No. 16-CO-850

IN THE

SUPREME COURT OF THE UNITED STATES

BILLY A. ROBIN — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

DISTRICT OF COLUMBIA, COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BILLY A. ROBIN
(Your Name)
FCI #2, P.O. BOX 1500
(Address)
BUTNER, N.C. 27509
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

(1) DOES NEW CASE LAW INVALIDATE APPELLANTS AGGRAVATED ASSAULT WHILE ARMED CONVICTIONS BECAUSE HE LACKED THE REQUISITE MENS REA TO COMPLETE THE CRIME?

(2) WAS APPELLATE COUNSEL INEFFECTIVE WHEN HE FAILED TO RAISE THE ISSUE AS TO WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO STRIKE JUROR #836 FOR CAUSE IN HIS ORIGINAL 23-110 MOTION?

(3) WAS APPELLATE COUNSEL INEFFECTIVE WHEN HE FAILED TO RAISE THE ISSUE AS TO WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO STRIKE JUROR 927 FOR CAUSE IN HIS ORIGINAL 23-110 MOTION?

(4) WAS APPELLATE COUNSEL INEFFECTIVE WHEN HE FAILED TO RAISE THE ISSUE AS TO WHETHER THE COURT ERRED WHEN IT FAILED TO PERMIT CROSS-EXAMINATION OF THE GOVERNMENTS WITNESS KEITH DANIELS ON DIRECT APPEAL, RELEVANT TO HIS MENTAL HEALTH STATUS?

(5) WAS APPELLATE COUNSEL INEFFECTIVE WHEN HE REFUSED TO RAISE APPELLANTS ISSUES AFTER APPELLANTS MULTIPLE ORAL AND WRITTEN PLEAS WERE RELAYED TO HIM TO DO SO?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. BILLY A. ROBIN

2. UNITED STATES OF AMERICA

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at 16-CO-0850, CF2-11466-09; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at 2009-CF2-11466; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

A

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was SEPTEMBER 7, 2018

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: SEPTEMBER 7, 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/A.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

STATEMENT OF THE CASE

SEE ATTACHED FOLLOWING PAGES #2 AND #3

STATEMENT OF THE CASE

On August 5, 2009, Billy Robin, along with codefendants D' Angelo Terry and D'Andre Banks were charged in a 21-count indictment, in connection with a May 19, 2009 shooting of North Capital Street, at which four individuals were shot: Chaquon Wingard, Jameeka Washington, Antoine Clipper and Tyrique Williams. A superseding 24 count indictment was filed on September 20, 2011. Against Mr. Robin, the indictment alleged one count of conspiracy to commit assault with intent to kill while armed and possession of firearm during a crime of violence relating to the shooting of one of the victims, Chaquon Wingard (Count 1); four counts of assault with intent to kill while armed (AWIK) for each of the four victims (Counts 2,4,6, and 8), and attendant counts of possession of a firearm during a crime of violence (PFCV) for each of the AWIK charges (Counts 3,5,7, and 9); four counts of aggravated assault while armed (AAWA) for each ofthe four victims (Counts 10, 12, 14, and 16); and attendant counts of PFCV for each of the AAWA charges (Counts 11,13,15, and 17); unauthorized use of a motor vehicle (UUV)(Count 18), knowingly fleeing law enforcement (Count 19), accessory after fact to AWIK (Count 20); tampering with evidence (count 21), and committing a crime while on release. (Count 22)

The Honorable Ann O'Regan Keary presided over a lengthy trial that lasted from January 11, 2012, through February 3, 2012. Prior to trial, Mr. Robin pled guilty to committing a crime while on release out of the jury's presence, and prior to going to the jury, the government dismissed the AWIK and attendant PFCV charges relating to victims Washington, Williams and Clipper. The jury convicted Mr. Robin of UUV, and fleeing law enforcement. The jury could not reach verdicts on the remaining counts. On May 30, 2012, Mr. Robin was sentenced to 120 months, on the AAWA upon Mr. Wingard, with concurrent sentenced of 108 months for the AAWA upon Ms. Washington and 84 months for the AAWA charges upon Mr. Clipper and Mr. Williams, concurrent sentences of 32 months on the UUV and fleeing law enforcement charges, and a concurrent sentence of 12 months on the crime while committed on release. The jury convicted Mr. Terry of the AAWA counts, as well as the attendant PFCV counts, and the jury could not reach a verdict on Mr. Banks charges. Mr. Robin and Mr. Terry both filed a timely notices of appeal, which have been docketed as 12-CF-925 and 120CF-802.

