson only in connection with their identification of *Spears* as the participant in the shooting who was wearing a white headband, and in connection with Lee's alleged attempts to intimidate them after the killing. The prosecutor also admitted that Marvin Jennings had "denied there were guns there," and he explained Bivens' testimony that Lee had passed him a handgun. During his entire initial argument, the prosecutor made no suggestion that any witness had seen Lee shoot anyone, or that any person other than Bivens had observed Lee with a handgun. He likewise said nothing further in his rebuttal argument along the lines of the misstatement with which he had begun it.

If the rebuttal argument is analyzed in conjunction with the prosecutor's initial presentation, we find it most unlikely, notwithstanding the prosecutor's infelicitous phrasing on rebuttal, that the jury would believe that he was claiming that the four named witnesses had seen Lee shoot Adams. Such a claim would have been irreconcilable with the prosecutor's own representations during his earlier remarks to the jury.

Moreover, both defendants were represented by able and experienced counsel who fought vigorously on behalf of their

clients. If the attorneys had believed that the misstatement had been meant literally, and that it had been understood by the jury to have been meant literally, then they would surely have made vigorous efforts to redress the situation. Yet, Lee's attorney made only a single objection and asked for no corrective instruction. Spears' counsel did not object at all. The lack of any reaction from Spears' attorney, and the limited reaction from Lee's attorney, suggest that experienced counsel perceived little, if any, prejudice, a fact which itself suggests lack of prejudice. *Hunter*, *supra*, 606 A.2d at 145.

B. Centrality.

The prosecutor's representation that four witnesses saw Lee shoot Adams, when they did not, undoubtedly goes to a central issue in the case. For the reasons stated in our discussion of the gravity of the improper argument, the record as a whole does not, in our view, support the conclusion that this was the meaning that the prosecutor intended to convey or that the jurors received.

C. Corrective Action by the Trial Judge.

The judge instructed the jury on several occasions that the arguments of counsel are not evidence.[22] After he charged the jury, the judge also asked the defense attorneys if they were requesting any additional instructions. If Lee's attorney had accepted the judge's invitation and requested a corrective instruction, the prosecutor's misstatement might well have been cured by stipulation or otherwise. Counsel made no such request, however, and he never asked the trial court to rule that the prosecutor's misstatement warranted a mistrial or new trial — the very relief that he seeks in this court. The decision by Lee's attorney to let the case go to the jury,

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22 The judge overruled a prosecution objection to an apparent misstatement during a defense attorney's argument on the same ground that he overruled Lee's objection to the prosecutor's rebuttal: "This is closing argument."

without first requesting corrective remedial action which might well have been available, significantly blunts the force of Lee's contentions on appeal.

D. The Strength of the Government's Case.

The strength of the prosecution's case against Lee turned largely on the credibility of the witnesses, and is "difficult to assess . . . from our . . . appellate perch." *See Clark v. United States*, 593 A.2d 186, 193 (D.C. 1991). Nevertheless, it is fair to say that the government's evidence was not overwhelming. The only witness who claimed to have seen a handgun in Lee's hands was Bivens.[23] Bivens had sworn to the grand jury before trial that Lee did not have a handgun.[24] Bivens was also the man to whom Adams had sold the allegedly defective drugs, and both defendants contended at trial, through their attorneys, that Bivens falsely implicated them in order to obtain a favorable plea bargain for himself.

The prosecution relied heavily on Lee's alleged efforts after trial to intimidate potential witnesses against him as evidence of consciousness of guilt. As to these offenses, too, the evidence was contested, and the results were mixed; Lee was convicted of some of these charges and acquitted of others.

E. Result.

Whenever a prosecutor seriously misstates the evidence, whether deliberately or through negligence, a significant risk arises that the trial will go for naught and that the parties will have to begin all over again. In this case, the prosecutor misstated the evidence, and he did so during his rebuttal argument, when the potential for prejudice was especially

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23 Arthur Richardson testified that he observed the "print" or "outline" of a pistol in Lee's trousers, thus providing some corroboration for Bivens' account. Richardson, however, had failed to mention this "print" in his pretrial statements.

