APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CO-0850

BILLY A. ROBIN, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia
(CF2-11466-09)

(Hon. Ann O'Regan Keary, Trial Judge)

(Submitted November 1, 2017 Decided January 5, 2018)

Before BLACKBURNE-RIGSBY, *Chief Judge*, THOMPSON, *Associate Judge*, and WASHINGTON, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a jury trial, appellant Billy A. Robin was convicted of four counts of aggravated assault while armed, D.C. Code §§ 22-404.01, -4502 (2001), one count of unauthorized use of a vehicle, D.C. Code § 22-3215 (2001), and one count of fleeing a law-enforcement officer, D.C. Code § 50-2201.01 (2001). On direct appeal, we affirmed the jury's finding that appellant had the requisite *mens rea* for two of the aggravated assault while armed convictions, but remanded the remaining two aggravated assault while armed convictions for the court to enter judgment on the lesser offense of assault with significant bodily injury. We held that there was insufficient evidence to support the "serious bodily injury" element for two of the victims. *Terry v. United States*, 114 A.3d 608, 616 (D.C. 2015).[1] Before the court now is appellant's *pro se* D.C. Code § 23-110

[1] On direct appeal, appellant also alleged that the trial court abused its discretion in admitting two pieces of testimony, and that inculpatory statements made by a co-defendant to a government witness were improperly admitted against him. *Terry, supra*, 114 A.3d at 612.

On September 20, 2011, appellant and his co-defendants were charged with four counts of assault with intent to kill while armed, four counts of aggravated assault while armed, eight counts of possession of a firearm during a crime of violence, one count of conspiracy, and one count of unauthorized use of a vehicle. Appellant was also individually charged with accessory after the fact, fleeing a law enforcement officer, tampering with physical evidence, and offenses committed during release (since he was on pretrial release at the time of this crime for a separate case). Appellant pled guilty to the offenses committed during release charge, before trial.

From January 11 to February 3, 2012, Judge Ann O'Regan Keary presided over a jury trial, which returned a guilty verdict for the four aggravated assault while armed charges, the unauthorized use of a vehicle charge, and the fleeing a law enforcement officer charge.[5] On May 30, 2012, appellant was sentenced to 164 months of imprisonment and five years of supervised release. Appellant filed a timely appeal in which he challenged, in relevant part, the sufficiency of the evidence used to show that he had the requisite *mens rea* to commit the four aggravated assault while armed charges.[6] *See Terry, supra*, 114 A.3d at 616. Upon a review of the record and the jury's decision, this court affirmed the jury's finding that appellant had the sufficient *mens rea* to sustain the aggravated assault while armed convictions. *Id.*

---

[5] During trial, the government had dismissed three of the assault with intent to kill while armed charges, and three of the possession of a firearm during a crime of violence charges. The jury was hung on five of the possession of a firearm during a crime of violence charges, the assault with intent to kill while armed charges, the conspiracy charge, the accessory after the fact charge, and the tampering with physical evidence charge. The court dismissed the counts on which the jury had been deadlocked during sentencing.

[6] Appellant also challenged the trial court's discretion in admitting two pieces of evidence and an inculpatory statement from Terry to a government witness, which we previously affirmed. Additionally, he challenged the sufficiency of the evidence of the four aggravated assault while armed charges to prove the "serious bodily injury" element, which we remanded on two of the counts for an entry of assault with significant bodily injury because there was not enough evidence to show "serious bodily injury" for two of the victims. *Terry, supra*, 114 A.3d at 630.

On February 12, 2015, during the pendency of his direct appeal, appellant filed a *pro se* § 23-110 motion collaterally challenging his convictions on the basis that: (1) new case law invalidates his aggravated assault while armed convictions because he lacked the requisite *mens rea* to complete the crime; (2) the trial court abused its discretion when it failed to strike juror 836 for cause; and (3) his trial counsel was ineffective because he did not remove jurors 836 and 927 through peremptory strikes and because he failed to convince the trial court to permit cross-examination of a government witness on his mental health status. On July 22, 2016, the trial court denied appellant's motion without a hearing.

This collateral appeal followed.

II. Analysis

A. Appellant's Challenge to his Aggravated Assault while Armed Convictions on the Basis of New Case Law

Appellant first argues that his aggravated assault while armed convictions must be set aside in light of the Supreme Court's decision in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), which held that an aiding and abetting conviction requires both an act facilitating the crime, and "a state of mind extending to the entire crime." *Id.* at 1248. The trial court denied appellant's claim, stating that the claim was barred because appellant had already litigated this issue before this court in his direct appeal, and we had decided that there was sufficient evidence to show that appellant had the requisite *mens rea* to sustain his conviction.

It has long been settled that an appellant cannot re-raise an issue that has been settled by an appellate court on appeal in a collateral attack "absent special circumstances." *Doepel v. United States*, 510 A.2d 1044, 1046 (D.C. 1986). An intervening change of law may occasionally be considered a special circumstance which might warrant reconsideration of a prior decision. *See Diamen v. United States*, 725 A.2d 501, 509-10 (D.C. 1999).

In this case, however, there has not been an intervening change of law, despite the Supreme Court's holding in *Rosemond*. In *Rosemond*, the Supreme Court recognized that for an individual to be convicted of an aiding and abetting charge, he needed to intend to bring about the conclusion of a crime. *Rosemond, supra*, 134 S. Ct. at 1248. The Court further recognized that intent can be shown if "the defendant has chosen, with full knowledge [of his companion's plans], to participate in the illegal scheme." *Id.* at 1250. In appellant's direct appeal, this

failure to bring this claim on his direct appeal, nor has he alleged that he suffered any prejudice from juror 836's service, this claim is procedurally barred. *See Washington, supra*, 834 A.2d at 903.

