BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 98-CF-1821, 98-CF-1871, & 98-CF-1872

WALTER A. BOLANOS, LUIS M. PALACIO, EDGAR A. CRUZ,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

KENNETH L. WAINSTEIN, United States Attorney.

JOHN R. FISHER, BARBARA J. VALLIERE,

- MARGARET A. SEWELL, IL BAR #6243855
 Assistant United States Attorneys.
- * Counsel for Oral Argument

555 Fourth Street, N.W., Room 8104 Washington, D.C. 20530 (202) 514-7088

Crim. No. F-2764-98, F-2902-98, & F-2827-91

INDEX

	<u> </u>	1=
COUNTERST	ATEMENT OF THE CASE	1
THE	TRIAL	3
	The Government's Evidence	3
	Jose Mejia	5
	Omar Gonzalez	8
	David Rodriguez	9
	The Defense Evidence	11
	The Government's Rebuttal Evidence	12
ARGUMENT		12
I.	The Trial Court Did Not Plainly Err in Failing to Dismiss the Indictment for Lack of Jurisdiction	
		12
	A. Background	13
	B. Standard of Review	16
	C. Discussion	17
II.	The Trial Court Did Not Err in Denying Appellant Cruz's Motion to Suppress Identification	20
	A. The Hearing	21
	1. Standard of Review and Applicable Legal Principles	24
	2. Discussion	25

	Pag	<u>16</u>
	There Was Sufficient Evidence To Support Appellants' Convictions	29
1	A. Standard of Review	30
1	B. There Was Sufficient Evidence of "Serious Bodily Injury" to Support Appellants AAWA Convictions	31
	1. Mejia	33
	2. Gonzalez	40
	3. Rodriquez	42
(C. There Was Sufficient Evidence To Support Palacio's Conviction for Aiding and Abetting .	43
. 1	D. There was Sufficient Identification Evidence To Support Cruz's Conviction for Assault with A Deadly Weapon	45
	The Trial Court Did Not Plainly Err When it Instructed the Jury on AAWA	47
i	A. Background	47
1	B. Standard of Review	48
	C. Discussion	49
CONCLUSION	·	50

TABLE OF CASES

		- 4	ge
	Allen v. United States, 659 A.2d 548 (D.C. 1994)	•	16
	Bardoff v. United States, 628 A.2d 86 (D.C. 1993)		43
*	Beaner v. United States, 845 A.2d 525 (D.C. 2004)		29
	Beatty v. United States, 544 A.2d 699 (D.C. 1988)		27
	<pre>Carter v. United States, 826 A.2d 300 (D.C. 2003)</pre>		48
	<pre>Choco v. United States, 383 A.2d 333 (D.C. 1978)</pre>	•	18
	Clark v. United States, 755 A.2d 1026 (D.C. 2000)		28
	Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)		18
	Colorado v. Sanchez, 751 P.2d 1013 (Colo. Ct. App. 1988)	•	42
	<u>Comber v. United States</u> , 584 A.2d 26 (D.C. 1990) (en banc)		15
	Commonwealth v. Bruneau, 386 N.E.2d 29 (Mass. App. 1979)	•	39
	Curry v. United States, 520 A.2d 255 (D.C. 1987)	•	30
*	Gathy v. United States, 754 A.2d 912 (D.C. 2000) 30	6,	4 0
	<u>Gibson v. United States</u> , 792 A.2d 1059 (D.C. 2002), <u>cert. denied</u> , 536 U.S. 972 (2002)		30
	<u>Griffin v. United States</u> , 502 U.S. 46 (1992) 30	6,	37
	Halsering v. State, 474 So.2d 196 (Ala. Crim. App. 1985)		34
	<u>Hanna v. United States</u> , 666 A.2d 845 (D.C. 1995)		30
	Hayward v. United States, 612 A.2d 224 (D.C. 1992)		49

^{*} Cases chiefly relied upon are marked by an asterisk.