24 After the trial, Bivens recanted his accusation against Lee. See note 26, *infra*.

great. *Coreas I, supra*, 565 A.2d at 605. We cannot, and do not, take such prosecutorial misstatements lightly.

In the final analysis, however, we must determine whether this single lapse on the prosecutor's part, assessed in the context of the entire trial, warrants reversal of Lee's convictions. Considering all of the circumstances, we conclude that the result of the trial should not be set aside on the basis of a serious but isolated misstatement during rebuttal argument.

IV.

CONCLUSION

For the foregoing reasons, the order setting aside each appellants' VMWA conviction is reversed, and these convictions are reinstated. Appellants' convictions are affirmed.[25]

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[25] We deal briefly with those of appellants' contentions not previously addressed in this opinion. We discern no abuse of discretion in the trial judge's admission of a photograph of the wound to Adams' head. *Cf. Womack v. United States*, 339 A.2d 37, 38 (D.C. 1975); *Dixon, supra*, 565 A.2d at 76 n.6. The judge's finding that no written statement by prosecution witness Arthur Richardson existed rested on the judge's assessment of credibility; it was not clearly erroneous, and Lee's request for sanctions under the Jencks Act, 18 U.S.C. § 3500, was properly denied. *See, e.g., Sullivan v. United States*, 404 A.2d 153, 156 (D.C. 1979). Even if we assume, without deciding, that the trial judge erroneously admitted a police detective's testimony that two prosecution witnesses reported one of the incidents in which Lee allegedly obstructed justice, we are satisfied, in the light of the record as a whole, that any error was harmless. *See Kotteakos, supra*, 328 U.S. at 765. Viewing the record, as we must, in the light most favorable to the prosecution, *see Irick, supra*, 565 A.2d at 30, we conclude that there was sufficient evidence that Lamara Wilson was a witness within the meaning of D.C. Code § 22-722 and that Lee obstructed justice by threatening her. *See Smith v. United States*, 591 A.2d 229, 231 (D.C. 1991). Finally, the trial judge did not abuse his discretion in denying Spears' motion for a severance. *Cf. Payne v. United States*, 516 A.2d 484, 490-92 (D.C. 1986) (per curiam).

The order denying Lee's motion for a new trial is affirmed.[26]

So ordered.

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[26] Lee contends that the trial judge erred in denying his motion for a new trial, which was based on Bivens' post-trial recantation of his testimony incriminating Lee. According to Lee, "the record does not support the trial court's finding that the recanting witness' trial testimony was credible and the recanted testimony incredible." Lee argues that Bivens' post-trial version of Lee's role was consistent with his earlier testimony to the grand jury. Lee asserts that Bivens lied at trial to obtain a more favorable plea agreement.

There can be no gainsaying that Bivens contradicted himself under oath on several occasions. We can only speculate as to how the jury would have viewed the evidence if the recantation had come during the trial before the jury. We have held, however, that in the context of a motion for a new trial by a convicted defendant, it is the function of the judge to determine the credibility of a recantation. *Godfrey v. United States*, 454 A.2d 293, 300 & n.24 (D.C. 1982) (citations omitted).

The trial judge saw and heard Bivens testify at trial and again at the post-trial motions hearing. The judge found the witness' trial testimony credible and his motions testimony incredible. We are in no position to second-guess, on the basis of a paper record, a credibility determination by a trier of fact who was in the courtroom on both occasions and who had the opportunity to observe Bivens' demeanor. *In re S.G.*, 581 A.2d 771, 774-75 (D.C. 1990). In light of the judge's credibility determination, the motion for a new trial was properly denied. *See Godfrey, supra*, 454 A.2d at 299-301.

