SIGNIFICANT DECISIONS IN CRIMINAL CASES

December 1, 2015 – November 30, 2016

From the

United States Supreme Court

and the

District of Columbia Court of Appeals

ASSAULT ON A POLICE OFFICER (APO)

Foster v. United States, 136 A.3d 330 (D.C. Apr. 21, 2016).

The DCCA affirmed the defendant's APO conviction for "pushing" or "shouldering" an officer as well as actively flailing to resist handcuffing. The resistance occurred after police officers were called to help a psychiatric team that was trying to take the defendant to a hospital. Chief Judge Washington wrote the lead opinion, but also wrote a concurrence stating that although he appreciated the reasons that police were needed to assist in the defendant's medical detention, he was (1) concerned by the apparent lack of special training that the officers possessed; (2) troubled that the result of the attempt to help the defendant was a criminal conviction; and (3) hopeful that "those individuals who have the discretion to decide whether to criminally prosecute individuals who fail to comply with lawful orders will think twice before inflicting what could be considered a greater harm, in the form of a criminal charge and conviction, on a very vulnerable population."

ASSAULT WITH SIGNIFICANT BODILY INJURY (ASI)

Brown (Stephon) v. United States, 146 A.3d 110 (D.C. Sept. 1, 2016).

The court affirmed the defendant's convictions for robbery and assault with significant bodily injury (ASI). While delivering food, the complaining witness (CW) was repeatedly punched and kicked in the head by two men who then stole the CW's phone, wallet, and bicycle. Following the assault, the CW experienced headaches. Five days after the assault, the CW was treated at a hospital and diagnosed with a concussion. The DCCA rejected defendant's claim that the CW's concussion was not a "significant bodily injury" because he was never hospitalized and received no immediate medical attention. The government's trial evidence included photos of the CW's injuries, and the CW's testimony that: he was "loopy" and "dazed" after the assault; EMT's urged him to go to the hospital; and he had a constant headache for a week causing him an "unacceptable" level of pain. The CW's treating physician testified that a concussion alters normal brain functioning and requires evaluation and treatment (although the generally-prescribed treatment is monitoring and rest). The DCCA found that this evidence was sufficient to establish "significant bodily injury." That is, "immediate medical attention" was necessary "to prevent long-term physical damage . . . or severe pain." The court emphasized that the CW received "repeated" blows to the head, and suffered "lingering head pain" from the assault. The injury required intervention "by a professional with true medical expertise," and monitoring at a hospital, which exceeded "mere diagnosis." The evidence showed that the hospital actually *treated* the CW's concussion by

ruling out "additional head injuries," and by instructing the CW about how "to avoid worsened and prolonged symptoms."

Wilson v. United States, 140 A.3d 1212 (D.C. June 30, 2016).

The court reversed defendant's conviction for felony assault, concluding that the government's evidence failed to show that "immediate medical attention" was necessary to "prevent long-term physical damage and other potentially permanent injuries" or to "abate pain that [was] severe," where the victim of a brutal beating suffered cuts, bruises, profuse bleeding, pain and dizziness, and was treated at a hospital. The court rejected the government's argument that the jury could have inferred that treatment was necessary from photos of the victim's injuries, the fact that the victim was treated by paramedics and hospital personnel, and bystander testimony that the victim was bleeding profusely, dizzy, and in pain. The court noted the lack of testimony from "paramedics," "treating physicians" or the complainant that medical treatment was necessary to prevent long-term injury or to abate severe pain.

BATSON

Foster v. Chatman, 136 S. Ct. 1737 (May 23, 2016).

The Court reversed the defendant's death sentence after finding that the Georgia state court had clearly erred in failing to find a *Batson* violation. The Court reviewed the record at length to find that the state court clearly erred in crediting the prosecutors' alleged non-discriminatory reason as to at least two stricken black jurors. The Court considered the damning notes, which included *inter alia* a list of "definite NO's" containing all black jurors, whose names were also highlighted on the juror list; a note from an investigator to the prosecutor stating, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; and a note on a specific church that one juror belonged to that read, "NO. No Black Church." The Court also considered that the prosecutor had proffered a "laundry list" of purported non-discriminatory reasons for the strike. These reasons were "nonsense" because they shifted over time, were inconsistent with the notes, and were largely contradicted by the trial record itself. For example, the prosecutor averred that he'd decided at the last minute to strike one black juror for a non-discriminatory reason, but that claim was false because the juror was on the list of "definite NO's." The Court also reiterated that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." Finally, the prosecution argued that the notes' focus on race was valid because

prosecutors had to be aware of racial composition of the jury so that they could respond to any potential *Batson* challenge. This argument was made only on appeal, and "reek[ed] of afterthought." Moreover, the notes demonstrated "a concerted effort to keep black prospective jurors off the jury."

BRADY

Wearry v. Cain, 136 S. Ct. 1002 (Mar. 7, 2016).

The Court summarily reversed a Louisiana capital murder conviction on *Brady* grounds. Specifically, the Court found that the prosecutor had failed to disclose that: (1) a key government witness had told a fellow inmate that he wanted to make sure the defendant "got the needle" because of a prior dispute they had had; (2) the same government witness tried to get another inmate to falsely implicate the defendant; (3) contrary to the prosecutor's representations in closing argument, another key government witness had sought a sentencing reduction from the government; and (4) medical records showing an alleged accomplice had knee surgery nine days before the murder that might have undermined the state's evidence that the accomplice had run and lifted substantial weight during the commission of the crime.

The Court reiterated the *Brady* materiality standard, which mandates reversal upon a showing of "any reasonable likelihood" that the suppressed material "affected the judgment of the jury." Here, that standard was met because the defendant was implicated in the murder solely by these two witnesses. (Other evidence, primarily that the defendant possessed the decedent's stolen property, suggested only that the defendant might have been an accessory after the fact.) Moreover, the state court's finding of non-materiality had improperly considered each suppressed item individually, rather than considering the cumulative effect.

In a footnote, the Court noted that the state could not excuse the *Brady* violation on the ground that investigators only obtained one of the inmate's statements during trial, because "'suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.'"

Johnson v. United States, 136 A.3d 74 (D.C. Apr. 14, 2016).

The DCCA reversed the defendant's murder conviction. The decedent was shot by a masked man with dreadlocks. Proof that the defendant was the masked man included evidence of motive in the form of an escalating violent beef with the decedent. Five weeks before trial, the government disclosed evidence that a third-

party-perpetrator had a potential motive to kill the decedent. The trial court had ruled that the government's disclosure of the third-party perpetrator was late, but that a sanction was unwarranted because the evidence was inadmissible under *Winfield*. The DCCA disagreed with the trial court's conclusion regarding admissibility, and ruled that a sanction may be appropriate prior to any retrial, if the defense could show prejudice from the late disclosure. In a footnote, the Court suggested such sanctions could include admitting hearsay to prove the above proffer, if the defendant was now unable to locate a declarant.

Wonson v. United States, 136 A.3d 60 (D.C. Apr. 14, 2016), superseding opinion at 144 A.3d 1 (D.C. 2016).

The DCCA affirmed the defendant's murder convictions against multiple challenges. At a third re-trial, over a decade after the murders, the government did not call the lead crime scene officer, who had since been fired for mishandling evidence. The government instead obtained admission of 43 shell casings and one live round by calling another crime scene officer who assisted with collection on the scene, but was not at the station for packaging of the items. The defendant challenged the chain of custody, but the lead opinion found that any error was harmless. Although the ballistics evidence corroborated the government's theory that there were two shooters and that one shooter's gun had jammed (causing the discharge of a live round), the evidence was not relevant to the disputed issue of the identity of the second shooter. For the same reason, the defendant could not show materiality in support of his *Brady* claim that the government should have disclosed more information about the fired officer's alleged misconduct.

BURGLARY

Sydnor v. United States, 129 A.3d 909 (D.C. January 14, 2016)

The DCCA reversed a defendant's burglary conviction, leaving intact convictions for unlawful entry and theft. The defendant had entered a fenced construction site and stolen six steel pipes. In addition to buildings and dwellings, the burglary statute applies, *inter alia*, to "yard[s] where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade." The DCCA rejected the government's arguments that "for the purpose of trade" meant "for use in one's occupation" and found instead that it meant that the items were intended to "eventually be bought, sold, bartered, or exchanged in a commercial transaction." So construed, the DCCA agreed with the defendant that there was insufficient evidence that the pipes stored there were for "trade." The DCCA did permit entry of

judgment on the offense of unlawful entry. The defendant argued that unlawful entry was not really a lesser-included offense of burglary. However, the defendant had argued otherwise to the trial court, so he could not change positions on appeal.

CARJACKING

Clark (Rayshawn) v. United States, Nos. 14-CF-565, 14-CF-625 & 14-CF-638, 2016 WL 5860803 (D.C. Oct. 6, 2016).

The DCCA affirmed defendants' convictions for a series of armed robberies. Defendants first robbed and carjacked Cornell Scott. As they were doing so, another person happened to walk by and defendants robbed him. The robbers fled but soon realized they had left behind Hilton's cell phone. The robbers returned to the crime scene to look for the phone, and again robbed Scott, who was waiting for the police. During the latter robbery, the police arrived and defendants fled. After a high-speed chase, the robbers crashed their SUV. Hilton and Lee fled on foot. Clark, who was pinned in the overturned SUV, was arrested. The police recovered the proceeds of the robbery in the SUV, and Hilton's phone at the scene of the robberies. The evidence was sufficient to support Hilton's carjacking conviction because, as in *Sutton v. United States*, 988 A.2d 478 (D.C. 2010), Scott was standing near enough to his truck -- about ten feet away -- when defendants took it that it was in Scott's "immediate actual possession."

CARTER IMMUNITY

Young v. United States, 143 A.3d 751 (D.C. July 28, 2016).

The DCCA affirmed defendant's conviction for possession with intent to distribute (PWID) PCP and remanded for the trial court to merge defendant's convictions for PWID PCP and possession of PCP. The police found two vials of liquid PCP in defendant's SUV. Defendant's nephew, Maurice, a juvenile, claimed that he was the SUV's driver. OAG declined to grant Maurice immunity. The DCCA held that the trial court erred in failing to conduct a *Carter* inquiry but affirmed because the proffered testimony was not material. *See Carter v. United States*, 684 A.2d 331 (D.C. 1996) (process for review of decision declining to grant immunity to a "crucial defense witness" invoking Fifth Amendment right against self-incrimination). The DCCA rejected the government's argument that a *Carter* inquiry was unnecessary because Maurice's testimony was not "clearly" exculpatory. "Exculpatory" for purposes of *Carter* "mean[s] the same thing as in the *Brady* context," except that it does not include impeachment evidence. Thus, the proffered evidence need not be "completely or wholly" exculpatory. As long as it is "favorable" to the defense, it would implicate *Carter*.

The DCCA also rejected the government's argument that OAG's immunity decision was reasonable because the proffered trial testimony "would be a clear instance of perjury." Maurice had testified at the suppression hearing that he was not driving the SUV. Because there was "ambiguity" in the record concerning which testimony Maurice believed to be false, OAG's immunity decision was not based on "clear indications of potential perjury." Applying the *Brady* materiality standard, the DCCA held that the proffered testimony was not "material" to defendant's guilt because, even assuming Maurice was the SUV's driver, defendant at least constructively possessed the PCP. Defendant owned the SUV, the SUV smelled of PCP, defendant tried to hide the PCP from the police, and defendant falsely told the police that the vials contained bath "oils."

CHAIN OF CUSTODY

Wonson v. United States, 136 A.3d 60 (D.C. Apr. 14, 2016), superseding opinion at 144 A.3d 1 (D.C. 2016).

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Judge Easterly concurred that the admission of the shell casings was harmless, but wrote separately to explain her view that it was error. In her view, the presumption that items kept by the government are properly handled attaches only once the government establishes a reasonable probability of "an unbroken chain of custody," which was not proven here.

COMPETENCY

Taylor v. United States, 138 A.3d 1171 (D.C. May 12, 2016).

The DCCA upheld the defendant's convictions for two murders committed during the robbery of a convenience store against multiple challenges. The trial court did not clearly err in finding the defendant competent to stand trial, where

the court credited testimony from a psychologist and other witnesses that showed that the defendant was malingering symptoms in an attempt to delay trial.

Williams v. United States, 137 A.3d 154 (D.C. Apr. 28, 2016) (amended July 7, 2016).

The DCCA affirmed the defendant's murder and carrying a dangerous weapon (CDW) convictions. There was no abuse of discretion in permitting the defendant to represent himself. Before trial, the defendant was found to be competent to stand trial and malingering, at least in part. He elected to proceed *pro se* at trial. On appeal, he argued that he was not competent to proceed *pro se* and that the trial court should not have allowed him to do so. The DCCA disagreed. However, in articulating the governing law, the DCCA appeared to agree with his contention that "[i]n determining a defendant's competency for self-representation, the trial court must go beyond the standard in *Dusky*[,] which provided the basic standard for competency to proceed to trial." "[A] defendant may well be able to satisfy *Dusky*[,] but at the same time he or she does not possess the necessary mental capacities to carry out the basic tasks needed to present his [or her] own defense without the help of counsel." However, here the trial court explicitly found both that the defendant was competent to stand trial and that the defendant was competent to proceed *pro se*. This finding was well-supported by a lengthy record, including pretrial competency hearing, a pretrial *Faretta* inquiry, and the defendant's adequate handling of trial matters.

CONFLICT OF INTEREST

Blackmon v. United States, No. 14-CF-868, 2016 WL 5539893 (D.C. Sept. 29, 2016).

The DCCA affirmed defendant's conviction for first-degree sexual abuse. The DCCA rejected defendant's argument that his trial counsel had an actual conflict of interest. Defense counsel had given defendant erroneous advice about his sentencing exposure, which, defendant argued, caused him to reject the government's plea offer. The trial court appointed conflict-free counsel to advise defendant about entering a guilty plea and to make arguments on defendant's behalf. Defendant did not ultimately enter a guilty plea. Thereafter, defendant's original counsel represented him at trial. The DCCA concluded that defense counsel's erroneous pre-trial advice about defendant's sentencing exposure, which was cured by the appointment of conflict-free plea counsel, did not create a conflict

for defendant's counsel during trial, and did not otherwise cause defense counsel to perform ineffectively during trial.