	<u> </u>	age
	Hill (Kevin) v. United States, 541 A.2d 1285 (D.C. 1988) .	46
	Hill (Reginald) v. United States, 664 A.2d 347 (D.C. 1995)	25
	Howard v. United States, 656 A.2d 1106 (D.C. 1995)	15
*	<u>Hudson v. United States</u> , 790 A.2d 531 (D.C. 2002)	34
*	<u>Hunter v. United States</u> , 590 A.2d 1048 (D.C. 1991)	19
	<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979)	39
	<u>Jennings v. United States</u> , 431 A.2d 552 (D.C. 1981), <u>cert. denied</u> , 457 U.S. 1135 (1982)	30
	<u>Johnson (Danny Lee) v. United States</u> , 812 A.2d 234 (D.C. 2002)	48
	<u>Lewis v. United States</u> , 767 A.2d 219 (D.C. 2001)	30
	<u>Lockhart v. Nelson</u> , 488 U.S. 33 (1988)	47
	<u>Lucas v. United States</u> , 522 A.2d 876 (D.C. 1987)	20
*	Lyons v. United States, 833 A.2d 481 (D.C. 2003) . 24, 27,	46
	Malik v. State, 953 S.W.2d 234 (Tex. Crim. App. 1997)	39
	McClain v. United States, 460 A.2d 562 (D.C. 1983)	26
*	McCoy v. United States, 781 A.2d 765 (D.C. 2001) 26,	27
	Moore v. United States, 757 A.2d 78 (2000)	30
*	Nixon v. United States, 730 A.2d 145 (D.C. 1999) . 32, 40,	43
	Olano v. United States, 507 U.S. 725 (1993)	16
	Partlow v. United States, 673 A.2d 642 (D.C. 1996)	14
	Pearsall v. United States, 812 A.2d 953 (D.C. 2002)	18

	<u> </u>	age
	People v. Irwin, 774 N.Y.S.2d 237 (N.Y. App. Div. 2004)	34
	People v. Rodriguez, 769 N.Y.S.2d 257 (N.Y. App. Div. 2003)	34
*	Price v. United States, 813 A.2d 169 (D.C. 2002) 44,	45
*	Riddick v. United States, 806 A.2d 631 (D.C. 2002) 32,	36
	Robinson (Ronald) v. United States, 797 A.2d 698 (D.C. 2002)	46
*	<u>Smith (Alexander) v. United States</u> , 801 A.2d 958 (D.C. 2002)	49
	Smith (Diane) v. United States, 684 A.2d 307 (D.C. 1996) .	44
	<u>Thomas v. United States</u> , 557 A.2d 599 (D.C. 1989) (en banc)	47
	<u>Turner v. United States</u> , 622 A.2d 667 (D.C. 1993)	25
	<u>United States v. Cotton</u> , 535 U.S. 625 (2002)	48
	<u>United States v. Cruz</u> , 127 F.3d 791 (9th Cir. 1992)	38
	<u>United States v. Hobbs</u> , 594 A.2d 66 (D.C. 1991)	14
	<u>United States v. Jimenez Recio</u> , 258 F.3d 1069 (9 th Cir. 2000)	38
	United States v. Jimenez Recio, 537 U.S. 270 (2003) 37,	38
	<u>United States v. Zanghi</u> , 189 F.3d 71 (1st Cir. 1999)	39
	Valentine v. United States, 394 A.2d 1374 (D.C. 1978)	29
	Wilson v. United States, 785 A.2d 321 (D.C. 2001) 16,	41

OTHER REFERENCES

																	P	age	₹
D.C.	Code	§	16-2301	(3)														14	1
D.C.	Code	§	16-2302	•				•										14	1
D.C.	Code	§	22-404.	01												4	47,	5()
D.C.	Code	§	22-501															. :	L
D.C.	Code	§	22-503					•										. 2	2
D.C.	Code	§	22-504.	1					•		•		•	•			1,	4	7
D.C.	Code	§	22-2403															. 2	2
D.C.	Code	§	22-3202														1	, 2	2
D.C.	Code	§	22-3204	•														. :	L
D.C.	Code	ş	22-4104	(7)										3	32 .	3	36,	4()

ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented:

- I. Whether the trial court plainly erred when it failed to dismiss the indictment for lack of jurisdiction over juveniles Bolanos and Palacio where the government properly charged them with assault with intent to murder while armed, a crime which is properly brought in Superior Court, and where appellants never demonstrated that count was defective.
- II. Whether the trial court erred in denying Cruz's motion to suppress two of the victims' photo identifications of him, where the evidence showed that the array was not suggestive because the victims were shown 11 photographs of similar-looking males of a similar age group, and where, in any event, there was ample evidence that the identifications were reliable.
- III. Whether there was sufficient evidence to support (1) appellants' convictions for aggravated assault while armed, particularly that the three victims suffered serious bodily injury, where the evidence showed that after each man was stabbed they (a) were taken to the hospital in an ambulance, (b) underwent procedures to repair life-threatening injuries, (c) suffered extreme pain which required medication, and (d) carried scars from their stab wounds which were still present at the time of trial;

- (2) Palacio's conviction for assault with a dangerous weapon for aiding and abetting Cruz's stabbing of Gonzalez, where the evidence showed that Palacio instigated the confrontation between the two rival gangs and was the first to pull his knife; and (3) Cruz's conviction for stabbing Mejia and Gonzalez, where both men reliably identified Cruz as one of their assailants.
- IV. Whether the trial court plainly erred when it instructed the jury that there were two possible grounds to convict Cruz for aggravated assault while armed even though the indictment set forth only one, where the entire statute was plainly cited in the indictment thereby giving Cruz notice of the charges brought against him.

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 98-CF-1821, 98-CF-1871, & 98-CF-1872

WALTER A. BOLANOS, LUIS M. PALACIO, EDGAR A. CRUZ,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On June 9, 1998, an indictment was filed charging appellants Walter Bolanos, Luis Palacio, Edgar Cruz, and co-defendant Uvic Gutierrez, with various crimes for stabbing three separate victims, Jose Mejia, Omar Gonzalez, and David Rodriguez. Specifically, all of the appellants were charged with three counts each of assault with intent to kill while armed (AWIKWA) in violation of D.C. Code §§ 22-501 and -3202, three counts each of aggravated assault while armed (AAWA) in violation of D.C. Code §§ 22-504.1 and -3202, and one count each of carrying a dangerous weapon in violation of D.C.

Code § 22-3204 (R. 8). 1/ Bolanos, Palacio, and Gutierrez were also charged with three counts each of assault with intent to murder while armed (AWIMWA), in violation of D.C. Code §§ 22-503, -2403, and -3202 (R. 8). Prior to trial, the court appointed new counsel for Gutierrez and severed his case (7/17/98 Tr. 6).

Appellants' case proceeded to trial by jury before Judge Stephen G. Milliken on July 17, 1998, and concluded on July 28, 1998, with the following guilty verdicts: Bolanos, two counts of assault with a dangerous weapon (ADW) as a lesser-included offense of both AWIMWA and AWIKWA (both as to Mejia), AAWA (as to Mejia), and carrying a dangerous weapon (R. 32); Palacio, two counts of ADW as the lesser-included offense of both AWIMWA and AWIKWA (both as to Rodriguez), ADW as a lesser-included offense of AWIKWA (as to Gonzalez), AAWA (as to Rodriguez), and carrying a dangerous weapon (Palacio R. 12); and Cruz, two counts of ADW as a lesser-included

There are three volumes of the record on appeal, one for each appellant. Except where noted herein, the record material cited will be that of Walter Bolanos, referred to as "R. __." The record of Omar Gonzalez and David Rodriguez will be referred to as "Gonzalez R. __" and "Rodriguez R. __," respectively. " __ Tr. __" refers to the transcript (at the indicated date and page) of the trial. D.C. Code citations are to the 1981 edition and its supplements.