For the first time in his appellate brief, appellant also alleges ineffective assistance of his appellate counsel for failing to raise the issue of the trial court's failure to strike juror 836 for cause. But since appellant failed to raise this issue in the trial court, we decline to decide the issue here.[7]

C. Appellant's Claims of Ineffective Assistance of Counsel

To prevail on a claim for ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was so deficient that he or she was not functioning as a counsel guaranteed by the sixth amendment and (2) that trial counsel's deficient performance prejudiced the defendant so much that the defendant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ineffective assistance of counsel claims consist of a "mixed question of law and fact." *Wright v. United States*, 979 A.2d 26, 30 (D.C. 2009). "[W]e must accept the trial court's factual findings unless they lack evidentiary support in the record. The trial court's legal conclusions, however, are reviewed *de novo*." *Dobson v. United States*, 815 A.2d 748, 755 (D.C. 2003).

1. Jurors 836 and 927

Appellant alleges that his trial counsel was ineffective when he failed to use peremptory strikes to remove jurors 836 and 927 from the jury pool for their expressed views on gun violence. Juror 836 initially expressed concerns that a crime with a gun had been committed about six blocks from where she lived and

---

[7] The trial court also correctly concluded that even if appellant's claim had not been procedurally barred, there had been no error. The trial court has broad discretion to determine when it should strike a juror for cause, and this court will not disturb that decision "unless the juror's partiality is manifest." *Harris v. United States*, 606 A.2d 763, 764 (D.C. 1992) (quoting *Wilburn v. United States*, 340 A.2d 810, 812 (D.C. 1975)) (internal quotation marks omitted). The transcript in this case shows that the court questioned juror 836 during *voir dire* about her biases and her concerns about the nature of the case, and that at the end of that questioning, the trial court believed the juror when she concluded that she could be impartial.

that she was generally concerned about violence in the area since she lived alone. Juror 927 stated that he had strong feelings about gun possession, and that he was passionate about ensuring that guns did not end up in the wrong hands on the street. The trial court concluded that there was nothing in the record to suggest that appellant's counsel had acted unreasonably and that appellant had not alleged any prejudice that resulted from failing to strike these two jurors.[8]

Appellant, in his brief, does not suggest that he would have been acquitted of his crimes, but merely contends that the trial court should have evaluated his claims under whether or not the juror could be impartial. Appellant failed to show that he was prejudiced by having these two jurors in his case, and thus is unable to prevail on an ineffective assistance of counsel claim. *See Wright, supra*, 979 A.2d at 31.

2. Keith Daniels' Cross Examination

Finally, appellant argues that his trial counsel was ineffective for failing to convince the trial court to permit cross examination of a government witness, Keith Daniels, on his mental health history. The trial court concluded that appellant's trial counsel had vigorously defended his client in this regard, which cannot be seen as an unreasonable trial decision, and that appellant had shown no prejudice from his counsel's inability to question Daniels on his mental health status.

Appellant again has not alleged prejudice with respect to this claim. Appellant does not show how preventing Daniels from testifying would have resulted in his acquittal or in any way changed the outcome of his case. Without a showing of prejudice, appellant cannot prevail on his ineffective assistance of counsel claims.

---

[8] The trial court concluded that all of appellant's § 23-110 claims were barred, because he was represented by a different counsel on appeal than he was during trial. We agree that appellant's § 23-110 claims are barred as he could have raised the issue on direct appeal. Even assuming appellant's § 23-110 claims are not barred, any error in the trial court's decision was harmless as the trial court evaluated all of appellant's claims under both prongs of the *Strickland* standard.

Accordingly, the order on appeal is hereby affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Ann O'Regan Keary

Director, Criminal Division

Billy A. Robin
FR# 36274-007, FCI Butner Medium II
P.O. Box 1500
Butner, NC 27509

Copy e-served to:

Elizabeth Trosman, Esquire
Assistant United States Attorney

APPENDIX C

District of Columbia
Court of Appeals

No. 16-CO-850

BILLY A. ROBIN,
Appellant,

v.

CF2-11466-09

UNITED STATES,
Appellee.

BEFORE: Blackburne-Rigsby,* Chief Judge; Glickman, Fisher, Thompson,* Beckwith, and Easterly, Associate Judges; and Washington,* Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing *en banc*, and appellant's motion to supplement the record, it is

ORDERED that appellant's motion to supplement the record is denied. It is

FURTHER ORDERED by the merits division* that appellant's petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on appellant's petition for rehearing *en banc*. It is

FURTHER ORDERED that appellant's petition for rehearing *en banc* is denied.

PER CURIAM

Associate Judge McLeese did not participate in this case.

Copies to:

Honorable Ann O'Regan Keary

Director, Criminal Division

APPENDIX B

Appendix

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

16 CO 850

UNITED STATES OF AMERICA :
:
v. : Case No. 2009 CF2 11466
: Judge Ann O'Regan Keary
:
BILLY ROBIN, :
Defendant

O R D E R
(July 22, 2016)

This matter comes before the court upon consideration of the defendant's pro se "Motion Pursuant to 23-110," filed on February 12, 2015, the Government's Opposition to Defendant's Motion Pursuant to D.C. Code § 23-110, filed on July 30, 2015, and the defendant's "Petitioner's Reply to the Government's Motion in Opposition to Petitioner's 23-110 Motion," filed on November 13, 2015. After carefully considering the parties' pleadings, and the entire record in this case, the court concludes that the defendant's motion must be **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant's case arose from a May 19, 2009 shooting incident on North Capital Street in Washington, D.C., in which the defendant served as the driver when his co-defendant, DeAngelo Terry, fired a semi-automatic pistol loaded with an

extended magazine, at a group of four individuals, Chaquon Wingard, Jameeka Washington, Tyrique Williams, and Antoine Clipper. After defendant Terry fired two rounds of shots at the group, injuring all four victims, he ran to Randolph Place, where defendant Robin and co-defendant DeAndre Banks were waiting in a van. A witness, Ronald Taylor, observed co-defendant Terry getting into the passenger seat of the van, which then sped off toward 1st Street, N.W.