On February 12, 2015, the defendant filed a motion for appropriate relief rasing a myriad of claim. On July 22, 2016, the Superior Court denied the motion.

Now defendant appeals the district court judgment.

REASONS FOR GRANTING THE PETITION

1. NEW CASE LAW INVALIDATES APPELLANTS AGRAVATED ASSAULT WHILE ARMED CONVICTIONS BECAUSE HE LACKED THE REQUISITE MENS RAE TO COMPLETE THE CRIME. IN ROSEMOND Vs US 134 SCT 1240 (2014) THE U.S. SUPREME COURT HELD "AN UNARMED ACCOMPLICE CANNOT AID AND ABET A VIOLATION OF 18 USCS 924(c) UNLESS HE HAS FOREKNOWLEDGE THAT HIS CONFEDERATE WILL COMMIT THE OFFENSE WITH A FIREARM -- THAT MEANS KNOWLEDGE AT A TIME THE ACCOMPLICE CAN DO SOMETHING WITH IT, MUST NOTABLY, OPT TO WALK AWAY. IN THIS CASE THE APPELLANT WAS ONLY THE DRIVER IN WHICH HIS ACCOMPLICE (AS EVIDENCE-SHOWS) CAME TO HIS VEHICLE AND ASKED FOR A RIDE, NEVER SHOWING A GUN UPON ARRIVAL. THEREFORE APPELLANT WAS UNAWARE OF THE ACTS OF SAID ACCOMPLICE AND HAD NO INVOLVEMENT IN ANY ILLEGAL ACT COMMITTED VIA ACCOMPLICE THEORY.

2. APPEALATE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO RAISE THE ISSUE AS TO WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO STRIKE JUROR 836 FOR CAUSE IN HIS ORIGINAL 23-110 MOTION. JUROR 836 IN HER COLLOQUY EXPLAINED TO THE COURT THE REASON SHE WAS NOT CONFIDENT SHE WOULD BE FAIR AND IMPARTIAL WHICH IS SUPPORTED VIA THE RECORD OF TRANSCRIPT OF PROCEEDINGS IN THIS CASE. THE CORRECT TEST IS WHETHER TRIAL COUNSEL'S FAILURE TO EXERCISE A PREEMPTORY STRIKE RESULTED IN THE SITTING OF A JUROR WHO HAS EXPRESSED A CLEAR INABILITY TO BE FAIR AND IMPARTIAL. AS LEWIS Vs. VOSS 770 A.2D 996 DEMONSTRATES, JUROR 836 WAS CLEARLY IMPARTIAL.

3. APPELLATE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO RAISE THE ISSUE AS TO WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO STRIKE JUROR 927 FOR CAUSE IN HIS ORIGINAL 23-110 MOTION. JUROR 927 IN HER COLLOQUY EXPLAINED TO THE COURT REASONS WHY THERE WAS SOME DOUBT AS TO HER BEING

FAIR AND IMPARTIAL. THE CORRECT TEST IS WHETHER TRIAL COUNSELS FAILURE TO EXERCISE A PREEMPTORY STRIKE RESULTED IN THE SITTING OF A JUROR WHO HAS EXPRESSED A CLEAR INABILITY TO BE FAIR AND IMPARTIAL. AS LEWIS DEMONSTRATES JUROR 927 WAS CLEARLY IMPARTIAL. (ALSO SEE 2 OF FACTUAL PROCEDURAL HISTORY PG 2 OF COURTS MEMORANDUM OPINION AND JUDGMENT)

4. APPELLATE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO RAISE THE ISSUE AS TO WHETHER THE COURT ERRED WHEN IT FAILED TO PERMIT CROSS-EXAMINATION OF GOVERNMENT WITNESS KEITH DANIELS RELEVANT TO HIS MENTAL HEALTH STATUS AND FAILING TO CONSULT WITH APPELLANTS MULTIPLE REQUESTS TO RAISE THE ABOVE CITED ISSUES ON APPEAL (SEE APPENDIX D EXHIBITS IN SUPPORT)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Billy A Kidum