Palacio's verdict form mistakenly states that it is Bolanos who is guilty of carrying a dangerous weapon (Palacio R. 22). The trial court corrected this typographical error when announcing the verdict (7/27/98 Tr. 159).

offense of AWIKWA (as to Mejia and Gonzalez), two counts of AAWA (as to Mejia and Gonzalez), and carrying a dangerous weapon (Cruz R. 22).

Appellants were sentenced on November 16, 1998 (11/16/98 Tr. 30-32). Bolanos was sentenced to two terms of 40 months to 10 years for the ADW charges, 9-27 years for the AAWA charge, and 20 months to 5 years for the carrying a dangerous weapon charge, the sentences to run concurrently (11/16/98 Tr. 32; R. 37). Palacio was sentenced to three terms of 40 months to 10 years for the ADW charges, 7-21 years for the AAWA charges, and 20 months to 5 years for carrying a dangerous weapon, the sentences to run concurrently (11/16/98 Tr. 31; Palacio R. 22). Cruz was sentenced to two terms of 40 months to 10 years for the ADW charges, two terms of 10-30 years for the AAWA charges, and 20 months to 5 years for carrying a dangerous weapon, all sentences to run concurrently (11/16/98 Tr. 30; Cruz R. 27). Bolanos, Palacio, and Cruz filed timely notices of appeal on December 2, 1998, December 16, 1998, and December 11, 1998, respectively (R. 1; Palacio R. 23; Cruz R. 28).

THE TRIAL

The Government's Evidence

On April 14, 1998, at approximately 3:50 p.m., Jose Mejia, Omar Gonzalez, David Rodriguez and their friends, Walter Coreas, Alex Arevalo and Martin Salmeron, left Bell Multicultural School

("Bell"), in Washington, D.C., where they attended high school (7/20/98 Tr. 54). The group of six friends called themselves the Graffiti Kings because some members of the group liked to "tag" -- i.e., write their nicknames followed by "Graffiti Kings" or "GK" -- on the walls of the school (7/20/98 Tr. 58-59, 61). On that afternoon, Mejia and Coreas were on their way to work, and the others were going to the park to play basketball (7/20/98 Tr. 60).

As they crossed the black top from Bell towards Lincoln Middle School ("Lincoln"), the group of six encountered a group of approximately 15 men, including appellants, who were lined up along the fence near the pool (7/20/98 Tr. 61; 7/21/98 Tr. 73). 3/ One member of the group, Luis Palacio, stepped forward to confront the Graffiti Kings saying in Spanish, "if you are looking for a hassle, we can do it right now. Why leave it for later." (7/21/98 Tr. 154; 7/21/98 Tr. 74.) When none of the Graffiti Kings responded to Palacio's challenge, appellants surrounded them and began attacking them (7/21/98 Tr. 76, 155; 7/22/98 Tr. 230). Coreas yelled out that the appellants' group had knives and told his friends to run

Gonzalez, Rodriguez, Arevalo, and Salmeron, had a verbal encounter with some of the group earlier that day (7/21/98 Tr. 63). Specifically, Gonzalez approached Bolanos during the lunch hour and asked whether Bolanos had crossed out his "tag" and Salmeron's "tag" (7/21/98 Tr. 64). Bolanos responded, "if I did [,] what you going to do about it?" (7/21/98 Tr. 64, 143). Gonzalez testified "we just left it like that," and his group left (7/22/98 Tr. 66).

(7/23/98 Tr. 409). Arevalo, Coreas, and Salmeron ran when they saw Palacio pull out a knife (7/22/98 Tr. 356; 7/23/98 Tr. 409; 7/21/98 Tr. 156), but Mejia, Gonzalez, and Rodriguez did not and thus suffered multiple stab wounds during the ensuing fight.