U.S. Department of Justice

United States Attorney

District of Columbia
EHH:CFF

Judiciary Center
555 Fourth St. N.W.
Washington, DC 20001

April 29, 1996

Michael S. Frisch, Esquire
Senior Assistant Bar Counsel
The Board on Professional Responsibility
District of Columbia Court of Appeals
515 Fifth Street, N.W.
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Re: Ross/Bar Counsel
Docket No.: 94-96

Dear Mr. Frisch:

In Lee v. United States, 668 A.2d 822 (D.C. 1995), the District of Columbia Court of Appeals affirmed the manslaughter while armed convictions of two defendants, after considering various arguments, including an accusation that in his summation to the jury the prosecutor had made an argument that was not faithful to the evidence that had been introduced.

At the trial before the Honorable Herbert B. Dixon, Jr., the prosecutor was Assistant United States Attorney Maurice A. Ross, who has since left this office and is now employed in the legal department of the Federal Home Loan Mortgage Corporation ("Freddie Mac"). In your letter dated March 4, 1996, you asked Mr. Ross to respond to the allegations in Section III of the appellate opinion, in which the Court found that Mr. Ross had improperly argued facts not in evidence during his rebuttal argument.

We ask you to dismiss your inquiry into the matter in recognition of the fact that trial attorneys often express themselves less than precisely, and should not be held accountable under the Rules of Professional Conduct for such innocent lapses.

Evidence in the Lee case suggested, and the jury found, that the defendants David Lee and Reginald Spears had killed Kenneth Adams, who sold some bad cocaine to their associate, John Bivens. Several shots were fired from two different pistols. Adams was struck twice. 668 A.2d at 825 and n.5.

Booker Rowe testified he saw the shooting, but he identified only Spears, not Lee, as one of the shooters. Tr. 9-22-92, pages

94, 101. Kathleen Washington, Lamont Wilson, and Arthur Richardson testified about events immediately preceding and following the shooting, but said they were not present when the shots were fired. Tr. 9-21-92, pages 19, 23-24, 58, 80, and 136.[1] (Several other witnesses gave evidence that is not relevant for the purpose of your inquiry.) In his rebuttal argument, the prosecutor made the portion of his rebuttal argument that was criticized by the Court:

> You heard from Kathy Washington and Booker Rowe and Lamont Wilson and Arthur Richardson, and why did you hear from them? Because those are the people who saw David Lee and Reggie Spears shoot and kill Kenneth Adams.

Tr. 9-25-92, pages 614-615.

Clearly, Mr. Ross meant to tell the jury not that the four witnesses "saw" the actual shooting, but that the sum total of their on-the-scene "eyewitness" testimony conveyed the strong implication that Lee and Spears committed the offense.

While agreeing with defendant Lee that the prosecutor's recorded words amounted to arguing facts not in evidence, 668 A.2d at 830, the Court of Appeals ruled that it would not treat the "isolated (but most unfortunate) comment by the prosecutor as a deliberate falsehood." Id. at 831.

Heard in its proper context, the quoted argument could not possibly have been understood by the jury as an allegation that all four of the named witnesses actually saw the two defendants fire the two shots that killed Adams. Indeed, it was Mr. Ross who first brought out from Washington, Wilson, and Richardson that they had heard, rather than seen, the shooting. Id., pages 19, 58, and 136. The jury was perfectly well aware that those three witnesses had not even seen the shots fired, and that the fourth, Rowe, had not identified Lee as one of the shooters. Noting that the prosecutor had been faithful to the evidence during his initial closing argument when he went "over the government's evidence, witness by witness," id. at 831, the Court found it

> most unlikely, notwithstanding the prosecutor's infelicitous phrasing on rebuttal, that the jury would believe he was claiming that the four named witnesses had seen Lee shoot Adams. Such a claim would have been irreconcilable with the

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[1]Copies of the testimony of those four witnesses are enclosed with this letter. Also enclosed are copies of the final arguments of all counsel. The remainder of the transcript is available if you would like to see it.

> prosecutor's own representations during the earlier remarks to the jury.

Id. at 831-832.