Logan v. United States, No. 12-CO-1663, 2016 WL 5860442 (D.C. Oct. 6, 2016).

The DCCA affirmed defendant's convictions for various offenses including first-degree murder. Following a dispute about the financing of defendant's proposed business, defendant went to his business partner's house and slit the throats of the business partner, the partner's young child, and a bystander. The DCCA rejected defendant's argument that his stand-by counsel had an actual conflict of interest. Defendant's uninvestigated complaint to Bar Counsel was not an "actual conflict of interest." Similarly, defendant's "indirect" threat to harm stand-by counsel did not create an actual conflict of interest.

Taylor v. United States, 138 A.3d 1171 (D.C. May 12, 2016).

The DCCA upheld the defendant's convictions for two murders committed during the robbery of a convenience store against multiple challenges. The trial court did not err in denying trial counsel's motion to withdraw on the basis of a conflict of interest where the defendant manufactured the conflict by filing a bar complaint against and threatening his own attorney's children. Rather, the trial court appropriately protected the defendant's rights when it appointed co-counsel to assist the defendant at trial.

CONFRONTATION CLAUSE

Bynum v. United States, 133 A.3d 983 (D.C. Mar. 31, 2016).

The DCCA affirmed the defendant's unauthorized use of a vehicle (UUV) convictions. The government permissibly introduced the vehicle's registration and title at trial without calling the car's owner or a DMV clerk. Such records are admissible under the rules of evidence pursuant to D.C. Code §§ 50-1218, -1301.05a. And there was no Confrontation Clause problem. "Because the primary purpose of [title and registration records] is to meet administrative needs rather than to document facts for future prosecution, the documents are not 'testimonial.'" That a DMV clerk had printed the documents and certified their accuracy for trial did not render them testimonial. "Merely printing and certifying a copy of an electronic record does not impact its admissibility—the record is created when the information is entered into the DMV's electronic database, not when a DMV employee clicks on the 'print' button and signs the certifying statement on the copy."

***Wills v. United States*,** No. 14-CM-208, 2016 WL 5956985 (D.C. Oct. 13, 2016).

The DCCA reversed defendant's conviction for second-degree theft, concluding that the trial court plainly erred in admitting into evidence the victim's statement that defendant had "snatched her keys." However, because the victim's

statement was not relevant to defendant's assault conviction, the DCCA affirmed that conviction. This case arose from defendant's assault on his wife in a gas station parking lot. Several 911 callers reported an assault in progress. When the police arrived, they separated defendant from the victim, who was crying and upset. An officer asked if the victim was okay and she said "yes." She then told the officer, "he's got my keys. You need to get my keys." The officer asked "how he got the keys," and the victim responded, "He snatched them from me." The victim did not testify at trial, and the defense had not had a prior opportunity to cross-examine her. Defendant argued that the victim's response to the officer's question about the keys was admitted in violation of the Confrontation Clause. The government responded that because the contested statement was not testimonial there was no Confrontation Clause violation. The DCCA disagreed. A statement is nontestimonial when made "to enable police assistance to meet an ongoing emergency." Statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency," and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Hammon v. Indiana*, 547 U.S. 813, 822 (2006). Relying on *Hammon* and *Andrade v. United States*, 106 A.3d 386, 389 (D.C. 2015), the DCCA found that the victim's statement in this case was testimonial because there was no ongoing emergency when she made it. Specifically, the record showed that: the scene was not "volatile" or "chaotic"; the victim said she was "okay"; there were several officers present; the police immediately separated the victim from defendant; defendant was unarmed; when the police initially arrived there was no "fighting or arguing"; although the victim was crying, she was uninjured; and the police did not treat defendant as dangerous. Further, the victim's statement "was a straightforward reporting of a past event that the police had a duty to investigate." The DCCA concluded that the defense had satisfied the plain-error requirements because, *inter alia*, this case was controlled by *Hammon* and *Andrade*, the victim's statement was direct evidence of second-degree theft, and the government's proof of second-degree theft was not overwhelming.

CONSPIRACY

Ocasio v. United States, 136 S. Ct. 1423 (May 2, 2016).

Splitting 5-3, the Court upheld the defendant's conviction for conspiracy to commit Hobbs Act extortion. The defendant was a Baltimore police officer who reached an agreement with owners of a body shop to send them cars damaged in accidents in exchange for a kickback. He was charged with obtaining money from the shop owners under color of official right, in violation of the Hobbs Act, 18 U. S. C. § 1951, and of conspiring to violate the Hobbs Act, under 18 U. S. C. § 371, the general conspiracy statute. Although the offense might more typically be thought of

as bribery, established law says such acts also constitutes Hobbs Act extortion under the holding of *Evans* v. *United States*, 504 U. S. 255, 260 (1992).

In this case, the defendant challenged only his conspiracy conviction, claiming that he could not be guilty of conspiring with the shop owners to extort the shop owners, because they were members of the conspiracy. The majority rejected this argument: "Under longstanding principles of conspiracy law, a defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator with his consent and under color of official right." In so ruling, the Court helpfully catalogued a number of principles regarding conspiracies and applied those rules in several hypotheticals. One key rule: a defendant need not agree to commit every part of the offense, but is guilty if he reaches an "agreement with the specific intent that the underlying crime *be committed* by some member of the conspiracy." The Court then analogized to old precedent that upheld a conspiracy conviction against a woman who conspired with another to have *herself* transported in interstate commerce in violation of the Mann Act. That precedent, however, also showed that where a "person's consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator." Thus, here, where the shop owners actively arranged with the officers to have the officers commit the offense of extortion by taking property under color of official right from the shop owners themselves, both the police and the shop owners were guilty of conspiracy.

CONTINUANCE

Brooks v. United States, 130 A.3d 952 (D.C. Jan. 28, 2016).

The DCCA held that the trial court did not abuse its discretion in denying the defendant's unopposed motion to continue trial, where the defendant simply wanted more time to consider a global plea in connection with new charges incurred while on release. "The loss of a further opportunity to plea bargain is different in character from the kinds of prejudice reflected in cases in which this court has reversed trial-court rulings denying a continuance." Further, even assuming opportunity to bargain could be a valid basis for a continuance, here the defendant had sufficient time to negotiate before the day of trial and on the day of trial.

COUNSEL, RIGHT TO WAIVER/SELF REPRESENTATION

Williams v. United States, 137 A.3d 154 (D.C. Apr. 28, 2016).

The DCCA affirmed the defendant's murder and carrying a dangerous weapon (CDW) convictions. There was no abuse of discretion in permitting the defendant to represent himself. Before trial, the defendant was found to be competent to stand trial and malingering, at least in part. He elected to proceed *pro se* at trial. On appeal, he argued that he was not competent to proceed *pro se* and that the trial court should not have allowed him to do so. The DCCA disagreed. However, in articulating the governing law, the DCCA appeared to agree with his contention that "[i]n determining a defendant's competency for self-representation, the trial court must go beyond the standard in *Dusky*[,] which provided the basic standard for competency to proceed to trial." "[A] defendant may well be able to satisfy *Dusky*[,] but at the same time he or she does not possess the necessary mental capacities to carry out the basic tasks needed to present his [or her] own defense without the help of counsel." However, here the trial court explicitly found both that the defendant was competent to stand trial and that the defendant was competent to proceed *pro se*. This finding was well-supported by a lengthy record, including pretrial competency hearing, a pretrial *Faretta* inquiry, and the defendant's adequate handling of trial matters.

DOUBLE JEOPARDY

Bravo-Fernandez v. United States, No. 15–537 (Nov. 29, 2016).

The Supreme Court affirmed the judgment of the First Circuit and unanimously concluded that the Double Jeopardy Clause does not preclude retrial on a count of conviction where the jury returned inconsistent verdicts involving the same underlying events, even when the count of conviction was later vacated on appeal due to legal error by the trial judge, because "inconsistent verdicts shroud in mystery what the jury necessarily decided."

Juan Bravo-Fernandez, a business owner, paid a bribe to Hector Martínez-Maldonado, a political official, to secure the passage of legislation favorable to Bravo's business. The bribe involved an all-expenses-paid trip to Las Vegas, including a $1,000 seat at a professional boxing match. The jury convicted Bravo and Martínez of a standalone federal bribery offense, but acquitted them of related conspiracy and Travel Act charges. The verdicts were necessarily inconsistent because the only contested issue at trial was whether Bravo had offered, and Martínez had accepted, a bribe. There was no dispute about the existence of an agreement or travel across state lines. In an initial appeal, the First Circuit vacated the conviction for instructional error unrelated to the verdict inconsistency. The

First Circuit also held that the evidence was sufficient to support a finding of guilt. On remand, the defendants, citing Ashe v. Swenson, 398 U.S. 436 (1970) (defendant who was acquitted in one trial of robbing one member of a group of poker players could not be tried a second time for robbing a second member of the same group), argued that the Double Jeopardy Clause barred their retrial because the jury necessarily determined that they were not guilty of the conduct underlying the bribery count when it acquitted them of conspiracy to commit bribery and traveling in interstate commerce to further a violation of the bribery statute. The First Circuit agreed with the district court that the jury's inconsistent verdicts were fatal to the defendant's argument, notwithstanding the reversal for unrelated legal error.

The Supreme Court agreed, concluding that *United States v. Powell*, 469 U.S. 57 (1984) (defendant cannot meet burden of showing that an issue was actually decided by a prior jury's acquittal when the same jury returned inconsistent verdicts on the issue), controls when a jury returns inconsistent verdicts but the convictions are vacated on appeal for legal error unrelated to the inconsistent verdicts. In order to preclude retrial, it is the defendant's burden to show that, through an acquittal, the jury necessarily resolved in his or her favor the question to be retried. A defendant cannot meet that burden when his or her trial resulted in inconsistent verdicts. That in this case defendants' "bribery convictions were later vacated for trial error does not alter [this] analysis." That is, verdicts are considered to be inconsistent even if a conviction "is later overturned on appeal for unrelated legal error." Justice Thomas concurred, agreeing with the outcome but observing that, in an appropriate case, the Court should reconsider Ashe, which "departed from the original meaning of the Double Jeopardy Clause."

Freundel v. United States, 146 A.3d 375 (D.C. Sept. 15, 2016).

The DCCA affirmed defendant's convictions and sentence. Defendant pleaded guilty to fifty-two counts of voyeurism, in violation of D.C. Code § 22-3531(b)-(c). § 22-3531(c) "prohibits non-consensual electronic recording of an individual who has a reasonable expectation of privacy and is using a bathroom, is totally or partially undressed, or is engaging in sexual activity." The trial court imposed consecutive sentences of 45 days of incarceration on each count. The DCCA held that the consecutive sentences did not violate the prohibition on double jeopardy because each count involved the videotaping of a different victim, and each victim "was recorded undressing separately" from the other victims. The court noted that generally the Double Jeopardy Clause "does not prohibit separate and cumulative punishment . . . for criminal acts perpetrated against different victims." Further, under § 22-3531(c), the D.C. Council plainly intended the unit of prosecution to be each victim whose right to privacy was violated. The court rejected defendant's

arguments, *inter alia,* that his acts constituted a continuous course of conduct directed at a group of victims, and that the legislative history of the voyeurism statute contradicted the conclusion that a defendant could be separately punished under § 22-3531(c) for each victim.

DRUGS

Brooks v. United States, 130 A.3d 952 (D.C. Jan. 28, 2016).

The DCCA affirmed the defendant's assault on a police officer (APO) conviction, but reversed his possession of drug paraphernalia (PDP) conviction. When the defendant was arrested for swatting police who were attempting to detain him, officers found "a metal grinder with a picture of Bob Marley on the front" in his pocket. Police found no residue or other indicia of narcotics distribution. An experienced officer testified that the grinder was typically used to process marijuana. The DCCA found insufficient evidence that the defendant "intended to use the grinder for drug-related purposes." No evidence was introduced confirming the association between Bob Marley and marijuana. The evidence did support "a conclusion that there is an association between marijuana and grinders," but did not show that grinders are exclusively used for marijuana. Rather, "drug use and drug trafficking are associated with a wide array of items." "The fact that a defendant possesses a single such item, standing alone, does not . . . normally suffice to permit a finding beyond a reasonable doubt that the defendant intended to use the item for a drug-related purpose."

McRae v. United States, No. 14-CF-1343, 2016 WL 6543532 (D.C. Nov. 3, 2016).

The DCCA reversed defendant's conviction for possession with intent to distribute (PWID) marijuana, finding that the evidence was insufficient to support that conviction because possession of less than an ounce of marijuana is consistent with personal use. Members of MPD's gun recovery unit were responding to a report of a shooting. When defendant saw the MPD officers, he turned a ran into an apartment building. An officer pursued defendant into the building but the officer "gave up the chase" when defendant went out of the back of the building an into a dark alley. The officer found a jacket on the ground at the entrance to the alley, from which the officers seized 22.7 grams of marijuana. The police obtained a warrant and searched the apartment defendant had entered. They found defendant's personal possessions, photographs and documents along with a digital scale, 175 empty ziplock bags, and a loaded pistol. A drug expert testified that the packaging and the other evidence in defendant's apartment were consistent with

distribution, and that it would take one user "quite a while" to consume an entire ounce of marijuana. However, the expert also testified that an ounce is a quantity that consumers sometimes purchase for their own consumption, and that the ziplock bags in defendant's apartment were so small they were likely intended for drugs other than marijuana. The DCCA concluded that the expert's testimony was not sufficient to establish that defendant intended to distribute the marijuana that he possessed because: (1) the 22 grams defendant possessed was stored in one package; (2) "we do not think . . . that four-fifths of an ounce of marijuana exceeds a reasonable supply for a single user"; and (3) and the retail cost of the marijuana ($220) "does not mean it was too much for one user to acquire for his own consumption." The DCCA observed, "possession of an ounce of marijuana is consistent with personal consumption." This conclusion was confirmed by the District's decriminalization of the possession of less than an ounce of marijuana for personal use. The court also rejected the government' argument that the paraphernalia in defendant's apartment evidenced his intent to distribute the marijuana. Instead, it might evidence an intent to distribute some other drug. Similarly, defendant's flight from the police might have reflected his possession of the marijuana, not his intent to distribute it. Although the government's evidence created a "strong suspicion" that defendant sought to distribute marijuana, a reasonable jury could not have been convinced beyond a reasonable doubt. The DCCA remanded for entry of judgment on the lesser-included offense of simple possession (the Marijuana Possession Decriminalization Act of 2014 was enacted after defendant's offense conduct, and does not apply retroactively).