Jose Mejia

Mejia testified that he looked up and saw Bolanos and Cruz coming towards him both armed with knives (7/20/98 Tr. 60). The weapon that Bolanos had in his hand looked like an ice pick, it was long with a brown handle and had a silver blade (7/20/98 Tr. 66). When Mejia started walking backwards with his hands out in front of him to protect himself, he stepped on his friend's foot and fell to the ground (7/20/98 Tr. 66). Bolanos then jumped on top of him and stabbed him in the chest, while Cruz stabbed him in the left shoulder (7/20/98 Tr. 67). Mejia got up and started running, and when he got halfway to Bell, he looked back and saw Bolanos chasing him, about six feet away, with the knife in his hand, saying "I am going to get you. I am going to kill you." (7/20/98 68-69.) When Mejia responded, "I'm not scared, go ahead, come on," Bolanos fled (7/20/98 Tr. 70). Mejia's girlfriend then grabbed him, and they

 $[\]frac{4}{}$ None of the Graffiti Kings had weapons on them (7/20/98 Tr. 127; 7/21/98 Tr. 149; 7/22/98 Tr. 370; 7/23/98 Tr. 416).

Martin Salmeron's cousin, Mauricio, testified that he saw Mejia fall and "lots of guys hit him" (7/23/98 Tr. 437-438).

ran toward the school (7/20/98 Tr. 69, 72).

Mejia had not immediately noticed that he was bleeding, and thought he was just sweating because he was hot (7/20/98 Tr. 64). As he ran, however, he noticed that he was actually soaked with blood (7/20/98 Tr. 64). As he was taken by ambulance to the hospital, Mejia recalled telling a female police officer that Bolanos and Bolanos's friends had stabbed him (7/20/98 Tr. 74-75). He also told the officer that he was in pain and that he could not breathe, and, holding his chest, asked her, "can you get me to the hospital[?]" (7/20/98 Tr. 75). When he arrived at the hospital, he was bleeding, his muscles hurt, his chest was in pain, and he kept reassuring himself "I'm not going to die" (7/20/98 Tr. 80). In addition to the stab wounds to his chest and left shoulder, Mejia also suffered a stab wound to his back (7/20/98 Tr. 74).

Mejia was in the hospital for two nights and three days and had "surgery" the day of the incident (7/20/98 Tr. 81, 98). 6/
Mejia's medical records confirmed that he had "difficulty breathing," that he was "in pain," that he complained of "shortness of breath ["SOB"] related to pain," and that he was placed on

 $[\]underline{6}$ It appears from his medical records that the surgery Mejia was referring to was the insertion of a chest tube.

oxygen (Mejia's Medical Records at 1, 2, 7, 9). The records also stated that three of the wounds were "repaired" with sutures, and that he was given a left side chest tube (Mejia's Medical Records at 4-5). Upon discharge, Mejia was given Percocet for pain, and was instructed not to lift anything greater than ten pounds and to visit the trauma clinic for a follow-up appointment the following week (Mejia's Medical Records at 13). At the time of trial, Mejia had three scars from the stabbing, one on the bottom of his left nipple, one up on his left shoulder, and one on his right back which he displayed to the jury (7/20/98 Tr. 97-98).

Mejia testified that while he was at the hospital the detectives brought Bolanos to him and asked if Bolanos was the person who stabbed him $(7/20/98 \text{ Tr. } 81).^{8/}$ Mejia told the

By stipulation, the court admitted Mejia's medical records, and the medical records of Gonzalez and Rodriguez (7/23/98 Tr. 400). Bolanos has supplemented the appellate record with Mejia's medical records, and Cruz has supplemented the appellate record Rodriguez's medical records. Both sets of records have been given page numbers, and will be referred to by appellee as "Mejia's Medical Records at ____" and "Rodriguez's Medical Records at ____." The government's motion to supplement the record with the medical records of Gonzalez, which will be referred to as "Gonzalez's Medical Records at .."