The appellate panel also noted that when Lee's counsel objected to the statement that the witnesses "saw" Lee and Spears shoot the victim, Judge Dixon quickly overruled the objection, saying "This is argument of counsel." Id. at 830. At that point Mr. Ross, apparently understanding the basis for counsel's objection, immediately corrected his imprecise words ("those are the people who saw") by saying "Those are the witnesses, people on Robinson Place." These circumstances, coupled with the fact (noted by the appellate panel, id. at 830 n.20) that neither attorney took the prosecutor's slip as serious enough to merit a motion for mistrial or even a request for a corrective instruction, strongly suggests that Mr. Ross's misstatement was understood by all who were present as unintentional and harmless. As the Court noted,

> If the attorneys had believed that the misstatement had been meant literally, and that it had been understood by the jury to have been meant literally, then they would surely have made vigorous efforts to redress the situation.

Id. at 832.

The imprecision of the language in Mr. Ross's argument no doubt resulted from a momentary lapse of concentration in the heat of argument. It is apparent that the defense attorneys, the trial judge, and the appellate panel all viewed it as an inconsequential slip. Consequently, we ask you to dismiss your inquiry.

Very truly yours,

ERIC H. HOLDER, JR.
United States Attorney

by

CHARLES F. FLYNN
Assistant U.S. Attorney
(202) 514-7188

Enclosures

Guess what, a lie is a lie is a lie. A lie is a lie is a lie. If it's a lie on a murder II, it's a lie on a manslaughter, and it's all the same. A rose is a rose.

This is it. The judge is going to cut me off right now. I'm going to sit down. I want to thank you on behalf of Reggie. Reggie thanks you. We've invested faith in you, the system has invested faith. Thank you so much.

Not guilty, ladies and gentlemen. This young child is innocent. Thank you.

THE COURT: Counsel, please step this way off the reporter's record. Ladies and gentlemen, please feel free to stand up and stretch if you like.

(Discussion off record.)

Mr. Ross, are you ready to proceed with the Government's rebuttal argument?

MR. ROSS: Yes, Your Honor.

THE COURT: All right, you may proceed, sir.

GOVERNMENT'S REBUTTAL CLOSING ARGUMENT

MR. ROSS: Counsel, ladies and gentlemen of the jury, you heard from John Bivins and you heard from Marvin Jennings. You know why? Because of Reginald Spears and David Lee. Those are the people who they hung out with.

You heard from Kathy Washington and Booker

Rowe and Lamont Wilson and Arthur Richardson, and why did you hear from them? Because those are the peopl who saw David Lee and Reggie Spears shoot and kill Kenneth Adams.

MR. CANAN: Objection.

THE COURT: this ia -- it's -- the objectic is overruled. This is argument of counsel.

MR. ROSS: Those are the witnesses, people on Robinson Place. As I told you in the beginning, and when we announced the witnesses we said some of them were incarcerated. We said they had a bad record. But look at the evidence.

Now, defense counsel told you about jury instructions, the judge has told you, you decide as the jury what happened on Robinson Place. The Government presents the case, you are the final arbiters. You decide the fact of what happened that day. And the judge has also told you you would be retired to deliberate, to work together and to put it together.

Now, counsel has argued that there are reasonable doubts. Mr. Canan argues that the physical evidence doesn't make sense. Well, he also told you that bullets are going different ways. And you heard from Mr. Gabour and firearms experts, these are just X's. They don't know which -- Mr. Gabour told you

these are the things that were recovered. They don't know where they were going. You heard how light these things are, and when you go back into the jury room you'll be able to see them.

You heard testimony about how they can be kicked and scattered. But Marvin Jennings and the witnesses -- other witnesses told you about there were a number of shots, and Mr. Adams was shot up in the stairwell where the bullets ended up, and all the shell casings discharged. And they blow -- they can be kicked or blown or end up anywhere.

Two guns, ladies and gentlemen. Evidence of two guns. Now, different people see and hear different things, they perceive things differently. Now, when you go back in the jury room you'll experience that when you start to talk about the evidence you've heard. Different people look at different things. Someone's looking at the witness, someone's looking at the defendant, someone else is looking at the judge. Who did what? And you will have different interpretations

What exactly did someone say? You're not taking it down, you don't have reporters. Those are natural things that happen.