Date: NOVEMBER 6, 2018

(CONTINUED)

ARGUMENT ONE

APPELLANT'S AIDING AND ABETTING AND AGGRAVATED ARMED ASSAULT IS INVALID IN LIGHT OF THE SUPREME COURT DECISION OF ROSEMOND

It's defendant's contention that the district court erred and abused its discretion when it denied his claim that there was insufficient evidence for his conviction for aiding and abetting in light of Rosemond v. United States, 134 S.CT 1240 (2014), which "requires that the government show a state of mind extending to the entire crime, not speculation and inference that failed to satisfy this critical requirement."

The Superior Court held, however, that the claim was already litigated during his appeal. . . and that in its opinion, the Court of Appeals squarely addressed "Robin's contention that there was insufficient evidence to support the "intent" element for all four of his AAWA convictions, to the extent that he was convicted under an accomplice liability theory." See Terry and Robin v. United States, 114 A.3d at 612. The Court of Appeals held that "sufficient evidence was presented that Robin possessed the requisite mens rea to sustain his conviction as an aider and abettor." Id at 616.

The Court further held that "the law is well-settled that when an appellate court has previously resolved an issue, that issue cannot be litigated again on collateral attack in the trial court, absent some special circumstances. See Dopel v.

United States, 510 A.2d 1044, 1045-46 (D.C 1986). As the defendant's claim regarding his AAWA convictions was clearly disposed of by the Court of Appeals in its opinion, the defendant's identical post-conviction claim is now procedurally barred in this court."

It's defendant's contention whether it's due to the ineffective assistance of appellate counsel, or otherwise, that the foregoing claim was not disposed of with the Supreme Court decision of Rosemond v. United States, 134 S.CT 1240, 1249 (2014), and Tann v. United States, 127 A.3d 400, 434 (D.C 2014) in mind, which discussed the advanced knowledge compoents of aiding and abetting armed offenses.

This Court has never mentioned neither Rosemond or this Court's decision of Tanner in its decision, and based on such special circumstances warrants this Court considering this issue anew in this appeal of the denial of motion for appropriate relief.

(CONTINUED)

ARGUMENT TWO

ITS APPELLANT'S CONTENTION THAT THE LOWER COURT ABUSED ITS ITS DISCRETION WHEN IT DENIED HIS CLAIM THAT TRIAL COUNSEL FAILED TO GIVE A PROPER ADVERSARIAL TESTING TO THE FAILURE OF THE COURT TO ALLOW CROSS EXAMINATION OF KEITH DANIELS

It's defendant's Robin contention that the District Court abused its discretion when it denied his ineffective assistance claim premised on Counsel's failure to correctly present the argument that Robin was entitled to cross examine Keith Daniels regarding his mental health history, and make a proffer as a prerequisite to the allowance of the testimony.

The United States Supreme Court has held that the Confrontation Clause of the Sixth Amendment protects the rights of the accused in a criminal trial to confront and cross examine witnesses against him. Delaware v. Van Arsdall, 475 U.S 673, 679 (1986). Despite the importance of this right, trial counsel although objecting, failed to give the issue of cross examining Daniel's with regard to his prior mental history an adversarial testing as is required by the Sixth Amendment right to effective assistance of counsel. Objecting to the denial of the right to cross examine without putting forth a legal basis for the request, or without supporting the request with a necessary proffer isn't counsel performing within the meaning of the Sixth Amendment Right to Counsel.