EVIDENCE – PREJUDICE/PROBATIVE

Bryant v. United States, No. 14-CF-268, 2016 WL 6543633 (D.C. Nov. 3, 2016).
The DCCA affirmed defendants' convictions related to the shooting deaths of innocent bystanders during a gun battle between rival gangs. The court rejected defendants' claim that the trial court erred in allowing certain gang-affiliation evidence, and "other crimes" evidence of a rivalry or feud between gangs. The evidence was admitted for a proper purpose under *Johnson v. United States,* 683 A.2d 1087 (D.C. 1996) (en banc): to show the motive for the shooting, and any error was harmless because the court gave a limiting instruction as to that evidence.

Holmes v. United States, 143 A.3d 60 (D.C. July 21, 2016).

The DCCA affirmed Holmes's convictions for second-degree murder and gun offenses. The government's evidence showed that Holmes argued with David Tucker

in a barbershop following Tucker's suggestion that Holmes previously had robbed Nicholas Proctor. When Tucker left the barbershop and stepped into the street, Holmes shot him through the heart. The court rejected Holmes's argument that the trial court erred in admitting Proctor's testimony that he told Tucker that Holmes "might have" been the one who robbed him. Proctor's testimony about the robbery was admissible under *Johnson* "to explain the confrontation between Holmes and Tucker," and "was relevant to help explain Tucker's accusatory statements" to Holmes "giving context to the animosity between the two men leading up to the shooting." In addition, any danger of unfair prejudice was mitigated by the trial court's limitations on the scope of Proctor's testimony and on the government's use of that testimony during its arguments to the jury.

The court also rejected Holmes's argument that certain witness-fear testimony was inadmissible. One witness's testimony concerning his generalized fear was admissible to explain his reluctance to testify, and his prior inconsistent statements. Another witness's testimony that Holmes suggested that he keep quiet, where the witness testified that Holmes had not threatened him in any way, also was admissible to explain the witness's reluctance to testify and his inconsistent statements about the shooting.

Finally, the court rejected Holmes's argument that the trial court should have declared a mistrial or conducted a *voir dire* of the jurors following an outburst outside the courtroom during the trial, during which a prospective defense witness yelled "my life is in danger." The witness never testified at trial, and, because the outburst occurred outside the courtroom, the jury would have had no reason to connect the outburst to Holmes's trial. In a dissent addressing only this issue, Judge McLeese concluded that the court should have inquired of (or at least instructed) the jury about the outburst because there was a "plausible" concern that the jurors had been exposed to intrinsic information that could have affected their impartiality.

Logan v. United States, No. 12-CO-1663, 2016 WL 5860442 (D.C. Oct. 6, 2016).

The DCCA affirmed defendant's convictions for various offenses including first-degree murder. Following a dispute about the financing of defendant's proposed business, defendant went to his business partner's house and slit the throats of the business partner, the partner's young child, and a bystander. The court rejected defendant's claim that the trial court erred in admitting gory autopsy photos. The photos were highly probative of how the wounds occurred, evidence concerning the "bloody nature of the crime" was unavoidable, and the photos were taken in a "clinical setting," which reduced their prejudicial effect.

Shepherd v. United States, 144 A.3d 554 (D.C. Aug. 4, 2016).

The court affirmed defendant's convictions related to the shooting of Henry Miller. Defendant's defense was self-defense. The court rejected defendant's claim that he should have been able to introduce into evidence the details of Miller's 2010 conviction for simple assault (as summarized in the *Gerstein* in that DV case). Although the *Gerstein* was "arguably admissible" to support defendant's self-defense theory, the trial court did not abuse its discretion in declining to admit that evidence because the facts of the DV case were "quite different" from the facts of the charged offense. The DCCA observed, "prior acts of violence have more probative value when they are similar in kind to the events on trial." Moreover, the "inflammatory details" in the *Gerstein* would have confused the jury and invited the jury to ignore the trial evidence.

EVIDENCE – THIRD-PARTY PERPETRATOR

Johnson v. United States, 136 A.3d 74 (D.C. Apr. 14, 2016).

The DCCA reversed the defendant's murder conviction. The decedent was shot by a masked man with dreadlocks. Proof that the defendant was the masked man included evidence of motive in the form of an escalating violent beef with the decedent. Five weeks before trial, the government disclosed evidence that a third-party-perpetrator had a potential motive to kill the decedent. Additional evidence also pointed to a fourth-party-perpetrator. The DCCA held that the trial court erred under *Winfield v. United States* when it excluded evidence of the third- and fourth-party perpetrators. Evidence as to the third-party was sufficient where it included: (1) that the third party had a motive comparable to that of the defendant given that the decedent had recently robbed and pistol-whipped the third-party; (2) the third-party knew where the decedent lived and had "inferential knowledge" of his whereabouts at the time of the murder; (3) the third-party had the practical opportunity to commit the crime because he was not incarcerated at the time. The DCCA implied this proffer was sufficient to require admission, but added that the third-party also "demonstrably intended to handle his dispute with [the decedent] himself without involving police," had access to a firearm; and seemingly lied about his whereabouts at the time of the shooting. Evidence as to the fourth-party was "not as robust" but still required admission. The fourth-party (1) had objected to the robbery of the third-party; (2) had been in a recent altercation with the decedent in which the decedent stole the fourth-party's motorbike; (3) had cut his own dreadlocks after the shooting; (4) had inferential knowledge of where the decedent lived and could be found; and (5) appeared to have nothing preventing him

confronting the decedent at the time of the shooting. The error was not harmless because, *inter alia*, "the probative value of a defendant's motive in establishing the perpetrator's identity is diminished if that motive was not unique to the defendant, but rather was shared by others."

EX PARTE COMMINCATIONS

Carpenter v. United States, 144 A.3d 1141 (D.C. Aug. 11, 2016).

The DCCA affirmed defendants' convictions. Defendants were arrested in connection with a narcotics buy/bust operation and charged with distribution of heroin. The DCCA rejected Jones's claim that he was entitled to a grant of a mistrial when the courtroom clerk sent an email to the prosecutor stating that defendants had "lied" during their trial testimony. It was clear that the email had no impact on the jury's deliberations. Jones instead claimed that he was entitled to resentencing due to prejudice from the email. However, the record contradicted that argument because Jones received a sentence that was "significantly less than the government had requested," and the sentencing judge stated on the record that she had not considered the clerk's email during sentencing.

EXPERT TESTIMONY/WITNESS

Gardner v. United States, 140 A.3d 1172 (D.C. June 23, 2016).

The DCCA held that "a firearms and toolmark expert may not give an unqualified opinion, or testify with absolute or 100% certainty, that based on ballistics pattern comparison matching a fatal shot was fired from one firearm, to the exclusion of all other firearms." The error in this case -- allowing the expert to express a conclusion to an absolute certainty -- was harmless due to the strength of the government's evidence.

Gray v. United States, No. 13-CF-854+, 2016 WL 6134869 (D.C. Oct. 20, 2016).

The DCCA affirmed defendants' convictions for offenses related to their September 21, 2012, armed robbery of Gerald McIntosh on a Metro train, and their convictions for assault and obstruction of justice in connection with their September 28, 2012, assault on McIntosh for "snitching." The court reversed defendants' convictions related to their unarmed robbery of Katherine Takai on September 28, 2012, which occurred on a Metro train about an hour before defendants had unexpectedly encountered McIntosh and then assaulted him at the Fort Totten Metro station. The DCCA rejected defendants' argument that the court should have

allowed the defense expert to opine whether the particular identifications made by the government's witnesses in this case were accurate because defendants were not prejudiced by the alleged error.

Motorola, Inc. v. Murray, No. 14-CV-1350, 2016 WL 6134870 (D.C. Oct. 20, 2016).

The *en banc* DCCA adopted the test set forth in Fed. R. Evid. 702 for the admission of expert testimony, and abandoned the *Dyas*/*Frye* test. *See Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). The *en banc* DCCA explained that unlike the *Dyas*/*Frye* "general acceptance" test, Rule 702 focuses "not only on methodology," "but also on the application of that methodology in a particular case." Rule 702(d) goes further [than *Dyas*] and expressly requires the court to determine whether "the expert has reliably applied the principles and methods to the facts of the case." The DCCA noted that its "decision to adopt Rule 702 means, among other things, that [courts] will no longer ask whether the subject matter is 'beyond the ken of the average lay[person].'" *Dyas*, 376 A.2d at 832. The proper inquiry is whether "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702 (a). The DCCA concluded "that Rule 702, with its expanded focus on whether reliable principles and methods have been reliably applied, states a rule that is preferable to the *Dyas*/*Frye* test."

HEARSAY

Gabramadhin v. United States, 137 A.3d 178 (D.C. Apr. 28, 2016).

The DCCA vacated the defendant's convictions for kidnapping and assault with intent to commit first-degree sexual abuse on the grounds that a 911 call was improperly admitted as an excited utterance. Specifically, after having been attacked, forced into a park, robbed, and assaulted, the victim called Georgetown police and was eventually transferred to the District's 911 call center. The entire 911 call was admitted at trial. The DCCA found this to be an abuse of discretion for several reasons. First, the call lasted 12 minutes; "lengthier statements are less likely to reflect spontaneity and lack of reflection." Second, the victim "gave detailed and patient responses to many questions from both the Georgetown officer and the 911 dispatcher." Although such questioning does not automatically make a statement inadmissible, the victim's "rational, patient answers, and her repetition of those answers during the call, suggest reflection rather than spontaneity." Third, the complainant "initiated the call," so this was "not a situation where the police, summoned by a third party, arrived at the scene and encountered an individual

wholly undone by a traumatic incident." Fourth, the DCCA disagreed with the trial court that the victim's voice on the call sounded distraught. Rather, her tone was "consistent with a determination that [she] was upset, but . . . not consistent with a determination that [she] was so upset that she was unable to reflect or was speaking reflexively." Although each factor was not dispositive, together they rendered the entire call inadmissible.

IDENTIFICATION – IN COURT

Clark (Rayshawn) v. United States[1], Nos. 14-CF-565, 14-CF-625 & 14-CF-638, 2016 WL 5860803 (D.C. Oct. 6, 2016).

The DCCA affirmed defendants' convictions for a series of armed robberies. Defendants first robbed and carjacked Cornell Scott. As they were doing so, another person happened to walk by and defendants robbed him. The robbers fled but soon realized they had left behind Hilton's cell phone. The robbers returned to the crime scene to look for the phone, and again robbed Scott, who was waiting for the police. During the latter robbery, the police arrived and defendants fled. After a high-speed chase, the robbers crashed their SUV. Hilton and Lee fled on foot. Clark, who was pinned in the overturned SUV, was arrested. The police recovered the proceeds of the robbery in the SUV, and Hilton's phone at the scene of the robberies. The court rejected defendants' challenge to Scott's in-court ID of Clark and Lee. Even if the court erred in allowing Scott's in-court ID (which occurred after Scott's memory was allegedly "refreshed" when Scott phoned an MPD detective during trial, in violation of the court's sequestration order), any error was harmless due to the government's overwhelming evidence of guilt, and the extensive voir dire of Scott about his contact with the detective. The court also noted that the trial prosecutor "promptly notified all three defense lawyers about the conversation on the day it occurred" and "did not highlight" the disputed ID evidence in the government's closing or rebuttal arguments.

IMPEACHMENT

Gardner v. United States, 140 A.3d 1172 (D.C. June 23, 2016).

Even assuming that the trial court should have permitted defendant to testify that one of the government's witnesses had a "reputation as a snitch," any error was harmless because there was other evidence indicating the witness was "a snitch." Even assuming the trial court erred by limiting the bias cross-examination of a police officer concerning internal investigations into complaints of harassment and excessive force, any error was harmless because defense counsel conducted a "rigorous and effective" cross-examination of the officer, and the officer's testimony was not a significant part of the government's case.

Johnson v. United States, 136 A.3d 74 (D.C. Apr. 14, 2016).

The DCCA reversed the defendant's murder conviction. A government witness testified that the defendant had confessed to him while the two were incarcerated together. That witness had himself been charged with murder, and had lied to hospital staff and to the police regarding the circumstances of that murder. The trial court erroneously precluded cross-examination about "corruption bias." That is, the witness's "past fabrications demonstrated his willingness to lie to avoid being punished for murders he had committed, and hence tended to make it more probable that the same motivation (the existence of which was undisputed) actually had led him to lie again by fabricating defendant's confession."

McCray v. United States, 133 A.3d 205 (D.C. Mar. 10, 2016).

The DCCA affirmed-in-part, reversed-in-part, and remanded-in-part, as to homicide and related convictions against four defendants charged with a conspiracy at Benning Terrace housing complex. On appeal, the court addressed several issues. A defendant pled guilty mid-trial and testified against his co-defendants. His juvenile records included a diagnosis for bipolar disorder and "severe impairment of prefrontal function." The defense sought a continuance to enlist a psychiatric expert to opine on the cooperator's credibility in light of these conditions. The trial court denied the request, citing the age of the juvenile records and the absence of evidence the cooperator was presently unable to perceive and recall events. Although prior case-law supported curtailing impeachment with such psychiatric history, the DCCA here found an abuse of discretion considering other reasons to doubt the cooperator's credibility, including a recent incident at D.C. Jail involving throwing feces at a guard. As such, certain defendants were entitled to "an opportunity to show, at a hearing and through expert opinion, whether at the time of his trial testimony, [the cooperator]'s mental disabilities seriously impacted his credibility," and, if so, whether any error was prejudicial.

INDICTMENT/INFORMATION

Sutton v. United States, 140 A.3d 1198 (D.C. June 23, 2016).