Now, Mr. Canan also told you it's just a cartridge cases, but it's also the bullets, the bullets

type, two different guns, and the bullets are all in the area and the proximity to the body. Three bullets, two from one gun, one from another. Corroboration.

There was no testimony, I submit, if you look at the record, that Bivins had a gun. Mr. Jennings was asked about a gun, and at first he said I don't remember, and then he said -- he didn't say anybody had a gun at anytime. And then when I asked him about his Grand Jury transcript, he said, "Yeah, I did tell the Grand Jury that there was a discussion of some -- of Dave and Reggie having a gun." No evidence that Bivins had a gun.

Now, Mr. Delgado -- now, Mr. Canan attacks John Bivins and he attacks his statement, and he says he's not protecting David Lee. Well, and Mr. -- Mr. Canan says Bivins says he went to Robinson Place alone. Well, that protects David Lee. He's going to Robinson Place in his own car. Well, that doesn't implicate David Lee. Bivins never had a gun. That doesn't implicate David Lee. Bivins went by himself. That doesn't implicate David Lee. He didn't know where Reggie and Dave ran. He didn't know where Marvin lived. That doesn't implicate David Lee. That doesn't implicate any of them. And then he says Bivins statement to the Public -- Public Defender

investigator, that Bivins is downstairs. That doesn't implicate David Lee. That doesn't implicate his friends.

Bivins doesn't mention that David Lee has a gun. That doesn't implicate David Lee. Bivins doesn't see a gun. That doesn't implicate David Lee. Bivins went downstairs with Kathy. And he says Kathy says that she went downstairs alone. Kathy says she got the crack, she went right downstairs to smoke it. People don't have eyes in the back of their head. They don't know who's behind them. On the one hand Mr. Canan tells you about Booker Rowe and his identification of Bivins' photograph. Booker Rowe also says there is one person on the steps. And we submit that person was John Bivins.

Now, Mr. Canan tells you about Bivins' statement to the Grand Jury. He said three times David Lee doesn't have a gun. Once again, it doesn't implicate his friend David Lee. Lamont and Kim are present at the shooting. He saw Lamont. There were lots of people there, and he comes back up the steps and there's shooting. Lamont says he's going inside. Things are happening quickly.

Now, Mr. Bivins plea agreement. You heard that he entered and Alford plea, and you're going to

have his plea agreement in the jury room. And he explained to you that Alford plea allows him to maintain his innocence and pleads guilty. Mr. Bivins, as you can tell, is not a lawyer. Many of you, as I said, might not understand that someone might not fire a gun him or herself and be guilty of murder until I explain aiding and abetting.

Mr. Delgado also argues this plea agreement is Mr. Bivins' excuse for giving up his client Reggie Spears. Uh uh. He always said Reggie Spears. It doesn't work. Nice try, but that's not the reason.

Now, as far David Lee, he's already pled guilty, already said Reggie Spears was a shooter. What's --

MR. CANAN: Your Honor, I think he misspoke.

MR. ROSS: I'm sorry. Bivins has pled guilty. And I said "he." I mean Bivins.

MR. CANAN: You said David Lee.

MR. ROSS: No. I said he. I meant -- I meant Bivins. Bivins has pled guilty. Bivins is still friends with David Lee. He's friends with David Lee. There is no motive once he's pled guilty and said he's going to tell the truth to give up David Lee unless it's true. He's already locked into his 10 to 30 that a judge is going to decide. It's just another

distraction that the defense put out there for you.

Now, let's talk aa little bit about Arthur Richardson and some of the witnesses who were confronted with their Grand Jury transcript. You know how long this case was, and you saw how precise the questioning was from the counsel. And you saw witnesses. You saw Arthur didn't want to read his Grand Jury testimony.