Taylor called the police, who gave chase to the van, which was speeding recklessly through oncoming traffic and hitting other cars in its way. Ultimately, over 20 police vehicles became involved in the chase, which ended when the van crashed in Hyattsville, Maryland. Defendant Robin was found in the driver's seat, with co-defendant Terry in the passenger seat, and co-defendant Banks in the backseat. The police also recovered a ski mask that the defendant attempted to discard after they were caught.

In September 2011, a superseding indictment charged the defendant and his two co-defendants with four counts of Assault With Intent to Kill While Armed (AWIKWA), four counts of Aggravated Assault while Armed (AAWA), eight counts of Possession of a Firearm During a Crime of Violence (PFCV), one count of Conspiracy, and one count of Unauthorized Use of a

Vehicle (UUV). In addition, the defendant himself was also charged with Accessory After the Fact, Fleeing a Law Enforcement Officer, and Tampering with Physical Evidence. Because he was on pretrial release in a separate case at the time of the incident, the defendant was also charged with Offenses Committed During Release ("OCDR"), an offense to which he pled guilty before trial.

A jury trial commenced on January 11, 2012 and concluded on February 3, 2012 with a jury verdict of guilty on all four AAWA counts, the UUV count, and the Fleeing a Law Enforcement Officer count. The jury was hung on the remaining five counts of PFCV, the AWIKWA charge, the Conspiracy charge, the Accessory After the Fact charge, and the Tampering with Physical Evidence charge.[1] On May 30, 2012, the defendant was sentenced to an aggregate sentence of 164 months imprisonment and five years of supervised release. In imposing concurrent rather than consecutive sentences on the defendant's four AAWA convictions, the court chose not to apply the Superior Court's Voluntary Sentencing Guidelines' policy of consecutive sentences for each victim in such crimes, see Sent. Guideline Sec. 6.1, as the

[1] During trial, the government had dismissed three of the AWIKWA counts and three of the PFCV counts against the defendant related to victims Washington, Williams, and Clipper. After sentencing, the government dismissed the counts on which the jury had been deadlocked.

court believed adherence to that policy would result in an unduly harsh sentence on the defendant.

The defendant then pursued a direct appeal of his convictions, through new appellate counsel, making several arguments. Among his many claims on appeal, the defendant argued that there had not been enough evidence adduced at trial to show that he possessed the requisite intent to commit the four AAWA offenses of which he was convicted.

On April 30, 2015, the Court of Appeals issued a ruling rejecting all of defendant Robin's claims except the one regarding the alleged insufficiency of evidence to prove the "serious bodily injury" element of the two AAWA convictions relating to the victims Clipper and Williams. The Court of Appeals affirmed the remaining convictions, and remanded the case to the trial court to vacate the convictions of AAWA, and enter convictions of the lesser included offense of Assault with Significant Bodily Injury.[2] Terry and Robin v. United States, 114 A.3d 608, 616-621 (D.C. 2015), amended by Robin v. United

[2] In accordance with that Order, an Amended Judgment and Commitment Order was recently signed and issued by this court, on June 28, 2016. As the court had sentenced the defendant to concurrent sentences on each assault count, this amendment did not change the length of the defendant's sentence.

States, 2015 D.C. App. LEXIS 256 (D.C., June 5, 2015) (reh'g en banc denied, December 23, 2015).[3]

On February 12, 2015, while his appeal was still pending, the defendant filed the instant pro se motion pursuant to D.C. Code § 23-110, seeking to vacate his convictions of AAWA in this case.[4] On March 31, 2015, the court ordered the government to file a response. On June 23, 2015, the government filed a Motion to Enlarge Time Within Which to File Response to Defendant's 23-110 Motion, which was granted on June 30, 2015. Additionally, on July 20, 2015, the government filed a Motion for Waiver of Attorney-Client Privilege, which was granted on September 10, 2015. The government's opposition was filed on July 30, 2015. Thereafter, on August 25, the defendant filed a Motion for Extension of Time, in order to file a response to the government's opposition. The defendant filed a "Petitioner's Reply to the Government's Motion in Opposition to Petitioner's 23-110 Motion" on November 13, 2015.

[3] The April 30, 2015 Court of Appeals opinion was subsequently amended, twice, to make minor corrections, once on May 11, 2015 and later in June 2015. A corrected and final version of the opinion was issued on June 5, 2015. See Robin v. United States, 2015 D.C. App. LEXIS 256 (D.C., June 5, 2015).

[4] As the defendant conceded his guilt at trial on the UUV and Fleeing counts, and had previously pled guilty to the OCDR charge, his motion seeks only the vacating of the four AAWA counts, rather than all seven counts on which he was sentenced.

LEGAL ANALYSIS OF DEFENDANT'S CURRENT CLAIMS

D.C. Code § 23-110 allows "a prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States . . . [to] move the court to vacate, set aside, or correct the sentence." D.C. Code § 23-110(a). In support of his motion, the defendant makes four main claims. First, the defendant argues, as he did on appeal, that there was insufficient evidence of his intent to commit the Aggravated Assault While Armed offenses as an aider and abettor. Second, the defendant claims that the court erred in failing to strike one of the jurors for cause during voir dire. Third, the defendant argues that he received ineffective assistance from his trial counsel, citing various claimed flaws in his representation. Finally, the defendant takes issue with two statements made by the government during its closing argument, claiming that they amounted to due process violations. As the analysis below reflects, all of defendant's claims are lacking in merit; some moreover, are procedurally barred.

I. Sufficiency of Evidence of Intent to Commit AAWA

In his motion, defendant raises an argument identical to one he made on appeal -- that there was insufficient evidence adduced at trial to sustain his convictions of the offenses of

AAWA. Specifically, the defendant argues that to convict him as an aider and abettor to the principal actor, the government needed to have shown that, on the day in question, the defendant "had advance knowledge that an aggravated assault while armed would take place." Defendant's Motion at 20. According to the defendant, a conviction on this ground "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." Id.