Although the trial court erred in allowing amendment of the information, the error was harmless. Sutton was charged with misdemeanor sexual abuse of a child, in violation of D.C. Code § 22-3010.10, for touching himself in front of the minor victim, and attempted misdemeanor sexual abuse (MSA) of a child for attempting to touch the victim. On the morning of trial, the government amended the information,

changing the latter count to attempted MSA, in violation of D.C. Code § 22-3006, predicated on defendant's attempt "to get [the victim] to touch" the defendant. The trial court erred in allowing the amendment. The new count "charged a different statutory offense," and "the conduct it specified also was different from what had been described" in the previous information, i.e., defendant's attempts to touch the victim instead of defendant's attempt to force the victim to touch defendant. The error was harmless, however, because the offense conduct "involved the same incident, with the same complaining witness, at the same time and place." In addition, there was no indication that the defense "was confused by or uncertain about the amended charge," and the new charge did not expose defendant "to any greater statutory penalties."

McCray v. United States, 133 A.3d 205 (D.C. Mar. 10, 2016).

The DCCA affirmed-in-part, reversed-in-part, and remanded-in-part, as to homicide and related convictions against four defendants charged with a conspiracy at Benning Terrace housing complex. The trial court instructed the jury under both an "urban gun battle" theory of liability and also under the standard aiding and abetting instruction. That combination of instructions did not constitute a variance from the indictment, which charged explicitly that the defendants had "engag[ed]" in the gun battle. And even assuming it was error to give both instructions, any error was harmless because the prosecution did not ask the jury to convict any defendant of aiding and abetting the initiation of the gun battle and there was sufficient evidence that the defendants acted as co-principals.

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) – SENTENCING

Clark (Ralph) v. United States, 136 A.3d 334 (D.C. Apr. 21, 2016).

The DCCA affirmed the denial of a defendant's motion for new trial on the claim of ineffective assistance of counsel. In an earlier appeal, the DCCA criticized a prosecutor for allocuting in violation of a plea agreement, but found no plain error given counsel's failure to object. In collateral proceedings, the defendant claimed that counsel was deficient for failing to consult with the defendant about his option to withdraw his plea. In response, trial counsel averred that she made a tactical decision to proceed to sentencing with the same judge, because the judge had caught the error and appeared angry at the prosecutor already for the mistake. The trial court found neither deficient performance nor prejudice. On collateral appeal, the DCCA found that trial court should have had a hearing on whether counsel was deficient, explaining that withdrawal of a plea, like entering a plea, is a decision "for

a counseled client, not the lawyer, to make." Nonetheless, the defendant could not show prejudice because he was unable to show a reasonable probability that he would have sought to withdraw his plea.

INEFFECTIVE ASSISTANCE OF COUNSEL – TRIAL

Surur Fatumabahirtu v. United States, No. 13-CO-273, 2016 WL 6543531 (D.C. Nov. 3, 2016).

Because defendant's trial counsel was ineffective for failing to investigate a defense of misidentification (mis-ID), the DCCA reversed defendant's 2008 conviction for attempted possession of drug paraphernalia with intent to sell, and remanded for a new trial. Defendant was employed as a store clerk. The government's evidence was that on June 28, 2007, an undercover officer (UC) asked defendant for an "ink pen," and she handed the UC a pen and a metal scouring pad. Together, these items are commonly used to fashion crack pipes. About a week later, on July 6, 2007, MPD obtained a warrant, searched the store, and arrested defendant. Defendant was tried and convicted, and her conviction was affirmed on direct appeal. Thereafter, defendant moved the court to vacate her conviction, arguing that she was not the clerk who originally sold the items to the UC, and that her trial counsel failed to investigate this mis-ID defense. During a hearing on defendant's motion, defense counsel admitted that he did not investigate a mis-ID defense, and that his decision was not strategic but instead was an oversight. The DCCA rejected the government's argument that defendant was not prejudiced by any deficient performance because it was undisputed that defendant was present at the time of the search of the store. That admission did not prove that defendant was the person who sold the drug paraphernalia to the UC a week before the search. Only that person had the intent to sell the seized items as drug paraphernalia. The DCCA concluded that counsel's deficient failure to investigate a defense of mis-ID created a reasonable probability that the outcome of defendant's trial would have been different had defense counsel raised that defense; the government's evidence that defendant was the person who sold the drug paraphernalia to the UC was "crucial" to establishing her intent to sell the items as drug paraphernalia on the date of her arrest. The DCCA observed that an IAC claim may be brought in a petition for coram nobis relief if the defendant is no longer in custody (because the court lacks jurisdiction over a § 23-110 motion if the defendant is no longer in custody, and a meritorious IAC claim otherwise satisfies the requirements for coram nobis relief).

Jayvon White v. United States, 146 A.3d 101 (D.C. Sept. 1, 2016).

The DCCA remanded this case for a hearing on appellant's *pro se* § 23-110 motion alleging that his plea counsel was constitutionally ineffective in advising appellant about his parole eligibility. The DCCA rejected the government's argument that appellant's claim was procedurally barred because he failed to raise it during the pendency of his direct appeal. The DCCA concluded that appellant had raised a colorable claim that, following the conclusion of appellant's direct appeal in 2004, the sentencing court had misinformed him about his parole eligibility. Because appellant's claim that he was misinformed by the court was not "palpably incredible," appellant is entitled to develop that claim during a hearing on his motion.

INNOCENCE PROTECTION ACT (IPA)

Caston v. United States, No. 15-CO-36, 2016 WL 5827479 (D.C. Sept. 29, 2016).

The DCCA reversed the trial court's denial of defendant's Innocence Protection Act claim, and remanded the case to allow the trial court to reconsider defendant's claim. A jury found defendant guilty of a 1994 murder. The government's trial evidence included that: several eyewitnesses who knew defendant had seen him shoot the victim; defendant had a longstanding beef with the victim; and the police discovered the murder weapon in a closet where defendant was hiding immediately before he was arrested. During an evidentiary hearing on defendant's IPA motion, defendant and a new eyewitness each testified that defendant was not the shooter. The trial court did not credit that testimony, and denied defendant's motion. The DCCA reversed and remanded for reconsideration of defendant's IPA motion, concluding that the trial court had erroneously: (1) considered the testimony of defendant's new witness as merely impeaching of the government's trial witnesses instead of as exculpatory evidence; (2) discredited the new witness's testimony without considering whether inconsistencies in the witness's testimony "were trivial," "insignificant," or "explainable"; (3) "did not critically examine the weight of the trial evidence"; and (4) judged the credibility of defendant's new witness "in light of the court's adverse determination about defendant's own credibility."

INSTRUCTIONS – MISCELLANEOUS

Cousart v. United States, 144 A.3d 27 (D.C. Aug. 4, 2016).

The DCCA affirmed defendant's convictions for aggravated assault while armed (AAWA) and assault with a dangerous weapon (ADW). In its opinion, the DCCA suggested minor changes to the Redbook instructions on AAWA and ADW.

The DCCA rejected defendant's argument that the trial court's instruction on AAWA, which closely tracked the Redbook, directed a verdict because it stated that defendant "was armed with or had readily available a knife." Viewing the instructions as a whole, there was no reasonable probability that the jury would have understood the challenged language to mean that it did not have to determine whether defendant was armed with a knife. The DCCA suggested modifying the Redbook instruction to make clear that "the jury must find both that the defendant possessed the alleged named weapon and that it was a dangerous weapon." Similarly, the DCCA rejected defendant's challenge to the trial court's omission of the third element of ADW as defined in the Redbook (i.e., the "apparent ability to injure"). In ADW Option A in the Redbook, this element is bracketed, suggesting that it is optional. The DCCA found that the element is not optional. However, the error did not require reversal under the plain-error standard because "the most reasonable conclusion" from the trial evidence was that defendant had an "apparent ability to injure" when he brandished the knife.

Wilkins v. United States, 137 A.3d 975 (D.C. May 5, 2016).

The DCCA affirmed the defendant's Bail Reform Act (BRA) conviction. The defendant requested a legally erroneous instruction below, and then contended on appeal that the trial court should have fashioned some other defense-theory instruction. The DCCA rejected this contention:

> Our rules oblige the parties to play an active role in proposing, objecting to, and clarifying instructions. Nevertheless, in *Whitaker v. United States*, 617 A.2d 499 (D.C. 1992), we endorsed the view that "even a request for an instruction which is not entirely perfect may in some situations impose upon the court the duty to give a more specific instruction on an issue" if it is necessary to assist the jury in making its decision intelligently. There are limits to that duty, however. For example, "a [trial] court is not required to rewrite an improper instruction to capture a kernel that may have some validity." (Some internal citations omitted.)

Here, "the proffered instruction was so far off the mark, the trial court was not required to rewrite it."

Thomas v. United States, 137 A.3d 166 (D.C. Apr. 28, 2016).

The DCCA affirmed the defendant's armed carjacking conviction. During deliberations, the jury sent notes explaining that they understood that they could not consider the defendant's decision not to testify, but inquiring whether they could "consider that there's no contradictory testimony such as an alibi?" The trial

judge ultimately replied, ""The answer to the question is yes, but the defense has no burden to present any evidence. The government must prove every element of an offense beyond a reasonable doubt, and you must decide the case based only on the evidence presented at the trial." The DCCA affirmed, reiterating its prior holdings that, "merely considering whether the government's evidence has been contradicted does not, without more, shift the burden of proof to the defendant. It is the role of the fact-finder, in determining a witness's credibility, to consider whether other evidence corroborates or contradicts [a] witness. . . . We have repeatedly held that it is permissible for a fact-finder . . . to consider whether the defense contradicted the government's evidence." Here, the trial judge's response was both legally correct and appropriately cautious in reiterating the burden of proof.

INSTRUCTIONS – REASONABLE DOUBT

Griffin v. United States, 144 A.3d 34 (D.C. Aug. 4, 2016).

The court affirmed Griffin's convictions for gun offenses. Although the trial court "omitted the first paragraph of the reasonable doubt instruction" the DCCA adopted in *Smith v. United States*, 709 A.2d 78, 82 (D.C. 1998) (en banc), defense counsel did not object. Defendant could not satisfy the plain-error requirements on appeal. Specifically, the error, although plain and obvious, did not affect Griffin's substantial rights because: (1) "an omission or incomplete instruction is less likely to be prejudicial than a misstatement of the law"; (2) "[w]hen read together, the [jury] instructions . . . correctly convey[ed] the concept of reasonable doubt"; and (3) when examining "the trial as a whole" the trial court and the parties had repeatedly reminded the jury that the government must prove guilt beyond a reasonable doubt. The DCCA rejected Griffin's argument that the trial court's instruction was unconstitutional because it omitted language from the *Smith* instruction comparing the civil and criminal burdens of proof. The DCCA had never so held, and the vast majority of federal and state courts do not define "reasonable doubt" "by comparing the civil and criminal burdens of proof." Nonetheless, the DCCA warned against "any deviation" from the *Smith* instruction.

INSTRUCTIONS -- RESPONSE TO JURY NOTE

Buskey v. United States, Nos. 14-CF-1148 and 14-CF-1203, 2016 WL 6659495 (D.C. Nov. 10, 2016).

Applying the plain-error standard of review, the DCCA affirmed defendants' convictions for offenses including armed robbery and carrying a dangerous weapon

(CDW). The trial court made the following plain or obvious errors when instructing the jury: (1) the court's final instructions amalgamated its instructions on conspiracy liability and aiding-and-abetting liability such that the jury would have had difficulty distinguishing the two separate theories of liability; (2) the court's final instructions concerning aiding-and-abetting liability as applied to the "while armed" offenses contravened *Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014), because the jury was not required to find that the accomplice knew that the principal was armed; and (3) when the court learned of its omission, it provided written supplemental instructions to the jury but, as to the CDW charge, the supplemental instructions "did not explicitly address the requirement, set forth in [*McCoy v. United States,* 760 A.2d 164, 186 (D.C. 2000)], that the accomplice also must aid and abet the principal's "'carrying' of the dangerous weapon." In addition, the court erred when it provided the jury with written supplemental instructions but did not read those instructions to the jury in open court. That error was not plain or obvious, however, because the DCCA had not previously addressed that question. The DCCA concluded that the instructional errors that were plain or obvious were not substantially prejudicial to the defense because: each co-defendant brandished a knife during the offenses, so each clearly acted as a principal and thus the erroneous instructions on accomplice liability did not affect the outcome of the trial; the confusing instruction on conspiracy liability helped the defense because it removed that theory from the jury's consideration; and, although the court failed to read the supplemental instructions in open court, the record showed that the jury carefully read those instructions.

McCray v. United States, 133 A.3d 205 (D.C. Mar. 10, 2016).

The DCCA affirmed-in-part, reversed-in-part, and remanded-in-part, as to homicide and related convictions against four defendants charged with a conspiracy at Benning Terrace housing complex. The trial judge did not abuse his discretion in responding to a note from the foreperson that one juror had his mind made up from the first week of trial. The judge, concerned about exposing a hold-out juror and creating coercion, conducted only a limited inquiry of the foreperson and did not ask the foreperson to identify the alleged problem-juror. The judge then gave an instruction to all jurors to continue deliberating with an open mind, to which defendants' counsel did not object. But on appeal, the defendants argued the judge should have learned more about the problem-juror to determine if juror misconduct had occurred. Even assuming this claim had not been forfeited, the judge's actions constituted a reasonable balancing of competing interests.

INSTRUCTIONS – SUBSTANTIVE OFFENSES

Bryant v. United States, No. 14-CF-268 (D.C. Nov. 3, 2016).

The DCCA affirmed defendants' convictions related to the shooting deaths of innocent bystanders during a gun battle between rival gangs. Defendants argued that because the government did not prove who shot the fatal bullet, they could not be convicted of first-degree murder on an urban-gun-battle theory; that theory only applies to second-degree murder. The court disagreed. Intentionally engaging in a shootout, during which a bystander is killed, satisfies the elements of first-degree murder. The court properly submitted this theory to the jury, and it was for the jury to determine whether the shooting was in fact premeditated and deliberated (an element of first-degree murder). Similarly, the court did not plainly err in giving a provocation instruction concerning defendants' self-defense theory (i.e., that self-defense would not apply if defendants provoked the gun fight by entering rival gang territory). Here, the gang affiliation evidence factually supported the giving of the provocation instruction, and defendants did not challenge the wording of the instruction, just its factual predicate.