The trial court in denying defendant's motion to cross examine Mr. Daniels in regards to his prior mental history stated in part that:

> The Court has looked at what it considers the most relevant cases on this issue. The case of Valasquez from 2002 and the

D.C Circuit decision in 2008 in the case of United States versus George and as that case noted, mental illness is certainly no longer presumed to undermine a witness competence to testify. There are certainly varying degrees of severity and differing effects from a diagnosis. It would be relevant that a person had mental illness if a witness was exhibiting a pronounced disposition to lie or to hallucinate or suffer from some acute or sever illness that would dramatically impair their ability to perceive or tell the truth. But there would have to be some indication in his clinical history that would be necessary in order to place his reliability and competence to testify in doubt. Or to affect his credibility. I would note in the George case, a relatively recent decision case, the Court of Appeals from the circuit affirmed the District Court's precluding cross examination of a witness who had bipolar disorder, finding that there was nothing in the record indicating that the witness would have any difficulty in perceiving reality or any motivation of the witness to lie, based on their mental health condition. The Court there noted again without expert witness to show why it's relevant it would be very problematic to admit that. Further, the Valasquez case spoke of the degree of invasion of personal privacy that was involved permitting testimony or cross examination of a witness that would include examination of them about mental health treatment and noted that in balancing the prejudice versus the probity , and invasion of an individual witness had to be supported by evidence that their mental illness really influenced their credibility or their perception, otherwise it would be too prejudicial and collateral. So I weighed the prejudice versus probity in this case, and I find that there's very little probative value to going into the fact that Mr. Daniels in the past has been described as having bi-polar disorder or mood disorder not otherwise specified as it's referred to in the records from his current treatment at the jail. See Jan, 26, trial record, pg. 16-18.

Trial Counsel in the instant case clearly failed to give the issue of Defendant's right to cross examine Daniel's with regard to his mental history a proper adversarial testing as is required by the Sixth Amendment right to effective assistance of counsel. Despite the Court on more than one occasion indicating that counsel submit expert testimony as to relevance, and make a proffer as to as to Daniel's mental illness, counsel failed to make either showing,

Ferret

giving credence to the Court's notion that the cross examination of Daniel's would be improper. A defendant proposing a line of cross examination has the responsibility to make some proffer suggesting its relevance. See United States v. Davis, 127 F.3d 68, 71 (D.C Cir. 1997)("We cannot conclude that . . . a reasonable jury might have received a significantly different impression . . . since defense counsel made no proffer. . . ").

Counsel also should have objected to and challenged the trial court's reliance on the decision of Velasquez v. United States, 801 A.2d 72 (D.C 2008) and United States v. George, 532 F.3d 933 (D.C 2008) because the Valaquez decision dealt with proposed cross examination that concerned a witness condition some three years after the crime charged making the witness testimony not relevant to the witness perception at the time of the offense, and George is an opinion from outside the circuit, which directly contradicts precedent from inside the Court, i.e, United States v. Pryce, 938 F.2d 1343, 1346 (D.C Cir. 1991) that allow cross examination of a witness with mental illness.

It's clear from Daniel's own testimony that in 1995 he was previously diagnosed as bi-polar which pointed to a longer history of mental illness than the 2011 to 2012 jail records relied on by the trial court. The government during its questioning of Keith

Truncated

Daniels provided in part the following:

> By Ms. Miller
>
> Q. Now, Mr. Daniels, I want to ask you a couple of questions about your health. Have you been diagnosed with any mental health issues.
>
> A. Yes, ma'am
>
> Q. What diagnoses have you had?
>
> A. Bi-polar, depression.
>
> Q. Do you remember when you were first diagnosed with Bi-polar.
>
> A. Probably like 95 or 96.

Clearly had counsel had a command of the law in relation to the facts, he would have realized that it was his obligation to first seek out the medical records of Daniels based on the government's own testimony that he was diagnosed as bi-polar years before the diagnoses from the county jail relied on by the trial court. These records could have been just as relevant to what Daniels mental condition was at the time of the events in question, and trial counsel despite having two weeks to gather the information and make a proffer concerning Daniels medical condition, it made no attempts. Trial counsel failure in this regard, provided the Court no basis to allow the cross examination of Daniels regarding his medical history. See United States v. Smith, 77 F.3d 511, 516-517 (D.C Cir. 1996)(On the basis of hospitalization alone, "without reviewing the medical records," no way to decide whether the witness

mental health was relevant). Counsel was clearly ineffective for failing to explore Daniel's 1995 diagnosis as bi-polar which had more relevance to Daniels mental state at the time of the crime than the time period when he was under the care of a doctor.