This claim, however, was already litigated during his appeal. Indeed, in its opinion, the Court of Appeals squarely addressed "Robin['s] conten[tion] 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." 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.[5]

The law is well-settled that when an appellate court has previously resolved an issue, that issue cannot be litigated

[5] The 2014 Supreme Court decision which defendant relies upon, Rosemond v. United States, 134 S.Ct. 1240 (2014), predated the Court of Appeals' 2015 decision in this case, and clearly did not persuade the Court of the merits of the defendant's argument.

again on collateral attack in the trial court, absent some special circumstances. See Doepel v. United States, 510 A.2d 1044, 1045-1046 (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.

II. Failure to Strike Juror 836 for Cause

The defendant also contends that the trial court committed reversible error when it failed to strike Juror 836 during voir dire. The defendant's motion cites a portion of the transcript of the voir dire in which Juror 836 was asked various questions about her opinions and concerns regarding gun violence, and whether she could remain impartial in light of those concerns. The defendant argues that Juror 836 never unequivocally stated that her concerns would not impair her ability to remain impartial during the trial, and that the court should have struck her from the jury pool for cause, based on her alleged bias.

Appeal Attorney Case

It must first be noted that the defendant is procedurally barred from raising this claim at the post-conviction stage, since he failed to raise it during his direct appeal. The Court of Appeals has long recognized that "relief under D.C. Code § 23-110 is appropriate only for serious defects in the trial

which were not correctable on direct appeal or which appellant was prevented by exceptional circumstances from raising on direct appeal." Shepard v. United States, 533 A.2d 1278, 1280 (D.C. 1987). Thus, if a defendant fails to raise an issue or challenge to his conviction in his direct appeal, he is precluded from raising that issue on collateral attack in the trial court, unless he can demonstrate both a cause of this failure, and prejudice resulting from the failure." Id. at 1280. In this case, the defendant has not shown proper cause for failing to raise the issue earlier, for he has not offered any explanation that justifies his failure to raise the claim of juror bias during his direct appeal. To establish sufficient cause for failing to raise such a claim on direct appeal, the defendant must show that some "objective factor external to the defense impeded . . . efforts to comply . . . with the procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). In this case, there was no such factor that prevented the defendant from raising the claim earlier, such as a new interpretation of the law, or newly discovered evidence. Since the defendant could have, and should have raised any such claim of a trial error during the pendency of his direct appeal, he is procedurally barred from raising it at this time.

Moreover, even if he could establish sufficient cause for not raising this claim on direct appeal, he still cannot show

prejudice, for he has 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. Shepard, 533 A.2d at 1282. Here, the defendant cannot show that, had Juror 836 been stricken, the jury would not have convicted him. As there is no reasonable probability that the outcome of the defendant's trial would have been different if the court had stricken Juror 836 for cause, the defendant has cannot show prejudice.

And even considering this 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. In Harris v. United States, 606 A.2d 763, 764 (D.C. 1992), the Court of Appeals noted that "[t]he trial judge has broad discretion over whether to strike a juror for cause, and the exercise of that discretion will not be reversed unless the juror's partiality is manifest." Id. at 764. In that case, the defendant, on appeal, challenged the trial court's failure to strike a potential juror who had previously been the victim of robbery, the same crime with which defendant Harris was charged. The Court in Harris clarified that "[i]n determining whether a juror can be impartial, the trial judge must consider all circumstances and not merely accept the juror's belief as controlling." Id. There, the court

declined to disturb the court's decision not to strike the juror, noting that "[t]he trial judge had the opportunity to evaluate the juror's demeanor, and his conclusion that she could be impartial was not unwarranted." Id. at 764-65.

In the instant case, after Juror 836 noted her fear of gun violence, the court probed her opinions with follow-up questions, asking her "whether . . . 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." Tr. 88, Jan. 11, 2012. To this query, Juror 836 responded, "I don't think so." Id.[6] The court's inquiry did not end there. Juror 836 was asked additional questions to assure her ability to serve impartially. The court asked, "[D]o you think you'll have any difficulty presuming the defendants innocent just because of knowing what the charges are?" Id. Juror 836 replied that she would "absolutely . . . give it an open mind, keep an open mind," while reiterating that "it does scare me . . . that being close to home." Id. at 88-89. The court continued to explore the juror's thoughts, asking whether

[6] In the defendant's motion, he misreads this colloquy, asserting that the juror had answered "I don't think so" when she was asked if she could fairly determine whether the government proved the guilt of the defendants. Def. Motion at 23. By contrast, the actual question was whether the juror's concerns about gun violence would prevent her from making a fair determination, to which she had answered "I don't think so." Tr. 88, Jan. 11, 2012.

"the fact that it happened close to your house in any way come[s] into play in terms of affecting your decision." Id. at 89. Juror 836 replied, "I want to say no. I would hope not." Id. The court then asked the juror for her "best judgment" to which the juror replied, "I'm going to say no. I want to give it a fair chance . . ." Id. The court, seeking to confirm the juror's impartiality, asked "You're going to say no, it wouldn't affect you?" to which the juror responded, "It wouldn't affect, no." Id.

Thus, the court carefully followed up on Juror 836's concerns, and whether they would affect her ability to remain impartial, until the court was able to confirm that her feelings about gun violence would not affect her impartial decision-making as a juror. The juror herself stated she believed she was able to keep an open mind several times, a sentiment the court confirmed with its repeated inquiries, and the juror showed her understanding, by her answers, of the need to be impartial. The court's ultimate conclusion, that the juror could fairly serve, was based on its experienced assessment of the juror's words as well as her demeanor, and was fully consistent with the court's obligations in this regard, as recognized by the Court of Appeals in Steele v. D.C. Tiger Mkt., 854 A.2d 175, 179 (D.C. 2004) and Ahmed v. United States, 856 A.2d 560, 563 (D.C. 2004) (trial judge's exercise of discretion over whether a juror

should be struck for cause will not be reversed unless the juror's partiality was manifest). Accordingly, the defendant's claim that the court committed reversible error in declining to strike the juror lacks merit.