You heard Booker Rowe say he really couldn't read. And you head these people, you've heard that they were witnesses involved in other cases and they talked to the police. And they -- and it's easy for a lawyer to parse a document and look at every word and remember the exact wording. But for -- for people who you saw and you heard and their background, they couldn't do it and they got impeached. And you saw how good Mr. Canan was at it. They would dig in, and he would get them on a hook and he would reel them in. That doesn't mean that they never said it before, that they weren't mistaken, they don't have the pride to admit it.

Now, Mr. Delgado tells you his client is a child. We ask you not to decide this case based on sympathy, and the judge told you that, or prejudice or fear, but on the facts in this courtroom and the

evidence that was adduced. Evidence that was adduced, but that on March 2nd, 1990, Reggie Spears was the enforcer on the block. He cussed Kathy Wilson -- Washington in that hallway, he cussed Tee, he had a gun in his waistband.

And, you know, another issue that Mr. Delgado -- Mr. Delgado says, well, Boo is not going to go up there with a gun, and it's a dangerous place and someone he doesn't know. It doesn't make sense. Well, ask yourself, if he comes in there, a place that he doesn't know and it's dark and he doesn't know what he's dealing with, and he's got a gun in his waistband, right away, isn't that more dangerous? Why do you need a gun if his two friends are right there to back him up?

So that you -- now, Mr. Delgado also says Reggie didn't have any interest in the drugs. Neither Marvin. Neither did David. But they played a role with their friends.

And Mr. Delgado's argument about G. Q., there's no evidence of that, ladies and gentlemen. It's just another way of distracting you. And why is he distracting you? Because he doesn't want to look at the evidence. He says, where's the proof? Well, ladies and gentlemen, Kenneth Adams lived and he died

that day, and he was killed with a gun. And there was an autopsy report and there was his clothing. That's the proof. That's the evidence. It's not just the testimony that came in, that's part of it. And he was killed by David Lee and Reginald Spears. They are guilty of murder in the second degree, and possession of firearms during a crime of violence, and carrying a pistol without a license.

Thank you for your time and service. Now the Government just asks you to do your duty.

FURTHER INSTRUCTIONS BY THE COURT

THE COURT: A few final words concerning your deliberations, ladies and gentlemen. First, the question of possible punishment of a defendant in the event of a conviction is no concern of the jury, and it should not enter into or influence your deliberations in any way. The duty of imposing sentence in the event of a conviction rest only with the Court. You should weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of evidence without any consideration of the matter of punishment.

If it becomes necessary during your deliberations to communicate with me, you may send a note by the marshal or by the deputy clerk signed by

OFFICE OF BAR COUNSEL

THE BOARD ON PROFESSIONAL RESPONSIBILITY
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June 7, 1996

CONFIDENTIAL

Maurice A. Ross, Esquire
c/o Charles F. Flynn
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Washington, D.C. 20001

Re: Ross/Bar Counsel
Bar Docket No. 94-96

Dear Mr. Ross:

This office has completed its investigation of this ethical matter. We have evaluated this matter in light of an attorney's obligations as set forth in the District of Columbia Rules of Professional Conduct (the "Rules"). It is the burden of this office to have clear and convincing evidence of a violation of the Rules to institute disciplinary proceedings against an attorney. "Clear and convincing" evidence is more than a mere preponderance of the evidence, which would be sufficient in a civil proceeding. We do not find clear and convincing evidence in our investigation and therefore, we must dismiss the matter.

This matter was docketed for investigation on review of the opinion of the District of Columbia Court of Appeals in Lee v. United States, 668 A.2d 822 (D.C. 1995). The Court affirmed the criminal convictions of two defendants, after considering the assertion that as the prosecutor in the case, you had made an argument in summation that misstated the evidence adduced at trial.

Our investigation reveals that at the commencement of your rebuttal argument, you stated:

> You heard from Kathy Washington, Booker Rowe, Lamont Wilson and Arthur Richardson and why did you hear from them? Because those are the people who saw David Lee and Reggie Spears shoot and kill Kenneth Adams.