The Judge, however, as it relates to Daniels medical history stated in part the following:

> We ordered production from the D.C jail, community and mental health, Dare medical records with regard to his mental health services at the jail and I disclosed under a protective order to all counsel, a packet of about a half an inch or quarter of an inch of the medical records from the jail, which covered a period from early 2011 to January 2012. That appears to be the full extent of any medical record information that's been developed with regard to Mr. Daniels and his history and it simply doesn't show a basis for the Court to permit invasion of privacy on this issue which sadly is still very stigmatizing, the issue of treatment for mental illness. And in weighing whether or not a witness should be examined about this, this Court considers the concerns of embarrassment of the witness, the concern of subjecting the witness to questions invading his personal privacy. Questions about mental health treatment, which will not only embarass the witness but also may likely mislead the jurors into a conclusion that may not be warranted based on simply the fact of a diagnosis or the fact of some prior mental health treatment. Particularly in a case where there's no suggestion of an intent to call an expert to analyze or present any evaluation or assessment of Mr. Daniels's condition. The defendant, as I said, has been on notice about this issue since the material was provided back on January 12th and has failed to come up with any evidence that reflects that Mr. Daniels was affected by syptoms of mental illness at any of the pivotal times in this case, either at the date of his grand jury testimony in June of 2009 or currently now that he's testifying in trial in 2012. See January 26, 2012, trial transcripts, pg. 15, line 7- 16, line 16.

The Superior Court Judge not only at the expense of Defendant's right to cross examination, placed too much emphasis on the

embarrassment of the witness, but as stated earlier, the Velasquez case it principally relied on in denying the cross examination of Keith Daniels medical history was clearly inapposite, as Valaquez concerned a proposes cross examination of the victim's mental condition which occurred some three years after the crime charged making the mental illness here not relevant to the victims perception of the events at the time of the assault. Here the record demonstrates that Keith Daniels had a long history of mental illness predating the crimes in question, i.e, his diagnosis in 1995 which for all practical purposes could have continued up until the time that he allegedly had the conversation with Terry.

There clearly existed no basis in fact, even crediting the jail records relied on by the trial judge to suggest that Keith Daniels was not suffering from psychosis at least at the time he supposedly had the incriminating conversation with Terry. And although the Court found Mr. Daniels testimony credible regarding his mental state, with all due respect the trial court is not qualified to make medical diagnosis, and certainly no one would allow a person with a history of mental illness to self diagnose themself.

Counsel had an obligation to not only distinguish the decisions of Valaquez and George to the facts of the instant case, but also and just as important, Counsel should have attempted to make a

proffer, especially considering case law in the District of Columbia is fairly lenient in describing how the requirement of factual foundation may be met. See Carter v. United States, 614 A.2d 913, 919 (D.C 1992)("after all a proffer is nothing more than an offer to prove factual allegations and does not consist of the proof itself."). See also, Scull v. United States, 564 A.2d 1161, 1164 (D.C 1989).

The trial court also abused its discretion on for its over-reliance on the D.C Circuit Court of Appeals of George, id, a decision that's not a decision from inside the circuit, while ignoring binding decisions from inside this circuit such as Bennett v. United States, 876 A.2d 623 (D.C 2003), which despite AND very the witness stating that he had been seeing a psychiatrist since he was 12 years old and was diagnosed with dual personality or paranoid schizophrenia; did not admit to any psychosis at the time of trial; up to date medical records including an intake assessment indicated no thought disorder; no record of auditory hallucinations or delusions close in time to the crime charged. . . or even remotely, id at 629, the Court allowed the questioning of the witness with regards to his history of mental illness, although the Court precluded the use of the diagnostic term of the witness' illness (paranoid schizophrenia).

This Court of Appeals held that a witness suffering from a mental illness may have a bearing on the witness' credibility, and ample precedent supports admission of evidence of mental issue

on the issue of credibility, although it precluded a line of questioning that referred to the diagnostic term of schizonphenia as alarming, prejudical, and of marginal relevance. Id at 633.