III. Claims of Ineffective Assistance of Trial Counsel

The defendant also argues that he is entitled to a new trial because his trial counsel, John Copacino, Esq., of the Georgetown Law Center's clinical program, and his co-counsel Emily Stirba, Esq., a Prettyman Fellow, were constitutionally ineffective in a variety of ways. Preliminarily, it must be noted that, as the defendant was represented on appeal by new counsel, claims regarding the deficiency of his trial counsel could have, and should have, been raised in his direct appeal. Because of his failure to raise the issues relating to ineffectiveness of his counsel in his appeal, these claims can be viewed as procedurally barred at this time. Shepard, 533 A.2d at 1280; Head v. United States, 489 A.2d 450, 451 (D.C. 1985). Nonetheless, the court will address the substantive merits of each claim.

my Attorney

To succeed on a claim of ineffective assistance, the defendant must establish (1) that he received ineffective assistance of counsel, and (2) that he was prejudiced as a result. Johnson v. United States, 631 A.2d 871, 874-75 (D.C.

1993); Southall v. United States, 716 A.2d 183, 190-191 (D.C. 1998) (citations omitted). Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Strickland v. Washington, 466 U.S. 668, 687-688 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700.

Specifically, the defendant must first establish that his trial counsel acted deficiently or unreasonably, considering the circumstances and professional norms. When ineffective assistance of trial counsel is alleged, "the benchmark of judging . . . ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see also Little v. United States, 748 A.2d 920, 921-22 (D.C. 2000). In evaluating claims of ineffective assistance, courts recognize a strong presumption that the trial attorney's conduct fell within the reasonable boundaries of professional assistance. See Strickland, 466 U.S. at 689; Williams v. United States, 725 A.2d 455, 460 (D.C. 1999) ("In retrospectively assessing trial counsel's performance, we must presume that it satisfies constitutional requirements." (citations omitted)). Second, in considering the prejudice caused by an attorney's deficient performance, the defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694.

A. Counsel's Decision Not to Use Peremptory Strikes on Specific Jurors

Defendant claims that counsel was ineffective for failing to use peremptory strikes to remove Jurors 836, as well as Juror 927 from the jury pool, given their expressed feelings about guns and gun violence. As noted earlier, Juror 836 had expressed some fear of gun violence in close proximity to her home, which prompted an extended voir dire by the court. Additionally, Juror 927 expressed, in her voir dire responses, "strong [oppositional] feelings about guns" Tr. 137, Jan. 11, 2012.

As previously discussed, supra at 8-12, however, the court probed Juror 836's comments and confirmed her ability to be impartial, despite her fear of gun violence. Similarly, with Juror 927, the court inquired whether the Juror 927 would be able to hear the case impartially, given that gun control was a "passion of [hers] that [she] feel[s] strongly about . . ." Id. at 138. The court asked Juror 927, ". . . knowing your feelings about how we should control guns carefully, do you feel like you come into the case with any kind of predisposition that would interfere with your ability to presume the defendants[']

innocen[ce], unless and until the government prove that they did what they're charged with?" Id. The juror replied, ". . . that's a separate issue. And I don't think it would interfere with whether I thought that person . . . did the crime or not." Id. at 138-39.

After the court's inquiry, the defendant's attorney himself questioned the juror, to confirm Juror 927's ability to remain impartial, asking the juror directly, "If it were a close case and you were trying to decide whether the government had proved its case beyond a reasonable doubt, do you think your feelings about guns might push you a little bit toward conviction because of your feelings about guns in order to make things safer?" Id. at 140-41. To that question Juror 927 responded, that she "[didn't] think I would convict somebody of a wrongful charge" simply because they possessed guns illegally." Id. at 141. The court further clarified by asking Juror 927 several follow-up questions, finally "asking . . . whether or not you're so distressed about the prevalence of guns in society that you're going to enter a verdict for the wrong reason here . . ." Id. at 142-43. The juror responded, "I don't think so." The court once again inquired, "You don't think you'd have a problem?" to which the defendant clearly stated, "No. I don't think I would." Id. at 143.

The court's, and the defense attorneys' own questioning of these jurors led to the court's reasonable conclusion that Jurors 927 and 836 would be able to be impartial in their decision-making. Thus, the defendant is unable to show that his counsel's decision not to exercise peremptory strikes to remove these jurors was objectively unreasonable. Further, as the government notes in its opposition, if defense counsel had utilized peremptory strikes on these two jurors, who ultimately had indicated that they could be impartial, such strikes would have come at the expense of the inability to use those two peremptory strikes on other potential jurors, who may not have been impartial. Accordingly, defense counsel's decisions not to strike Jurors 836 and 927 can only be viewed as reasonable, given their documented answers to the court's follow-up questions, and this failure cannot constitute constitutionally deficient performance.

Moreover, turning to the prejudice test, the defendant also cannot show that he was prejudiced by defense counsel's decision not to strike these two jurors. 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. As the defendant cannot prove to any reasonable

degree of certainty that he would have received a more favorable outcome if Jurors 836 and 927 had been removed he is unable to meet the prejudice prong of the Strickland test. Thus, this claim of ineffective assistance of counsel is wholly unpersuasive.

B. Counsel's Failure to Convince the Court to Permit Cross-Examination of Witness Regarding His Mental Health History.

The defendant also claims that his attorneys were ineffective because they failed to convince the court to allow cross-examination of the government's cooperating witness, Keith Daniels, on his prior mental health history.[7] However, the defendant's attorney cannot be faulted in this regard, as counsel did vigorously argue for the court to allow cross-examination of Mr. Daniels regarding his mental health. The court, however, denied that request, consistent with relevant legal authorities on this issue.