Fleming v. United States, No. 14-CF-1074, 2016 WL 6659494 (D.C. Nov. 10, 2016).

The DCCA affirmed defendant's conviction for second-degree murder. The DCCA rejected defendant's argument that the trial court erred by giving an "urban gun battle" instruction where the victim "was not a mere bystander but rather was an active participant in the battle." In *Roy v. United States*, 871 A.2d 498 (D.C. 2005), the DCCA approved of an urban-gun-battle instruction that required the jury to determine, as to causation, whether "it was reasonably foreseeable that death or serious bodily injury to innocent bystanders could occur as a result of the defendant's conduct" in engaging in a gun battle. Here, where the victim was not a bystander, the trial court modified the instruction to omit the reference to innocent bystanders, and required the jury to determine whether "it was reasonably foreseeable that death or serious bodily injury [] could occur as a result of the defendant's conduct during the gun battle." That instruction was a correct statement of law. The DCCA concluded, "it surely is no less foreseeable that a stray bullet fired in the heat of a gun battle will unintentionally hit an ally or confederate in the fight rather than someone outside it. For the purposes of applying principles of proximate causation, it thus makes no meaningful difference whether the reasonably foreseeable victim of a shootout was a participant in the battle or a bystander. In either case, all those who intentionally carried on the gun battle and

thereby shared in creating the danger may be found to have substantially contributed to the ensuing fatality." In a concurrence, Judge Easterly recognized that defendant's challenge to the "urban gun battle" instruction was controlled by *Roy v. United States*, 871 A.2d 498 (D.C. 2005). However, Judge Easterly wrote separately to opine that the *Roy* instruction is "flawed" because it relieves the government of proving "but for" causation, and she implored the en banc court to overrule *Roy*.

INTOXICATION

Davidson v. United States, 137 A.3d 973 (D.C. May 5, 2016).

The DCCA upheld the defendant's voluntary manslaughter conviction. The court rejected the defendant's claim that intoxication was a defense to that offense. Specifically, the court rejected the argument that intoxication could negate a showing that the defendant was in "conscious disregard" of a substantial risk. In so ruling, the court reaffirmed the holding *Wheeler v. United States*, 832 A.2d 1271 (D.C. 2003), that intoxication also was not a defense to second-degree murder. In a footnote, the court further held that the evidence was sufficient to show such conscious disregard.

JENCKS ACT

Hernandez v. United States, 129 A.3d 914 (D.C. Jan. 14, 2016).

The DCCA remanded an assault case for a *Jencks* inquiry. During trial, the complainant had testified that the prosecutor took notes during a pre-trial interview. The prosecutor told the court that her notes were not "'continuous narrative reportings,' but rather were 'selective notations, or excerpts from oral statements.'" The trial court accepted those representations. The DCCA reiterated that "the notes of a prosecutor's interview with a government witness can be subject to disclosure under the Jencks Act if the notes are substantially verbatim and were contemporaneously taken." There is no applicable claim of work product protection for such notes. And "the party seeking disclosure of interview notes is not required to prove what was written down, and rather need only show that notes were taken during the course of an interview concerning the events of the case. Once that initial showing is made, the trial judge must make an adequate inquiry or review the notes to determine whether they are Jencks material." Because the question of what constitutes a verbatim statement is difficult and context-sensitive, the trial court errs when it simply accepts the prosecutor's representations on whether the

notes were substantially verbatim. In so ruling, the DCCA distinguished an earlier case, *Lazo*, which held that trial courts may accept a prosecutor's more-straightforward representation that no notes were taken at all. The DCCA declined to find the error harmless because the notes involved the complainant, who was an important witness. Thus, a remand was required for the trial court to review the notes.

JOINDER/SEVERANCE

Gray v. United States, No. 13-CF-854+, 2016 WL 6134869 (D.C. Oct. 20, 2016).

DCCA affirmed defendants' convictions for offenses related to their September 21, 2012, armed robbery of Gerald McIntosh on a Metro train, and their convictions for assault and obstruction of justice in connection with their September 28, 2012, assault on McIntosh for "snitching." The court reversed defendants' convictions related to their unarmed robbery of Katherine Takai on September 28, 2012, which occurred on a Metro train about an hour before defendants had unexpectedly encountered McIntosh and then assaulted him at the Fort Totten Metro station. While expressing "serious doubts" about joinder, the DCCA concluded that the trial court should have severed the counts involving McIntosh from the counts involving Takai. The DCCA noted that none of the evidence of the September 21 armed robbery of McIntosh was admissible to prove defendants' identities as the September 28 robbers. The two robberies were not sufficiently similar (they occurred on different dates, in different locations, involved different victims, and the proffered similarity (the robbery of iPhones on the Metro) is not "unusual or distinctive" enough to prove identity. Likewise, the details of the September 21 armed robbery did not help to explain the September 28th robbery of Takai.

McCray v. United States, 133 A.3d 205 (D.C. Mar. 10, 2016).

The DCCA affirmed-in-part, reversed-in-part, and remanded-in-part, as to homicide and related convictions against four defendants charged with a conspiracy at Benning Terrace housing complex. "McCray's argument about the alleged weakness of the government's conspiracy case is unavailing. Joinder is proper when defendants are charged with conspiracy; the joinder decision does not take into consideration the strength of the government's evidence that has not yet been presented."

Rollerson & Burns v. United States, 127 A.3d 1220 (D.C. Dec. 17, 2015).

In two incidents involving different victims, Rollerson assaulted people that Burns suspected may have slashed her tires; Burns assisted in the second assault. The DCCA reversed Rollerson's convictions as to the first incident, but affirmed both defendants' convictions as to the second assault. First, the trial court abused

its discretion in denying Rollerson's severance motion as to the first incident. That motion was based on Rollerson's proffer that Burns would have testified that Rollerson was not present during an initial confrontation, which would have negated the government's theory of motive. Burns's attorney corroborated that Burns was willing to so testify if she was tried first. Thus, the DCCA found that Rollerson had made the required showing that the co-defendant had substantially exculpatory testimony and was willing to testify. Reversal was required even though Rollerson spurned an offer to stipulate to Burns's proposed testimony, because that offer deprived Rollerson of the force of presenting live testimony on an important point. As to the second incident, the trial court did not abuse its discretion in denying Burns's severance motion, which asserted spill-over prejudice. The DCCA helpfully reiterated the high showing a defendant must make to obtain severance on this theory. Here, although Burns was not charged in the earlier incident, her role in it was evidence of motive as to the second incident. Furthermore, the trial court took appropriate measures to prevent jury confusion.

JURY/JURORS/JURY TRIAL

Frey v. United States,137 A.3d 1000 (D.C. May 5, 2016).

The DCCA vacated the defendant's conviction for unlawful entry, holding that the defendant was entitled to a jury trial. D.C. Code § 22-3302(a) punishes unlawful entry in a private building with a maximum term of imprisonment of 180 days. No jury trial is required. D.C. Code § 22-3302(b) punishes unlawful entry in a public building with a maximum term of imprisonment of 6 months, which triggers a statutory right to a jury trial. Here, the defendant was located in a non-public area of the Library of Congress after closing hours. The trial court declined the defendant's jury trial demand. The DCCA reversed that decision. All parties agreed that the Library of Congress is a public building, so the DCCA did not have occasion to supply a definition of that term.

Rather, the court addressed the question of whether the private UE statute could be used to prosecute without a jury either (1) entry into a private area of a public building or (2) entry into a public building after closing time. The Court found a jury trial was required in either situation. First, "subsection (a) prohibits unlawful entry into a private building or a part of a private building, and subsection (b) prohibits unlawful entry into a public building or a part of a public building." In so ruling, the DCCA rejected the government's argument that the jury trial right was intended to be limited to protestors acting in what would be considered a public space under the First Amendment. The court held that it "must adhere to the broader language the Council chose," and "may not artificially limit the statute to the particular circumstances that gave rise to the Council's concern." Similarly, the

statute did not contain explicit temporal limitations, so the court refused to read in any such limitations by implication. Therefore, "a defendant charged with unlawfully entering a public building, or any part of a public building, has a right to a jury trial even if the building or part thereof was closed to the public at the time of the entry."

Kelly v. United States, 134 A.3d 819 (D.C. Mar. 31, 2016).

The DCCA affirmed the defendant's murder conviction against a challenge that the trial judge had replaced a juror with an alternate in violation of Rule 24(c). Specifically, a juror had been repeatedly late, and failed to appear at the time instructed for closing arguments. The judge delayed proceedings and tried to contact the juror, but was unsuccessful. After an hour delay, the judge found the juror's absence was "seriously interfering" with the progress of trial, and ordered trial to proceed. But, as the jury was lining up to enter the courtroom, the late juror called, apparently to say he was parking. Over the defendant's objection, the trial proceeded without the juror. The juror arrived sometime within the next hour. The judge instructed the juror not to say anything about his reason for his lateness, because the court was issuing a criminal contempt show-cause order against the juror.

The DCCA viewed the case as close, but found no abuse of discretion. Although the trial judge had not specifically invoked Rule 24(c) or its formal test for juror replacement, he ultimately made the required finding. The DCCA held that "when a juror is absent from court for a period sufficiently long to interfere with the reasonable dispatch of business there may be a sound basis for his dismissal." "A 'sound basis' under Rule 24 (c) to replace such a juror with an alternate without further delay may exist when the court has no reason to believe the juror's arrival is imminent; when the court has reason to believe the juror's arrival (even if imminent) will occasion further delay of the trial; or when the juror's repeated tardiness or other conduct indicates to the court that the juror cannot be relied upon to show up for trial on time in the future." "An hour's delay of a jury trial is not insignificant." The "judge did not act precipitously or without solicitude for defendant's desire to retain [the juror] (and this would be a different case if he had)." It was also critical that the juror had received a clear instruction as to the starting time, had been late repeatedly, and had not been in communication with the trial judge to suggest that arrival was imminent. Once the juror did call, the trial judge was not required to reconsider his ruling. The juror's track record "augured his future unreliability." And the judge permissibly declined to conduct a further investigation into the reasons for the tardiness in light of the show-cause

order. (In a footnote, the DCCA said the result likely would have been different if deliberations had already begun and the judge had decided to proceed with only 11 jurors under Rule 23's more stringent requirements.)

Smith v. United States, 141 A.3d 1095 (D.C. July 7, 2016).

The DCCA reversed defendant's convictions for leaving after colliding, DUI, and reckless driving, concluding that the trial court erroneously denied defendant his statutory right to a jury trial on those charges. The court rejected the government's argument that any error was harmless because the offenses of conviction did not carry a cumulative maximum sentence of more than two years or a $4000 fine, which on remand would trigger the right to a jury trial under D.C. Code Section 16-705(b). The court held, "we are aware of no authority that precludes us from granting [defendant] the jury trial that he was statutorily entitled to in the first place." Judge McLeese dissented, concluding that any retrial on the charges of conviction must be a bench trial and thus that the court lacks the authority to remand this case for a jury trial.

MISTRIAL

Carpenter v. United States, 144 A.3d 1141 (D.C. Aug. 11, 2016).

The DCCA affirmed defendants' convictions. Defendants were arrested in connection with a narcotics buy/bust operation and charged with distribution of heroin. The DCCA rejected Jones's claim that he was entitled to a grant of a mistrial when the courtroom clerk sent an email to the prosecutor stating that defendants had "lied" during their trial testimony. It was clear that the email had no impact on the jury's deliberations. Jones instead claimed that he was entitled to resentencing due to prejudice from the email. However, the record contradicted that argument because Jones received a sentence that was "significantly less than the government had requested," and the sentencing judge stated on the record that she had not considered the clerk's email during sentencing.

MOTIONS FOR RECONSIDERATION

***Marshall v. United States*,** 145 A.3d 1014 (D.C. Aug. 25, 2016).

The DCCA affirmed defendant's plea of guilty to second-degree murder while armed. The DCCA rejected defendant's argument that he should have been permitted to withdraw his guilty plea. The trial court had initially allowed defendant to withdraw his guilty plea, and the government moved for

reconsideration of that order. Following a hearing, the trial court granted the government's motion, reinstated defendant's guilty plea, and imposed sentence. The DCCA rejected defendant's argument that the trial court lacked the authority to grant the government's motion for reconsideration and to reinstate his guilty plea. Whenever the Superior Court "has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so." The DCCA rejected defendant's argument that the withdrawal of his plea of guilty, like a judgment of acquittal, divested the trial court of jurisdiction and thus was irrevocable. Instead, the grant of a motion to withdraw a guilty plea is "interlocutory in nature and subject to reconsideration." The DCCA found that the Superior Court's grant of reconsideration in this case was "consonant with justice" because: (1) the trial court had failed to conduct the required factual and legal inquiry when it initially allowed defendant to withdraw his guilty plea; and (2) recorded calls defendant made from the D.C. Jail placed his "motive for seeking to withdraw" in question.

OTHER CRIMES EVIDENCE

Holmes v. United States, 143 A.3d 60 (D.C. July 21, 2016).

The DCCA affirmed Holmes's convictions for second-degree murder and gun offenses. The government's evidence showed that Holmes argued with David Tucker in a barbershop following Tucker's suggestion that Holmes previously had robbed Nicholas Proctor. When Tucker left the barbershop and stepped into the street, Holmes shot him through the heart. The court rejected Holmes's argument that the trial court erred in admitting Proctor's testimony that he told Tucker that Holmes "might have" been the one who robbed him. Proctor's testimony about the robbery was admissible under *Johnson* "to explain the confrontation between Holmes and Tucker," and "was relevant to help explain Tucker's accusatory statements" to Holmes "giving context to the animosity between the two men leading up to the shooting." In addition, any danger of unfair prejudice was mitigated by the trial court's limitations on the scope of Proctor's testimony and on the government's use of that testimony during its arguments to the jury.