Based on the foregoing, it's clear that trial counsel's failure to seek out the records of Keith Daniels who testified that as early as 1995 he was diagnosed as bi-polar, make a proffer to the Court regarding how his credibility could be impeached, and point out to the Court that the decisions it relied on was inapposite to the facts at hand, rendered his representation ineffective, which resulted in this Court abusing its discretion in failing to vacate the convictions on this basis.

(CONTINUED)

ARGUMENT THREE

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO REMOVE JUROR 836 FOR CAUSE

It's Defendant's contention that the District Court abused its discretion when it denied the claim that it failed to strike juror 836 for case. The Court first held that defendant is procedurally barred from raising this claim at the post-conviction stage since he failed to raise it on direct appeal. However, as Petitioner submitted in his initial argument, and not acknowledged by the Court, pursuant to Murray v. Carrier, 477 U.S 478, 479 (1986) ineffective assistance clearly constitute cause for failing to raise an issue on direct appeal. It's defendant's contention that appellate counsel was clearly ineffective for not raising this claim on direct appeal, which was prejudicial, excusing the failure to raise earlier.

The Court also erred when it also held that even if defendant could establish cause, he couldn't establish prejudice for he failed to demonstrate that there is a reasonable probability that . . . the result of the proceeding would have been different, but for the alleged trial error, i.e, that defendant cannot show that , had juror 836 had been stricken, the jury would not have convicted him. The District Court here clearly uses the wrong standard to determine prejudice as this Court has held in no uncertain terms that failure

to remove a juror for cause was structural error requiring reversal with no showing of prejudice. See Hughes v. United States, 689 A.2d 1206, 1210 (D.C 1996). Defendant does not as this Court held have to show how had Juror 836 been stricken, the jury would not have convicted him, but instead only that the juror should have been removed for cause.

The Court as well was incorrect in its view that even considering the claim substantively a thorough reading of the voir dire confirms that the defendant's claim that the court committed reversible error in declining to strike Juror 836 is unfounded quoting Harris v. United States, 606 A.2d 763, 764 (D.C 1996). The case the Court relies on, i.e, Harris, involves a juror who was unequivocal to the Court's questions as to whether she could be impartial after having been the victim of a crime, whereas in the instant case, the juror was equivocal about her partiality throughout the entire questioning, and only acquiesed when the Court pressured her to choose the best judgment between she hope that the crime taking place close to her house wouldn't affect her decision and that she wanted to give it a fair chance, to the Court's suggestion that Juror 836 "You're going to say no, it wouldn't affect you?", see Tr. 89, line 5-16, where she finally settled in on, it wouldn't affect the answer the court solicited.

Any comparison this Court found to the Harris decision must be

rejected. The precedence more on point with this Court's handling of Juror 836 responses would be Lewis v. Voss, 770 A.2d 996 (D.C 1999), precedence the Court failed to mention. In Lewis, this Court in discussing whether a juror should have been excused for cause because of their response, held "people do not readily admit to bias, states of mind that prevent the rendering of a just verdict or opinion which would improperly influence their verdict." The Lewis decision is on all fours with the instant case because there just as you have here, this Court found that a district court had erred in accepting a juror's ambiguous claim that she could be impartial, after first expresssing her unpleasant experience, and then in response to a question whether she would treat plaintiff's witness the same, she said she thinks so. This Court in Lewis emphasized that the juror signaled doubts as to whether she could be impartial, and because juror 836 signaled the same doubts throughout the juror's questioning of her, only backing down when pressured to by the trial court, Petitioner contends that by the trial court committing reversible error in allowing the sitting of a juror's impartiality, defendant's Sixth Amendment right to an impartial jury was violated.

(CONTINUED)

ARGUMENT FOUR

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REMOVE JUROR 836 and 927 THROUGH PEREMPTORY CHALLENGES

The trial court abused its discretion when it also denied defendant's claim that trial counsel was ineffective when it failed to use peremptory strikes to remove Juror 836, as well as Juror 927 from the jury pool, based on their expressed feelings about gun violence. The Jurors specific exchanges starting with Juror 836 was as follows:

> The Court: Okay. All right. Tell me about why you circled "nature of the charges." I think that was the last thing you circled.
>
> The Juror: Just in terms of gun violence. Scares me, you know. I live alone. I walk home alone at night. It's frightening, especially in the Bloomingdale, LeDroit area. It's frightening. A lot of stuff happens there, so. . . Especially that being close to home, it's kind of frightening.
>
> The Court: Just hearing what the case involved is a bit frightening.
>
> The Court: Just hearing what the case involved is a bit frightening.
>
> The Juror: Right. Yeah.
>
> The Court: I understand. And the questions I have for you, though, is whether or not that reaction that you had is in any way going to prevent you from listening to the case with an open mind and determining fairly whether or not the government proves that these individuals did what they're charged with.
>
> The Juror: I don't think so.
>
> The Court: Do you think that you could-do you think you'll have any difficulty presuming the defendant's innocent just because of knowing what the charges are?

The Juror: I mean, I would absolutely give, you know, give it an open mind, keen an open mind in that sense but it does scare me, especially that being close to my house, so...

The Court: Would the fact that it happened close to your house in any way come into play in terms of affecting your decision or it just would make you say, oh that's close to may house?

The Court: Would the fact that it happened close to your house in any way come into play in terms of affecting your decision or it just would make you say, oh, that's close to my house?

The Juror: Well, I would hope not. But you know, obviously at this moment I want to say no. But I would hope not.

The Court: Okay. What's your best judgment about that?

The Juror: I'm going to say no. I want to give it a fair chance, so . ..

The Court: Okay. You're going to say no, it wouldn't affect you?

The Juror: It wouldn't affect, no

The Court: All right. I think those are all the questions for you, ma'am. We'll take this into consideration.

The exchange between Juror 927 and the Trial Court was as follows:

~~The Juror: I thought it was only honest to say that I do have~~ strong feelings about guns. I supported the Brady Bill. I think that, you know, there's still not enough background checks when people--Wal Mart will give a gun to anybody and people can get their hands on guns, and so, honestly, that's, you know, and I think saying that we all should have a gun, you know, and the whole right to bear arms is sort of overdone when we wouldn't need them if people who shouldn't get them didn't have guns. See Tr, Jan 11, 2012, 137-38.

It's defendant's contention that the trial court abused its

discretion particularly when she found that trial counsel was not ineffective for failing to remove Juror 836 through a peremptory challenge. It's clear from defense counsel Mr. Copacino colloquy with the trial court, specifically, "there was such hesistancy about it being in your neighborhood, and that it might affect--yeah, I try, I try. And I believe her, she would try. But she's pretty much told us that she's not confident she'd be able to do it," see Tr, pg. 89-90, Jan 11, 2012, that such warranted a peremptory challenge. As counsel stated Juror 836 did everything she could to notify the Court that she would have a hard time being impartial and not until the Court forced her to choose her best judgment between not being affected by gun violence and being impartial did she settle on what the Court wanted her to say.

It's clear that these two jurors in their answers to the Court on voir dire particularly Juror 836, presented enough of their state of mind that counsel even after failing to remove the Juror for cause, should have exercised a peremptory challenge to remove her. As this Court has stated, "People do not readily admit bias, states of mind that prevent them from rendering a just verdict." See Lewis, id. Clearly on more than one occasion, Juror 836 signaled doubts about her ability to be impartial, and the Court instead of accepting those doubts stayed at this Juror until she acquiesed, that she would not be affected by what she had stated numerous times might affect her ability to be impartial. So regardless of whether the

the trial court struck the juror for cause, counsel should had exercised a peremptory challenge and removed this particular juror.

The Court also abused its discretion when it found that even if the juror should have been removed through a peremptory challenge, defendant could not show prejudice. The trial court specifically held "The defendant has not demonstrated a reasonable probability that the removal of these jurors would have resulted in an acquittal, or in a hung jury on the Aggravated Assault While Armed counts of which he was convicted. The correct test is whether trail counsel failure to exercise a peremptory strike resulted in the sitting of a juror who has expressed a clear inability to be impartial. It's Defendant's contention as Lewis demonstrates, Juror 836 was clearly impartial. This Court must vacate this Court's order denying relief.

CONCLUSION

Based on the foregoing facts and conclusions of law, Appellant requests that this Court vacate the judgment for the reasons stated above.

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Respectfully Submitted

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