The court has the discretion to "place reasonable limitation on cross-examination so as to 'avoid harassment,

[7] In his motion, the defendant titles this argument, "Appellate Counsel Rendered Ineffective Assistance When it Failed to Challenge on Direct Appeal, Violation of Petitioner's Rights Under the Confrontation Clause." Defendant's Motion at 30. In his argument, he takes issue with both trial counsel's failure to overcome the trial court's limits on cross-examination of witness Daniel with respect to his prior mental health treatment, as well as his counsel's failure to challenge the court's ruling on this matter during direct appeal - an apparent allegation of ineffectiveness of his appellate counsel. However, this court can only address the defendant's claims as to trial counsel's performance, as "trial courts may not consider ineffective assistance of appellate counsel when ruling on § 23-110 claims." Mayfield v. United States, 659 A.2d 1249, 1253.

prejudice, confusion of the issues . . . of interrogation that is only marginally relevant." Velasquez v. United States, 801 A.2d 72, 79 (D.C. 2002). When the defense asserted that Mr. Daniels' prior mental health treatment records could be "significant in calling [into] question his credibility," Tr. 15, Jan. 26, 2012, the court conducted a review of the records in question. After an examination of Mr. Daniels' mental health records, the court found that the record "doesn't show a basis for the Court to permit invasion of his privacy on this issue which sadly is still very stigmatizing, . . . treatment for mental illness." Id. The court noted that "[t]he defense would have to show some connection between this very limited prior mental health history and the defense theory that jurors should doubt the credibility of the witness." Id. at 19. The court found little probative value in the information that Mr. Daniels had previously been given a psychiatric diagnosis, and noted that there were "no symptoms of any difficulty with his perception or his mentation [and] [n]o references to any acute mental health condition or severity of illness," Id. at 18. Therefore, the court rejected the counsel's request to cross-examine the witness on his limited mental health history.

While the defendant has attempted to distinguish Velasquez, the case on which this court relied, his argument is unpersuasive. The defense argument ignores the clear ruling in

Velasquez that:

> "One's psychiatric history is an area of great personal privacy which can only be invaded in cross-examination when required in the interest of justice." United States v. Lopez, 611 F.2d 44, 45 (4th Cir. 1979). "If of minimal probative value, such an inquiry would be manifestly unfair and unnecessarily demeaning of the witness." Id. Such cross-examination should not be used "to introduce into the case a collateral issue which would confuse the jury and which would necessitate allowing the government to introduce testimony explaining the matter." Id. at 46.

Velasquez, 801 A.2d at 79.

The relevant factor here, as in Velasquez, was whether the witness' mental condition impaired his credibility regarding the time period about which he was to testify. Id. at 19; See also Bennett v. United States, 876 A.2d 623, 634 (D.C. 2005) (upholding trial court ruling limiting mental health-related cross examination because the symptoms that the appellant sought to elicit were remote in time to the relevant time period).

Defense counsel cannot be deemed constitutionally ineffective for failing to establish that the witness' credibility was impaired at the time of the crime, where there is nothing in the record to suggest that Mr. Daniels was suffering from a mental health condition that affected his credibility at that time. Even so, the defense vigorously attempted to persuade the court to permit this cross-examination, and thus, his performance as counsel was hardly deficient.

Further, the defendant has not shown that he was prejudiced by counsel's inability to cross-examine Mr. Daniels about his mental health history, as the defendant can offer no actual reason to believe that Mr. Daniels' mental health history made him an unreliable witness. Accordingly, because the defendant cannot show with any reasonable degree of certainty that the outcome of his trial would have been different had his attorney been permitted to cross-examine Mr. Daniels on this issue, he fails to demonstrate prejudice, and his second claim of ineffective assistance of counsel fails.

C. Counsel's Failure to Advance a Third-Part Perpetrator Argument.

Next, the defendant claims that his trial attorney was ineffective for failing to investigate and make use of exculpatory evidence and impeachment information disclosed to the defense by the government in a discovery letter which implied that there may have been a third party perpetrator. Specifically, the government's February 2011 letter disclosed that one victim, Tyrique Williams, had stated in an interview that he believed the shooter had driven a tan truck, as opposed to the red van in which the defendants were found at the time of their arrest.

It should be noted that in his direct appeal the defendant made a related argument, contending that the government had violated its obligation, under Brady v. Maryland, 373 U.S. 83 (1963), to disclose all material and exculpatory information in its possession, since the information in the February 2011 discovery letter was only fully elucidated and understood after subsequent disclosures that were made too late for adequate preparation and use by defense counsel. This claim was rejected by the Court of Appeals, which found that, in fact, "defense counsel was able to use the information concerning the tan Explorer" early on in the case, thus ". . . very effectively planting the seeds of a possible third-party perpetrator theory." Terry and Robin v. United States, 114 A.3d at 622. While the information may not have been used as early as the defendant would have liked, this does not establish that his counsel was ineffective. As the trial court noted, "three to four experienced counsel missed the [exculpatory] implication" of the February 2011 letter" at first. Tr. 10, Feb. 14, 2012. Thus, it cannot be said that counsel's performance fell below an objectively reasonable standard.

Further, the defendant has not shown that he was prejudiced by counsel's failure to investigate this purported exculpatory information earlier. Indeed, as the Court of Appeals held, trial

counsel was able to make use of this information effectively at trial to advance the defense theory of a third-party perpetrator. The defendant offers no support for the bald and speculative assertion that he would have received a more favorable outcome had counsel begun his investigation of this information earlier. Accordingly, this claim of ineffectiveness of counsel is meritless.

D. Counsel's Response to Contact Between Juror 927 and a Police Officer

The defendant also takes issue with counsel's failure to challenge the trial court's handling, on January 13, 2012, of the earlier contact between Juror 927 and a police officer involved in the case. The court had received a note from Juror 927, advising that she had spoken with a police officer on January 11, 2012, the first day of jury selection, and was concerned that he might be a trial witness, so wanted to inform the court of the contact. See Tr. 87-88, Jan. 13, 2012. As a result of the note, the court initiated a thorough voir dire of the juror. During that voir dire, Juror 927 stated that she had briefly chatted with the officer on two occasions in the hallway on the first day of the jury selection process, but that they had not discussed the case. Instead, she indicated their conversation was limited to the general subject of jury duty and

lengths of trials; the juror had not learned the officer's name, and did not know whether he was involved in this case. See Tr. 88-91, Jan. 13, 2012.