PLEA OF GUILTY

***Marshall v. United States*,** 145 A.3d 1014 (D.C. Aug. 25, 2016).

The DCCA affirmed defendant's plea of guilty to second-degree murder while armed. The DCCA rejected defendant's argument that he should have been

permitted to withdraw his guilty plea. The trial court had initially allowed defendant to withdraw his guilty plea, and the government moved for reconsideration of that order. Following a hearing, the trial court granted the government's motion, reinstated defendant's guilty plea, and imposed sentence. The DCCA rejected defendant's argument that the trial court lacked the authority to grant the government's motion for reconsideration and to reinstate his guilty plea. Whenever the Superior Court "has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so." The DCCA rejected defendant's argument that the withdrawal of his plea of guilty, like a judgment of acquittal, divested the trial court of jurisdiction and thus was irrevocable. Instead, the grant of a motion to withdraw a guilty plea is "interlocutory in nature and subject to reconsideration." The DCCA found that the Superior Court's grant of reconsideration in this case was "consonant with justice" because: (1) the trial court had failed to conduct the required factual and legal inquiry when it initially allowed defendant to withdraw his guilty plea; and (2) recorded calls defendant made from the D.C. Jail placed his "motive for seeking to withdraw" in question.

Clark (Ralph) v. United States, 136 A.3d 334 (D.C. Apr. 21, 2016).

The DCCA affirmed the denial of a defendant's motion for new trial on the claim of ineffective assistance of counsel. In an earlier appeal, the DCCA criticized a prosecutor for allocuting in violation of a plea agreement, but found no plain error given counsel's failure to object. In collateral proceedings, the defendant claimed that counsel was deficient for failing to consult with the defendant about his option to withdraw his plea. In response, trial counsel averred that she made a tactical decision to proceed to sentencing with the same judge, because the judge had caught the error and appeared angry at the prosecutor already for the mistake. The trial court found neither deficient performance nor prejudice. On collateral appeal, the DCCA found that trial court should have had a hearing on whether counsel was deficient, explaining that withdrawal of a plea, like entering a plea, is a decision "for a counseled client, not the lawyer, to make." Nonetheless, the defendant could not show prejudice because he was unable to show a reasonable probability that he would have sought to withdraw his plea.

Mickens v. United States, 133 A.3d 562 (D.C. Mar. 10, 2016).

The DCCA found the prosecutor breached a plea agreement with respect to allocution, so vacated the defendant's sentence and remanded to permit the defendant the option of seeking to withdraw his plea or going to sentencing before

another judge. Specifically, police observed the defendant engaged in suspected narcotics transactions, and the defendant then fled from police, shedding his clothes nearby. When police recovered his clothing, they found more drugs. The defendant pled guilty, *inter alia*, to multiple charges of distribution and one charge of possession with intent to distribute. The government agreed to allocute within the guidelines. At sentencing, the government requested consecutive sentences for the distribution and the PWID. The defense attorney objected on the ground that D.C. Voluntary Sentencing Guidelines § 6.3 provides that sentences should be concurrent if they are non-violent and part of a "single event," which means that "they were committed at the same time or place, or have the same nucleus of facts." The judge overruled the objection and imposed concurrent sentences, albeit a total sentence greater than the defendant had requested.

Reiterating that ambiguities in plea agreements are strictly construed against the government, the DCCA found that the plea bargain had been breached. The distribution and the PWID arose from the same nucleus of facts. And here, the government had argued as much when it had earlier opposed severing the PWID charge from the distribution charges. "If the government violates its bargain, it is irrelevant that the government's remarks may not have influenced the sentencing judge; the court must remand the case for resentencing or, in appropriate cases, to allow withdrawal of the defendant's plea." Thus, it did not matter that the defendant obtained concurrent sentences, because the judge might have been affected in his rejection of the defendant's allocution by the government's impermissibly high allocution.

POSSESSION

Pannell v. United States, 136 A.3d 54 (D.C. Apr. 7, 2016).

The DCCA reversed the defendant's possession of PCP conviction on sufficiency grounds. The defendant was a passenger in a car that he did not own that smelled of PCP. Officers saw no furtive gestures while stopping or approaching the car. Police recovered two wet dippers from the gap between the passenger seat and the center console. Based on the officers' experience, the cigarettes had been dipped within the past "five to ten minutes at most." Police arrested the defendant, but found nothing. They patted down the driver and released him without searching him. The DCCA found insufficient evidence of constructive possession, specifically as to the defendant's intent to exercise dominion and control over the drugs. Previous DCCA precedent, *Rivas v. United States*, held that "[a] passenger in someone else's car, who is not the driver and who does not have exclusive control

over the vehicle or its contents, may not be convicted solely on the basis that the drugs were in plain view and conveniently accessible in the passenger compartment." Rather, "something more," albeit something "comparatively minimal" is required. According to the DCCA, there was nothing more here. First, the government's arguments that the defendant could have easily placed the cigarettes in the crack closer to him did not prove that he did so, absent any evidence of a furtive gesture. Second, although there was evidence that the cigarettes had been recently dipped in liquid PCP, that evidence did not show who dipped them, and police only observed the car for about 30 seconds before making the stop. Third, the government argued for an inference of shared possession with intent to consume by pointing out that there were two occupants of the car, two cigarettes, and that police observed a rolled down window. But the DCCA rejected this theory as too speculative. Finally, the court found the government's case "further weakened" by evidence that the defendant cooperated with the police and did not appear nervous.

RECEIVING STOLEN PROPERTY (RSP)

Brown (David) v. United States, 128 A.3d 1007 (D.C. Dec. 10, 2015).

The DCCA upheld one RSP conviction, but reversed another along with the conviction for trafficking in stolen property. Sufficient evidence supported only one RSP conviction. In addressing sufficiency, the DCCA first rejected the government's arguments that the defendant had failed to preserve the issue by failing to renew his motion for judgment of acquittal. Next, the court found sufficient evidence that the defendant was in receipt of a phone stolen the same day the police located it in his electronic repair shop, where the defendant admitted he knew the phone was stolen and offered to help police catch the robber. However, there was insufficient evidence supporting a conviction for receipt of a phone stolen six weeks earlier that was found during a later search warrant. Although the defendant ran the store, other people worked there too, and "a defendant's control over the place is not by itself enough to establish constructive possession of contraband found there." There was also insufficient evidence that the defendant knew the phone was stolen. Finally, because trafficking in stolen property requires two predicate acts, that conviction was vacated as well.

RECUSAL

Williams v. Pennsylvania, 136 S. Ct. 1899 (June 9, 2016).

In a 5-3 decision, the Court reversed a decision of the Pennsylvania Supreme Court concerning Williams's post-conviction motion. Williams was convicted of a 1984 murder, and the conviction was affirmed on direct appeal. In 2012, Williams filed a post-conviction motion alleging a *Brady* violation by the trial prosecutor, which was granted by the motions court. Pennsylvania appealed that ruling to the Pennsylvania Supreme Court. Williams's appeal was assigned to a panel that included then Chief Justice Ronald Castille. Williams requested that Castille recuse himself because Castille had previously personally participated in Williams's case (when he was District Attorney for Philadelphia). Castille refused, and the panel opinion, joined by Castille, reversed the decision of the motions court. The Supreme Court reversed, concluding that Justice Castille should have recused himself: "Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." The Court remanded the case so that a panel of the Pennsylvania Supreme Court that did not include Justice Castille could reconsider the appeal.

Taylor v. United States, 138 A.3d 1171 (D.C. May 12, 2016).

The DCCA upheld the defendant's convictions for two murders committed during the robbery of a convenience store against multiple challenges. The defendant claimed that the trial court should have recused itself after it heard trial counsel's *ex parte* motion to withdraw (which was based, *inter alia*, on the defendant threatening his own attorney's children). Although the DCCA had previously stated in a footnote that different judges should hear such a motion to withdraw than should preside at trial, the DCCA clarified that this language was "perhaps a rule of prudence, but not an inexorable command." Here, judicial efficiency counseled in favor of keeping the same judge, and the trial judge made it clear that he was not prejudiced, so recusal was unnecessary.

SEARCH AND SEIZURE – ATTENUATION

Utah v. Strieff, 136 S. Ct. 2056 (June 20, 2016).

Applying the attenuation doctrine of *Brown v. Illinois*, the Supreme Court held that an officer's discovery of a valid, pre-existing arrest warrant for the defendant attenuated the connection between an unconstitutional *Terry* stop and evidence seized incident to an arrest pursuant to the warrant, notwithstanding that the arrest came immediately after the illegal stop. An officer stopped Strieff solely because he was suspicious about the frequent, brief visits people were making to

Strieff's home. The officer requested Strieff's identification, relayed that information to a police dispatcher, and learned that Strieff had an outstanding arrest warrant. The officer lacked RAS for the stop, but arrested Strieff pursuant to the warrant. During a search incident to arrest, the officer found illegal drugs and drug paraphernalia. The Utah Supreme Court held that the evidence was the inadmissible fruit of the invalid *Terry* stop. The Supreme Court reversed, concluding that the arrest warrant was an intervening fact that attenuated the taint of the unconstitutional stop.

SEARCH AND SEIZURE – INEVITABLE DISCOVERY

Gore v. United States, 145 A.3d 540 (D.C. Aug. 18, 2016).

The DCCA reversed Gore's conviction for malicious destruction of property and remanded for a new trial. The victim called MPD seeking assistance in recovering his personal property from within the motel room defendant was renting at the time. The police knocked on the door and spoke with defendant. When she briefly left the motel room, the police entered, searched, and seized the victim's property. The DCCA held that the officers had violated the Fourth Amendment by entering defendant's hotel room without a warrant, and in the absence of exigent circumstances or consent. The DCCA rejected the government's argument that suppression was unwarranted because the officers would have inevitably discovered the victim's property. One of the officers had testified that the police "could" have sought and obtained a search warrant for the hotel room. Because the warrantless entry in this case preceded any effort to obtain a search warrant, the inevitable-discovery doctrine was inapplicable. The DCCA held that "the lawful process which would have ended in the inevitable discovery must have commenced before the constitutionally invalid seizure," and there must be additional facts indicating that "the discovery would have ultimately been made by lawful means."

Logan v. United States, No. 12-CO-1663, 2016 WL 5860442 (D.C. Oct. 6, 2016).

The DCCA affirmed defendant's convictions for various offenses including first-degree murder. Following a dispute about the financing of defendant's proposed business, defendant went to his business partner's house and slit the throats of the business partner, the partner's young child, and a bystander. The DCCA rejected defendant's argument that the trial court should have suppressed the fruits of the search of his cell phone, which revealed the phone numbers of potential witnesses to the murders. The search of the cell phone incident to defendant's arrest was unlawful under *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (search-incident-to-arrest exception to warrant requirement does not apply to cell phones possessed by criminal defendant at time of arrest; absent warrant, such

search may be lawful when consent or exigent circumstances). However, the government would have inevitably discovered the witnesses because it had begun an investigation into the murders, and as part of that investigation it would have subpoenaed the call records for defendant's cell phone even if it had never possessed the phone itself. The court distinguished *Hicks v. United States*, 730 A.2d 657, 659 (D.C. 1999) ("the lawful process which would have ended in the inevitable discovery [must] have . . . commenced before the constitutionally invalid seizure."). The government had argued that this statement is dictum. The DCCA did not resolve that question. Instead, it noted that the government had satisfied *Hicks's* prior-commencement requirement in this case because the investigation had begun, and the investigators eventually would have subpoenaed the call records for defendant's cell phone. The court observed that "in many jurisdictions it is not deemed necessary to establish that at the time of the search in question the government was actively pursuing the lawful process that would have led inevitably to discovery of the evidence."

SEARCH AND SEIZURE – SEARCH INCIDENT TO ARREST

Birchfield v. North Dakota, 136 S. Ct. 2160 (June 23, 2016).

The Supreme Court upheld state laws that criminalize the refusal to submit to breath testing for alcohol intoxication as not violative of the Fourth Amendment when the testing is conducted as part of a search incident to arrest for DUI. However, state laws that criminalize the refusal to submit to a blood test in those same circumstances violate the Fourth Amendment. Each state has enacted "implied consent" laws. When using a state's roads, you are deemed to have consented to testing for drug or alcohol intoxication when suspected of DUI. However, some drivers refuse the tests, so some states have passed laws criminalizing the refusal of testing conducted incident to an arrest for DUI. The Court found that breath tests conducted incident to an arrest for DUI are not unreasonable searches because they are not especially invasive, provide only one piece of information (the concentration of alcohol in the driver's breath), and the police cannot retain samples from the testing. Blood tests, on the other hand, are "significantly more intrusive" than breath tests, provide police with much more information than a breath test, and the police can retain the samples.

United States v. Lewis (David), No. 13-CO-1456, 2016 WL 5539892 (D.C. Sept. 29, 2016) (en banc).

Ruling 5 to 3, the en banc DCCA reversed the trial court's order of suppression. Applying *Arizona v. Gant*, 556 U.S. 332, 351 (2009), the majority held

that a *Gant* vehicle search incident to the arrest of a vehicle's occupant can precede the occupant's arrest. "[A] *Gant* evidence search is lawful if (a) the police have probable cause to arrest the suspect for an offense; (b) the suspect recently occupied a vehicle; (c) the police have reasonable, articulable suspicion to believe that the vehicle contains evidence of the offense; (d) at the time of the search, the police have not released the suspect or issued the suspect a citation for the offense; and (e) the suspect's formal arrest for the offense follows quickly on the heels of the search."

The police conducted a valid traffic stop of Lewis's car, placed Lewis in handcuffs, and planned to arrest him for driving without a permit. Lewis's passenger, Brittany Gibbs, claimed ownership of an open container of alcohol that was in plain view in the car. Despite her admitted POCA violation, the police planned to allow Gibbs to leave. However, they first searched the car for additional evidence of POCA. During that search, the police found drugs, a handgun, and ammunition. The police then arrested Lewis and Gibbs. The en banc court rejected Gibbs's arguments that a *Gant* search incident to arrest cannot precede an arrest, and a *Gant* search is invalid if, at the time of the search, the police do not subjectively intend to make an arrest. The DCCA noted that it has repeatedly held that the police can search an individual incident to an arrest even before the arrest. *See Millet v. United States*, 977 A.2d 932, 935 (D.C. 2009). The court applied that same rule to *Gant* searches. The court also concluded that, as in other Fourth Amendment contexts, an officer's subjective motivation is irrelevant. If the police objectively satisfy the five factors listed above, a *Gant* search is permissible even if the police initially did not intend to make an arrest.