After inquiring of the juror whether the prior contact would affect her ability to judge the case fairly, to which the juror answered negatively, Id. at 91-93, and instructing the juror not to discuss the contact with any other juror, Id. at 90, the court proceeded to trial, intending to address the issue again with the juror after the witness' testimony. The officer to whom Juror 927 had been speaking was Officer Francisco Montano, who in fact testified for the government on January 13th. After his testimony, the court conducted a further voir dire with Juror 927 at the bench, asking her whether she felt that the prior contact had "in any way affected [her] ability to evaluate the testimony having had the prior contact with him." Id. at 197. Juror 927 denied that it had affected her, responding "I don't think so . . . I weighed it on merits." Id.

On this record, defense counsel cannot be deemed ineffective for his "failure to move for a mistrial or Juror [927's] removal from the jury." Defendant's Motion at 42. Indeed, after the court completed its own voir dire of the juror about her casual interaction with the officer, the defense counsel further explored the issue and pressed her about her

conversation with the officer, stating, "Just to be clear . . . no one said anything about the case?" Tr. 90, Jan. 13, 2012. The defendant responded to counsel's question, "No, no." Id. Thus, defense counsel was clearly addressing this potential issue thoroughly.

While the defendant argues that his counsel should have moved for a mistrial or for removal of the juror, the Court of Appeals has rejected the "principle that juror partiality is 'presumed' . . . from the fact alone of the juror's exposure" to a contact or influence outside the courtroom. Hill v. United States, 622 A.2d 680, 684 (D.C. 1993). Instead, the law is clear that the remedy for a claim of juror taint or partiality is simply "a thorough inquiry" by the trial judge ". . . into whether the defendant suffered actual prejudice." Al-Mahdi v. United States, 867 A.2d 1011, 1018 (D.C. 2005). Only "upon a prima facie showing of juror bias or partiality" does it become the "government's burden to demonstrate that the juror's contact with extraneous information was harmless or non-prejudicial" Id. at 1019 (citing Hill, 622 A.2d at 684).

In this case, Juror 927's interaction with Officer Montano was so casual, non-substantive, and general in nature that it did not rise to the level of a prima facie showing of juror bias calling for further action by the court beyond the two voir

dires it conducted. Further, the court's questioning of this juror, both before, and after, Officer Montano's testimony, as well as the supplemental questioning by defense counsel himself, certainly justified the court's conclusion that Juror 927 had not been tainted. Accordingly, a mistrial would not have been warranted in such circumstances, nor would dismissal of the juror. Thus, defense counsel cannot be deemed constitutionally ineffective for failing to move for such remedies.

Clearly the defendant cannot meet the prejudice prong of the test for ineffectiveness of counsel either. He cannot show that the court would have granted his motion for mistrial or removal of the juror, nor that he was prejudiced by Juror 927's continued service on the jury. Nor can he prove to any reasonable probability that he would have received a more favorable verdict had this juror not served. As such, his claim of ineffective assistance of counsel on this ground is also unsuccessful.

E. Counsel's Handling of Defendant's Extradition

Additionally, the defendant claims that trial counsel was ineffective for not challenging his pre-trial extradition to Washington, D.C. from Maryland, where he was arrested when the van crashed after the shooting. On the same day as his arrest, the Superior Court of the District of Columbia issued an arrest

warrant for the defendant's unauthorized use of a vehicle. The defendant claims that his removal from Maryland to D.C., based on the arrest warrant issued for the defendant by Superior Court on the date of his arrest, violated the Extradition Act. See Defendant's Motion at 45. The defendant asserts that he was entitled to a removal hearing in Maryland, before being brought to D.C., and that his attorney's failure to contest his extradition to D.C. constitutes ineffective assistance of counsel.

However, the defendant was never really entitled to an extradition hearing, as D.C. Code § 23-563(c) states that "[a] person arrested outside the District of Columbia on a warrant issued by the Superior Court of the District of Columbia shall be taken before a judge . . . and held to answer in the Superior Court pursuant to the Federal Rules of Criminal Procedure as if the warrant had been issued by the United States District Court for the District of Columbia." Thus, by statute, the defendant's removal to D.C. was governed by the Federal Rules of Criminal Procedure. Under neither the Federal Rules, nor the D.C. Code, was the defendant entitled to an extradition hearing; he was instead entitled to a preliminary hearing to determine whether there was probable cause for his arrest. See Fed. R. Crim. P. 5.1(e).

As for the location of this preliminary hearing, the Federal Rules previously stated that a defendant arrested "outside the district in which an offense is alleged to have occurred shall be taken without unnecessary delay before the nearest available magistrate judge." Fed. R. Crim. P. 40(a). However, subsequent amendments to the rules now provide that the defendant's initial appearance should occur either "(A) in the district of arrest; or (B) in an adjacent district if . . . the appearance can occur more promptly there; or . . . the offense was allegedly committed there and the initial appearance will occur on the day of the arrest." Fed. R. Crim. P. 5(c)(2). Thus, there is no requirement that the defendant's initial appearance occur in the jurisdiction of his arrest.

The defendant cannot fault his attorney for failing to challenge the defendant's extradition to D.C., because the defendant was never legally entitled to an extradition hearing in Maryland and it is undisputed that he was afforded a preliminary hearing in our jurisdiction. Accordingly, counsel's lack of action on this issue was not constitutionally defective.

Even accepting the defendant's theory that his extradition involved a procedural violation, he cannot demonstrate that he was prejudiced by counsel's failure to secure an extradition hearing in Maryland. The defendant is unable to demonstrate that

the failure to challenge the defendant's extradition at a hearing in Maryland altered the outcome of his case. The defendant was afforded the appropriate hearing in D.C., before The Honorable Andrea Hartnett on May 27, 2009, which resulted in his being detained for trial. He has not shown that an extradition hearing in Maryland would have yielded a different result. Accordingly, the defendant is unable to demonstrate ineffective assistance of counsel with respect to this issue.