SEARCH AND SEIZURE – SEARCH WARRANT

In re: Grand Jury Witness G.B., 139 A.3d 885 (D.C. May 26, 2016).

The DCCA affirmed the denial of a *victim's* motion to quash a search warrant for the victim's buccal swab. The uncooperative victim got stabbed, but provided an apparently false account of the incident. However, a witness implicated a suspect. Police found a bloody knife in the suspect's car and sought a warrant for the victim's buccal swab to prove it was his blood on the knife. In upholding the warrant against the motion to quash, the DCCA addressed multiple issues.

Super Ct. Crim. R. 41(b) permitted issuance of a buccal swab warrant. That rule authorizes searches and seizure *inter alia* of "property that constitutes evidence of the commission of a criminal offense." "Rule 41 (b)'s reference to 'evidence of the commission of a criminal offense' includes within its scope 'evidence that might lead to other evidence.'" So, "if there is reason to believe that the evidence sought will aid in apprehending or convicting a criminal, a warrant to obtain it may properly issue, even if it is expected that the evidence will be corroborative of evidence law enforcement officials already have." Furthermore, the term "property" includes

"tangible objects," which includes saliva. Rule 41, consistent with the Fourth Amendment, permits the brief seizure of a person incident to a valid search warrant for the person's saliva. "[A] warrant to search a person for evidence of a crime 'implicitly carries with it the limited authority' to seize and detain the person while the search is conducted."

There was probable cause to believe that the search would produce evidence. The government was not required to adduce probable cause that the victim committed an offense. Rather, it was sufficient that there was probable cause that a match of the victim to the recovered blood would aid in a prosecution of the suspect. In a footnote, however, the DCCA suggested that it was "inclined to agree" that "before a warrant issues to permit a bodily search of a third party who is not a suspect, the third party "must be given notice and an opportunity to be heard at an adversary hearing," which the victim had in this case in the context of his motion to quash.

The search warrant was reasonable. "[F]or the proposed search to be reasonable, the government "must . . . show . . . a clear indication that material evidence relevant to the question of the suspect's guilt will be found[.]" Here, that showing was met because the "police have (suspected) blood evidence, from the suspect's rental vehicle, to which victim G.B.'s DNA can be compared, as well as reason to believe, based on the statement of [the witness], that the suspect came in contact with [the victim's] blood at the crime scene."

In a footnote, the DCCA noted that the evidence recovered from the suspect's car was merely "'suspected' blood." If the substance turned out not to be blood, then "there may be no reason to believe that DNA can be extracted from that evidence for comparison to [the victim's] DNA." But, here, "the affidavit establishes sufficient reason to believe that the 'suspected' blood is blood" because the witness saw the suspect slash the victim with a knife and saw the victim try to clean up blood before fleeing." Therefore, the "affidavit furnishes probable cause to believe that the swabs from the vehicle contain DNA to which [the victim's] buccal swab DNA can be compared."

Additionally, the manner of the search was reasonable because a buccal swab is not invasive. "Finally, a factor that weighs in favor of the reasonableness of the search the government seeks to conduct is the limitations the trial court placed on further use of the fruits of the search," which prevented the government from making use of the victim's profile in other cases and requiring destruction of the sample at the conclusion of the case. Although the DCCA did not hold that such restrictions were mandatory, it recognized that the restrictions contributed to a finding of reasonableness.

SEARCH AND SEIZURE – SEIZURE

Sharp v. United States, 132 A.3d 161 (D.C. Feb. 18, 2016).

The DCCA reversed convictions for possession of narcotics and PPW(a) by finding the evidence should have been suppressed. Three officers heard a scream or commotion in a parking lot. As the officers entered the lot, the people causing the commotion walked away, and the officers noticed the defendant sitting in his car. The defendant was looking at something in his hand and gave nervous and non-responsive answers when asked what he was doing. The officers requested consent to search the car, and the defendant declined. The officers then asked the defendant to step out of the vehicle. Once out of the car, the defendant admitted being in possession of brass knuckles, which led to a search that recovered additional contraband.

The DCCA found that the request to exit the vehicle was a seizure that was not supported by reasonable suspicion. "Courts routinely treat a request to step out of a car as interchangeable with an order or direction to get out of a car – a fact that strongly suggests that a reasonable person would likewise believe that an officer who asked him to get out of a car was not giving him a realistic right to say no." The DCCA qualified this assertion by then acknowledging it was not holding "that a police officer seizes a car's occupant in every instance where he asks him to get out of the vehicle." But, here, "in the absence of any sign that a reasonable person in these circumstances would believe the officer was giving him a genuine choice to decline the request," the police conveyed a message that compliance was required. One important supporting factor was that the officer's request to exit the car followed immediately on the heels of the defendant's refusal to consent to a search of the car.

Spencer v. United States, 132 A.3d 1163 (D.C. Mar. 3, 2016).

The DCCA affirmed three co-defendant's murder and related convictions against multiple challenges. Wilson challenged the admission of his statement to the police on *Miranda* and Fourth Amendment grounds. Police set up a meeting with Wilson's girlfriend in Virginia, and Wilson appeared at the meeting unexpectedly. Police then told Wilson, "We need you to come with us." Police transported Wilson and his girlfriend to the station separately, then left them in the lobby together, telling them, "[T]hey needed to wait there." When the detective came to get Wilson from the lobby, he explicitly told Wilson that he was not under arrest, then brought him to an interrogation room and closed the door. During the

interview, the detective told Wilson not to play games and, "[I]f you want to walk out of here, you got to be honest." The detective also warned that the girlfriend was "in it too" and risked getting a "murder beef." Wilson asked if he was going to be taken to D.C., and the detective answered that it depended on what happened after the interview. Wilson was permitted to use his cell phone, was never handcuffed, and was told again that he was not under arrest. After Wilson implicated himself, he was allowed to leave. Again weighing all of the factors, the DCCA found that Wilson was neither seized in violation of the Fourth Amendment or in custody under *Miranda*. Again important to the court was the absence of physical restraint, the absence of the use of any weapons, and that Wilson had himself voluntarily inserted himself into the investigation, perhaps "to support his girlfriend." Under the totality of the circumstances, "a casual statement like, 'if you want to walk out of here, you got to be honest' is better interpreted as a prompting of honesty from Wilson with the idea that if he was honest he would better his chances of avoiding charges."

SEARCH AND SEIZURE – TERRY STOP/FRISK

Carpenter v. United States, 144 A.3d 1141 (D.C. Aug. 11, 2016).

The DCCA affirmed defendants' convictions. Defendants were arrested in connection with a narcotics buy/bust operation and charged with distribution of heroin. The court rejected Carpenter's argument that the "lookout was too generic" to support *Terry* stopping him in connection with the buy/bust. The police stopped Carpenter within a minute of the lookout, and defendants were the only people in the area at that time. "Thus, there was the close spatial and temporal proximity between the reported crime and seizure that can justify a *Terry* stop notwithstanding an imperfect description."

In re: Z.B., 131 A.3d 351 (D.C. Feb. 4, 2016).

The DCCA upheld the respondent's robbery adjudication, and found that the stop was based on reasonable suspicion. The respondent was wearing clothing and found in an area consistent with a lookout for a robbery that had just occurred. That he was shorter than the height given in the lookout was not controlling because "[a]n imperfect description, coupled with close spatial and temporal proximity between the reported crime and seizure, justifies a *Terry* stop."

Pridgen v. United States, 134 A.3d 297 (D.C. Apr. 7, 2016).

The DCCA upheld the defendant's gun convictions against a Fourth Amendment challenge. MPD GRU officers encountered the defendant in a high gun area on New Year's Eve. The officers were wearing tactical vests marked "police," shone a flashlight on the defendant, and twice called out "do you have a gun." The defendant fled, holding his side in a manner that the experienced GRU officer recognized was consistent with possessing a firearm. The defendant entered an apartment building, dropped a cell phone, and didn't try to recover it. Police caught up to him, and ordered him to surrender at gunpoint. He did not comply, so the officers forced him to the ground, where they recovered a gun. The DCCA first held that the defendant was not seized until he was physically forced to the ground. At that point, the officers had reasonable suspicion that he was armed and dangerous. However, citing the dissent in *Illinois v. Wardlaw*, the DCCA declined to rely on the rationale that the defendant had fled from police in a high crime area. Rather, the court found reasonable suspicion by relying on the defendant's subsequent (1) holding his side in a manner consistent with a gunman; (2) failing to go back for his cell phone; and (3) refusing to comply with an order once it was obvious it was police who had pursued him and were ordering him to stop.

SELF-DEFENSE

Bassil v. United States, No. 13-CF-1133, 2016 WL 5860625 (D.C. Oct. 6, 2016).

The DCCA affirmed defendant's conviction for second-degree murder and found that the government had presented sufficient evidence disproving defendant's self-defense claim "even though defendant provided the sole eyewitness account of the stabbing." During her trial, defendant testified that she stabbed the decedent in self-defense because the decedent had assaulted her and she was "scared." Defendant admitted, however, that the decedent was not threatening her when she stabbed him. In addition, the government presented evidence that defendant had a strong motive to kill the decedent, she made inconsistent statements about the stabbing, immediately after the stabbing she fled, she had no injuries (undermining her claim that the decedent had assaulted her immediately before the stabbing), and the jury must have concluded that defendant's trial testimony was false, which gave rise to an inference of consciousness of guilt. Although "a jury may not use the disbelief of a witness's testimony as exclusive proof of a fact of an opposite nature or tendency," "disbelief of a defendant's testimony can, in limited circumstances, give rise to a positive inference of guilt." Here, that inference, along with the government's other trial evidence, sufficiently disproved defendant's self-defense claim.

Brown (Edward) v. United States, 139 A.3d 870 (D.C. May 26, 2016).

The DCCA upheld the defendant's ADW conviction, finding instructional error to be harmless. According to one version of the evidence, the defendant struck the victim's head with a hatchet after he discovered her stealing his property. The trial judge instructed the jury on the defense-of-property defense, which permits use of reasonable non-deadly force to prevent such theft. Deadly force is force likely to produce death or serious bodily harm. The defendant asked the judge to instruct the jury that "serious bodily harm" meant the same as it did in the context of the aggravated assault charge, that is "an injury that involves unconsciousness, extreme physical pain, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member, organ or mental faculty or a substantial risk of death." The trial court declined, ruling that the common law definition was not identical to the statutory definition. The DCCA disagreed and found "no reason the degree of serious bodily harm that establishes 'deadly force' and in turn precludes the defense-of-personal-property defense should be quantitatively different from the degree of 'serious bodily injury' that sustains a conviction for aggravated assault." (Thus, in future cases a defendant might argue that he used only non-deadly force even if that force was likely to cause *significant*, but not *serious*, injury.). Given this conclusion, it was error to fail to define this term for the jury. Nonetheless, the error was harmless under any standard of review, given (1) that the defendant pressed a different theory in closing (based on a different rendition of the evidence); and (2) strong evidence that the defendant used force (whether deadly or non-deadly) that was excessive.

SENTENCING - JUVENILES

Montgomery v. Louisiana, 136 S. Ct. 718 (January 26, 2016).

The Court reversed the State Supreme Court and ordered collateral relief for a 17-year-old who murdered a deputy in 1963 and received a mandatory life sentence. The State Supreme Court had denied the defendant's *state* petition for collateral relief on the ground that *Miller v. Alabama* – which barred mandatory life sentences for juveniles – was not retroactive. First, the Court held that it had jurisdiction to review that decision. Where the Court has announced a new rule of substantive law, the federal Constitution requires the states to apply that decision retroactively. (The Court explicitly left open whether States must also retroactively

apply new "watershed rules of procedure"). Second, the Court held that *Miller* was a new substantive rule that, thus, must apply retroactively in federal and state collateral proceedings. In so ruling, the majority described *Miller* expansively: "*Miller*, . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" "Because *Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status.'" Finally, the Court noted that the State could cure the constitutional error without re-sentencing by offering the defendant a parole hearing.

SENTENCING – ENHANCEMENT

Williams v. United States, 137 A.3d 154 (D.C. Apr. 28, 2016) (amended July 7, 2016).

Defendant was convicted of second-degree murder, CDW (prior felon), and offenses committed during release (OCDR). Applying the plain-error standard, and citing *Eady v. United States*, 44 A.3d 257 (D.C. 2012), the court held that the trial court erred in admitting into evidence at trial stipulations concerning defendant's prior felony and release status -- because they related to sentencing enhancements and did not prove elements of the offenses -- and that the errors were plain and obvious under *Eady*. As to the OCDR stipulation, the court noted that once the parties have stipulated to the defendant's release status, it is "unnecessary to advise the jury" of that fact. The court affirmed defendant's convictions, however, because the evidence against defendant was overwhelming and the court had given limiting instructions to the jury concerning its use of the stipulations.

SPEEDY TRIAL – CONSTITUTIONAL

Betterman v. Montana, 136 S. Ct. 1609 (May 19, 2016).

The Court unanimously held that the constitutional right to a speedy trial attaches at arrest or indictment and "detaches upon conviction." Thus the Sixth Amendment does not support a claim that the defendant was deprived of a right to a speedy sentencing hearing. So the 14-month delay in this case between plea and

sentencing did not violate the Sixth Amendment. Several reasons supported this result. First, the clause itself refers to the right of a speedy "trial" for the "accused." Second, the clause's history and jurisprudence showed that it "implements" the presumption of innocence, which "loses force upon conviction." Third, the "sole remedy" for a speedy trial violation – dismissal of the charges – does not fit the sentencing-delay context because it would ordinarily provide a guilty defendant "an unjustified windfall." Fourth, some sentencing delays are reasonable, for example because of the time required to prepare a presentence report. The Court left open the possibility that excessive delays could be considered under the Due Process clause, as well as under statutes and procedural rules, such as Fed. R. Crim. P. 32(b)(1). (The Court's opinion did not address the contours of any Due Process clause claim, but two concurrences addressed that issue.) The Court also left open whether the Speedy Trial Clause would apply "to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined" (e.g., capital cases). The Court also explicitly did not decide "whether the right reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence."