F. Counsel's Preparation For Trial

The defendant's final claim of ineffective assistance is that his counsel inadequately investigated and prepared for trial. In support of this surprising contention, the defendant cites only one isolated statement from the whole record of his case. Defendant's claim is based on a comment made by one of his counsel during a status hearing on January 4, 2012, that "we stopped preparing a week ago when we believed in good faith that this would be resolved." Tr. 9, Jan. 4, 2012. However, this isolated statement a week before the trial began cannot serve as an adequate basis for defendant's claim that defense counsel failed to adequately investigate or prepare for trial. On the day this statement was made, the parties had come to court for a status hearing for the defendants to enter guilty pleas in this case; however, as co-defendant DeAngelo Terry had decided that

he longer wished to enter a plea, and, as the plea agreements were wired, the result was that the parties would now need to resume trial preparation. The trial date previously set for January 9, 2012, was continued by the court until January 11, 2012, in deference to co-defendant Terry's counsel's request, thus affording all counsel more time to prepare for trial.

Trial counsel cannot be faulted for having interrupted their trial preparation when it was anticipated that the defendants would be resolving their cases with guilty pleas a few days before trial on January 4, 2012. It was completely reasonable for counsel to cease trial preparation temporarily when it appeared the case would not proceed to trial. When the plea deal broke down, and defense counsel asked the court for a continuance so that they could have more time to prepare, the court granted a slight delay to accommodate this effort.

Other than the one isolated statement by one of his counsel which the defendant relies upon, defendant can offer no evidence that counsel was not adequately prepared to proceed to trial. Indeed, from the court's perspective, the defendant was fortunate to have representation in this matter by two extremely well-prepared, diligent, and experienced counsel, who represented him competently, zealously, and effectively, utilizing a sophisticated defense strategy. Indeed, it is

notable that the jury convicted the defendant of only six counts (two of which he had conceded) out of the fifteen charges presented against the defendant at trial. The defendant has offered no support for his claim that counsel's investigation and preparation for trial fell below reasonable standards.

Further, the defendant cannot show that he was prejudiced by his counsel's alleged lack of preparation. His claim is too vague and unspecific, and fails to cite a single instance, or example of, counsel's conduct at trial which showed a lack of preparation. Accordingly, he cannot show that the outcome of his case would have been more favorable if not for his attorney's alleged lack of preparation. Thus, this claim of ineffective assistance of counsel is also wholly meritless.

IV. Claims of Prosecutorial Bias

The defendant's final argument is that he is entitled to a new trial based on the government attorney's comments during closing argument. The defendant contends that the government purposely misstated its evidence in two separate statements. First, the government stated, "It makes absolute sense why DeAngelo Terry asked Keith Daniels, why did the police take his clothes." Tr. 38, Jan. 30, 2012. Recognizing that this was a misstatement, defense counsel immediately objected, noting that the government's evidence was not that co-defendant Terry had

asked Mr. Daniels this question, but that Mr. Daniels had asked it of Mr. Terry. Id. at 38-39. Accordingly, the court instructed the government to rephrase its statement and tell the jury that he had made a misstatement, and the government did so. Id. at 38-41. Secondly, the defendant complains of the government counsel's statement, "Immediately before the shooting Defendant Banks was in that car with the masked gunman with that 9-millimeter gun capable of 15 rounds." Id. at p. 49. Again, as soon as that statement was made, defense counsel objected, and the court sustained the objection and again ordered the government to correct the misstatement before the jury, which government counsel did. Id. at 49.

While it is true that "the unfairness of a prosecutor's statement can sometimes deprive a defendant of his constitutional right to due process," Robinson v. United States, 50 A.3d 508, 533 (D.C. 2012), the government counsel's statements in this closing certainly do not warrant reversal of the defendant's convictions. For such statements to violate due process, they must have "so infected the trial with unfairness as to make the resulting condition a denial of due process." Darden w. Wainwright, 477 U.S. 168, 169 (1986). In deciding whether such misstatements should merit a new trial, consideration must be given to "the closeness of the case, the

centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." United States v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999) (emphasis added).

In this case, as noted above, the court took prompt steps to mitigate any unfair effect from these misstatements by ordering the government to correct them. Defense counsel had swiftly objected to the government's first statement, and the court ordered government counsel to remedy the misstatement. Tr. 38, Jan. 30, 2012. When government counsel began to move on from the statement instead of restating it correctly, defense counsel objected once more and the court called the parties to the bench, and discussed the government's misstatement further, and explicitly told government counsel "you need to say, [you] may have misstated it." Id. at 40. Government counsel agreed and resumed the closing argument, stating to the jury, "Ladies and Gentlemen, I may have misstated exactly what Keith Daniels said, but the point I was making is that it makes complete sense why DeAngelo Terry would say to Keith Daniels that the police took his clothes." Id. at 41.

When the government made the second statement at issue, and the defense objected again, asserting "there's no evidence he saw a gun. There's no evidence he saw a mask on." Id. at 49. The court agreed and instructed government counsel to "rephrase and

. . . correct." Id. The government rephrased the factual assertion accordingly. Id. at 50.

Given defense counsel's prompt objections, and the court's immediate steps to rectify the misstatements, the court effectively prevented the government's statements from infecting the trial with unfairness. Thus, the defendant's argument that the government's statements during closing arguments violated due process, and warrant a new trial is also without merit.

CONCLUSION

The defendant has failed to demonstrate any meritorious basis for his request that the court vacate his assault convictions and grant him a new trial on those counts. Therefore, for all these reasons and those others stated in the government's opposition, it is hereby, this 22nd day of July, 2016,

ORDERED: that the defendant's pro se Motion Pursuant to 23-110 is hereby **DENIED**.

ANN O'REGAN KEARY
SENIOR JUDGE
(Signed in Chambers)