STANDARD OF REVIEW -- PLAIN ERROR

Muir v. District of Columbia, 129 A.3d 265 (D.C. Jan. 14, 2016).

The DCCA vacated a conviction for operating while impaired because of plain instructional error. The trial judge instructed the jury, without objection, that it could convict if the defendant was impaired "in any way." After trial, but before this appeal, the DCCA resolved prior uncertainty in the law and held that OWI requires a finding of intoxication to "an appreciable degree." In this case, the DCCA applied the Supreme Court's holding in *Henderson v. United States*, 133 S. Ct. 1121 (2013), that the obviousness of the error is judged as of the time of appellate review. Thus, the instructional error was obvious. The error was also prejudicial on the facts of this case, so reversal was required.

STATEMENTS OF DEFENDANT – CUSTODIAL INTERROGATION

Robinson v. United States, 142 A.3d 565 (D.C. July 14, 2016).

Robinson entered a plea of guilty to various gun charges. The primary evidence against Robinson consisted of two (substantially similar) statements he made to the police: one in May 2012, and one in November 2012. On appeal, Robinson argued that the May statement should have been suppressed because the

detective who interviewed him deliberately omitted one of the questions on the PD-47 "Advice of Rights" Form when reading it to him (the question concerned whether Robinson would agree to answer questions without a lawyer present). The DCCA rejected the government's argument that a valid waiver could be inferred from the record, which included that the detective accurately read the complete *Miranda* warning to Robinson, Robinson responded that he understood those rights, and Robinson reviewed and signed the PD-47. The Court held that the deliberate decision to omit reading one of the questions on the back of the PD-47 meant that the government could not show that Robinson both understood and intentionally waived his right to have counsel present during questioning. Robinson also argued that his unwarned November statement should have been suppressed because he was in custody when he made it. The Court rejected that argument, concluding that although Robinson was interviewed in a police station and at all times accompanied by officers, he was not in custody because he was not restrained, and he was expressly told that he was not.

Spencer v. United States, 132 A.3d 1163 (D.C. Mar. 3, 2016).

The DCCA affirmed three co-defendants' murder and related convictions against multiple challenges. Spencer challenged the admissibility of his statement to police on *Miranda* grounds. Police executed a search warrant at Spencer's home and told Spencer to wait in the living room. Spencer asked what was going on, and the detective replied, "We'll gladly explain that to you at the [station]." Spencer was not handcuffed, but was frisked and "escorted to the police station" in the back of a police cruiser. At the station, Spencer was treated cordially and was told that he was not under arrest. He was not restrained, but he was also not left alone: he was escorted to the bathroom and outside for a cigarette. Weighing this totality of the circumstances, the DCCA found Spencer was not in custody within the meaning of *Miranda*. The court emphasized that "[l]ack of physical restraint can create strong indicia of lack of custody."

Defendant Wilson challenged the admission of his statement to the police on *Miranda* and Fourth Amendment grounds. Police set up a meeting with Wilson's girlfriend in Virginia, and Wilson appeared at the meeting unexpectedly. Police then told Wilson, "We need you to come with us." Police transported Wilson and his girlfriend to the station separately, then left them in the lobby together, telling them, "[T]hey needed to wait there." When the detective came to get Wilson from the lobby, he explicitly told Wilson that he was not under arrest, then brought him to an interrogation room and closed the door. During the interview, the detective told Wilson not to play games and, "[I]f you want to walk out of here, you got to be

honest." The detective also warned that the girlfriend was "in it too" and risked getting a "murder beef." Wilson asked if he was going to be taken to D.C., and the detective answered that it depended on what happened after the interview. Wilson was permitted to use his cell phone, was never handcuffed, and was told again that he was not under arrest. After Wilson implicated himself, he was allowed to leave. Again weighing all of the factors, the DCCA found that Wilson was neither seized in violation of the Fourth Amendment or in custody under *Miranda*. Again important to the court was the absence of physical restraint, the absence of the use of any weapons, and that Wilson had himself voluntarily inserted himself into the investigation, perhaps "to support his girlfriend." Under the totality of the circumstances, "a casual statement like, 'if you want to walk out of here, you got to be honest' is better interpreted as a prompting of honesty from Wilson with the idea that if he was honest he would better his chances of avoiding charges."

STATEMENTS OF DEFENDANT – VOLUNTARINESS

Gardner v. United States, 140 A.3d 1172 (D.C. June 23, 2016).

The DCCA found that defendant's statement to the police was voluntary under the Fifth Amendment. Defendant argued that he was detained for 13 hours, without food, and shackled in a cold room before he was interrogated. However, the defendant "was left alone [for a long period] to sleep off his drug-induced high." Once the defendant was awake and sober, he indicated that he wanted to make a statement, executed a Miranda waiver, and the officers did not use "physical or unduly coercive psychological tactics" to obtain his statement.

McCray et al. v. United States, 133 A.3d 205 (D.C. Mar. 10, 2016).

The DCCA affirmed-in-part, reversed-in-part, and remanded-in-part, as to homicide and related convictions against four defendants charged with a conspiracy at Benning Terrace housing complex. A seventeen-year-old defendant's post-arrest, post-*Miranda* admission was voluntary, notwithstanding a detective's suggestion that the defendant's other family members could be arrested or evicted for a weapon recovered at defendant's house, because, under the totality of the circumstances, the defendant was treated politely; he had prior experience with the criminal justice system; he did not appear to be intimidated; and his ultimate admission of involvement in a shooting was not made in response to the threat against his family.

STATEMENTS OF DEFENDANT – WAIVER OF *MIRANDA* RIGHTS

Robinson v. United States, 142 A.3d 565 (D.C. July 14, 2016).

Robinson entered a plea of guilty to various gun charges. The primary evidence against Robinson consisted of two (substantially similar) statements he made to the police: one in May 2012, and one in November 2012. On appeal, Robinson argued that the May statement should have been suppressed because the detective who interviewed him deliberately omitted one of the questions on the PD-47 "Advice of Rights" Form when reading it to him (the question concerned whether Robinson would agree to answer questions without a lawyer present). The court rejected the government's argument that a valid waiver could be inferred from the record, which included that the detective accurately read the complete *Miranda* warning to Robinson, Robinson responded that he understood those rights, and Robinson reviewed and signed the PD-47. The court held that the deliberate decision to omit reading one of the questions on the back of the PD-47 meant that the government could not show that Robinson both understood and intentionally waived his right to have counsel present during questioning. Robinson also argued that his unwarned November statement should have been suppressed because he was in custody when he made it. The court rejected that argument, concluding that although Robinson was interviewed in a police station and at all times accompanied by officers, he was not in custody because he was not restrained, he was expressly told that he was not under arrest, and he was told that he would be able to leave following the interview.

THREATS

High v. United States, 128 A.3d 1017 (D.C. Dec. 24, 2015).

The DCCA reversed a defendant's attempted threats conviction on sufficiency grounds. After being arrested for unlawful entry, the defendant said to an officer, "Take that gun and badge off and I'll fuck you up." The defendant added, "Too bad it's not like the old days where fucking up an officer is a misdemeanor." The DCCA concluded that an "ordinary hearer" would not think that these words conveyed fear of imminent serious bodily harm. Instead, these statements "are most aptly described as an expression of exasperation or resignation over the fact that defendant had just been arrested." Specifically, the conditional nature of the statements indicated defendant's "appreciation that he is constrained by the officer's status and potential criminal penalties" from actually harming the officer. Thus, this was merely a "feisty lament." Nor was the context of an arrest enough to make the facially unthreatening language objectively threatening. Rather, the defendant spoke in a conversational tone while handcuffed and surrounded by officers.

Lewis (Mark) v. United States, 138 A.3d 1188 (D.C. May 12, 2016).

The DCCA affirmed the defendant's convictions for second-degree theft and attempted threats in this DV case. The complainant left the defendant in her bedroom while she watched TV. After he left, she saw that her bed was ransacked and that $736 was missing from her wallet, which she had hidden under her pillow. The defendant had seen that the complainant had money when they got carryout the night before. When the complainant called the defendant to confront him, he threatened to "smack the shit" out of her and "get [her] fucked up."

Addressing the threats charge first, the DCCA held that the government need only prove that the words convey a threat of "bodily injury," not a threat of "serious bodily injury," as some earlier case law had suggested. (This decision addresses only the *actus reus* prong of the threats statute; the question of the correct *mens rea* is still pending before the *en banc* court in *Carrell*.) The court reached this conclusion by observing that the statute itself (D.C. Code § 22-407) referred to threats to do "bodily harm or injury" and does not include the word "serious." It "is a well-established principle that the 'definition of the elements of a criminal offense is entrusted to the legislature.'" Furthermore, the term "serious bodily injury," as used in the aggravated assault context, is ill-fitted to categorizing the seriousness of threats, as demonstrated by the words used in this case.

UNLAWFUL ENTRY

Frey v. United States,137 A.3d 1000 (D.C. May 5, 2016).

The DCCA vacated the defendant's conviction for unlawful entry, holding that the defendant was entitled to a jury trial. D.C. Code § 22-3302(a) punishes unlawful entry in a private building with a maximum term of imprisonment of 180 days. No jury trial is required. D.C. Code § 22-3302(b) punishes unlawful entry in a public building with a maximum term of imprisonment of 6 months, which triggers a statutory right to a jury trial. Here, the defendant was located in a non-public area of the Library of Congress after closing hours. The trial court declined the defendant's jury trial demand. The DCCA reversed that decision. All parties agreed that the Library of Congress is a public building, so the DCCA did not have occasion to supply a definition of that term.

Rather, the court addressed the question of whether the private UE statute could be used to prosecute without a jury either (1) entry into a private area of a public building or (2) entry into a public building after closing time. The Court found a jury trial was required in either situation. First, "subsection (a) prohibits unlawful entry into a private building or a part of a private building, and subsection (b) prohibits unlawful entry into a public building or a part of a public building." In

so ruling, the DCCA rejected the government's argument that the jury trial right was intended to be limited to protestors acting in what would be considered a public space under the First Amendment. The court held that it "must adhere to the broader language the Council chose, and . . . may not artificially limit the statute to the particular circumstances that gave rise to the Council's concern." Similarly, the statute did not contain explicit temporal limitations, so the court refused to read in any such limitations by implication. Therefore, "a defendant charged with unlawfully entering a public building, or any part of a public building, has a right to a jury trial even if the building or part thereof was closed to the public at the time of the entry."

VICTIMS OF VIOLENT CRIME COMPENSATION FUND (VVCCF)

Ruffin v. United States, 135 A.3d 799 (D.C. April 14, 2016).

The DCCA upheld the denial of the defendant's motion for a certificate of innocence and ordered the return of the defendant's VVCCF contribution. The defendant had earlier been charged with burglary, APO, and threats based on his actions towards police after being found in an alley after a reported burglary. He was acquitted of burglary but convicted of the other offenses. But, in an earlier published appellate decision, those convictions were vacated based on findings that his conduct was insufficient to constitute either offense. The defendant then sought sealing of his records, a certificate of innocence, and return of his VVCCF assessment. The trial court denied all the requests, finding that the defendant had not shown that he was actually innocent of the burglary, despite the acquittal, and finding that it lacked authority to pass on the other requests. The DCCA agreed in part, but on different grounds. First, a Superior Court judge has authority to issue a certificate of actual innocence under D.C. Code § 2-422 or 28 U.S.C. § 2513. Nonetheless, both statutes deny certificates of innocence to those whose "misconduct" triggers the prosecution. The DCCA adopted the definition of misconduct supplied by *Gates v. District of Columbia*, 66 F. Supp. 3d 1 (D.D.C. 2014). Applying that standard, the trial court's finding that the defendant had not established his innocence of the underlying burglary meant that the defendant could not show that his misconduct was not the cause of his prosecution and imprisonment for the APO and the threats. Thus, the defendant was not entitled to a certificate of innocence. Nonetheless, the Superior Court has jurisdiction over the VVCCF, and should have refunded the defendant's special assessment.

WEAPONS

Caetano v. Massachusetts, 136 S. Ct. 1027 (March 21, 2016)

In a two-page per curiam decision, the Court summarily reversed the Massachusetts high court, which had upheld the defendant's conviction for possessing a stun gun. The state court had ruled that stun guns were not protected by the Second Amendment, citing three reasons. First, stun guns were not in common use at the time of the enactment of that amendment. But this reasoning was inconsistent with *Heller*, which expressly held that the Second Amendment was not so limited. Second, the state court concluded that stun guns were excluded because they were "dangerous and unusual." But the claim that stun guns were unusual was premised entirely (and erroneously) on their newness. Third, the state court had relied on the absence of evidence that stun guns were "readily adaptable to use in the military." But, again, *Heller* had rejected this as a requirement. Thus, the Court remanded "for further proceedings not inconsistent with [its] opinion."

Washington v. United States, 135 A.3d 325 (D.C. Apr. 7, 2016).

The DCCA upheld the defendant's ADW convictions against a challenge to a jury instruction regarding the definition of the term "imitation firearm." Specifically, the defendant brandished an item that one witness described as a firearm but that other evidence suggested could be a cell phone. The jury then asked, "Can an object that is not a gun (or other truly dangerous weapon) – such as a cell phone – but is brandished in a manner so as to give the impression that it is a dangerous weapon, count as 'an imitation thereof,' as set forth in [the ADW counts]?" The trial court answered that, "An imitation firearm is any object that resembles an actual firearm closely enough that a person observing it in the circumstances would reasonably believe it to be a firearm." The DCCA agreed that the instruction was an accurate statement of existing law and upheld the verdict. But Chief Judge Washington wrote a concurrence arguing that the court should go *en banc* to hold that "an imitation firearm must physically conform to the characteristics commonly attributable to a real firearm," i.e. be a replica firearm of some sort. Judge Fisher concurred separately to defend the existing definition.