B/ Detective Trevor Hewick testified that he went to the hospital on April 15, 1998, to speak with all three victims and check on their condition (7/22/98 Tr. 291). The victims could talk although they were on medication and had tubes in them (7/22/98 Tr. 291). Despite the medication, Detective Hewick "could see that they were still in pain" (7/22/98 Tr. 292).

detectives that "there was no doubt in my mind that he was one of them" (7/20/98 Tr. 81). A few days later, the detectives brought him a group of photographs, and Mejia identified the photo of Cruz the person who stabbed him in the shoulder (7/20/98 Tr. 93).

Omar Gonzalez

Gonzalez testified that he was walking with his friends towards 16th Street when "some of [appellants] just came out" (7/21/98 Tr. 74). Gonzalez heard someone who he thought was Palacio say, "just get the beef on over with and go ahead with the bullshit, get it over with" (7/21/98 Tr. 74). None of Graffiti Kings responded to Palacio's comment (7/21/98 Tr. 76). Gonzalez recalled that one of his friends yelled "knives" and everybody started running (7/21/98 Tr. 76). Gonzalez then got stabbed by a three- to four-inch blade knife. He saw the person who stabbed him -- later identified as Cruz -- for 5 to 10 seconds (7/21/98 Tr. 79, 80, 86, 89).

Although Gonzalez was stabbed in the arm, the knife went through his arm, into his stomach, and into his intestines (7/21/98 Tr. 77). He was hospitalized for three days and had surgery to close a puncture wound in his bowel (7/21/98 Tr. 86; Gonzalez's Medical Records at 2). He also had a blood vessel injury on his right abdominal wall (Gonzalez's Medical Records at 21), for which he received morphine (7/21/98 Tr. 120). Upon discharge, he was

given an appointment with the trauma clinic, and was prescribed Percocet for pain (Gonzalez's Medical Records at 2).

Gonzalez picked Cruz from a photo array he was shown while in the hospital (7/21/98 Tr. 88-89). According to Detective Hewick, Gonzalez immediately picked out Cruz's picture and said "he is the one that got me" (7/22/98 Tr. 298).9/

David Rodriguez

Rodriguez saw a large group of people leaning against the fence at the pool (7/22/98 Tr. 222). He said that Palacio came out and said that "if we have a problem with "LBU" [the gang of which appellants were a part] [;] we should say something" (7/22/98 Tr. 230). When no one from the Graffiti Kings said anything, appellants surrounded and began attacking them (7/22/98 Tr. 230).

Rodriguez testified that the next thing he knew Palacio was "in his face" and stabbed him twice in the right arm (7/22/98 Tr. 232). When Palacio aimed his third strike at Rodriguez's chest, Rodriguez grabbed Palacio's arm to make sure that he did not get stabbed again, and the two boys began to wrestle (7/22/98 Tr. 232). During this struggle, a "short guy" (not Palacio), stabbed

On cross-examination, Gonzalez said that the detective had shown him only two or three photographs (7/21/98 Tr. 123). Detective Hewick testified, however, that he showned Gonzalez 11 photographs in a stack, and that both Gonzalez and Mejia had picked out the fifth photograph, which was Cruz (7/22/98 Tr. 294-297).

Rodriguez in the stomach, and a person named "Rudy" hit him in the head with a bottle (7/22/98 Tr. 232, 236).

Rodriguez was stabbed twice in the right arm, once in the wrist, once in the biceps, and once in the abdomen (7/22/98 Tr. 232). While he was waiting in the nurse's office for the ambulance, he saw Mejia and Gonzalez, both of whom looked pale and shocked, and Mejia was covered in blood (7/22/98 Tr. 236).

All of Rodriguez's injuries needed stitches, except for the abdomen, which required surgery (7/22/98 Tr. 232). At the hospital, Rodriguez was medicated and sedated while the doctors performed a "laparoscopy" on his abdomen (Rodriguez's Medical Records at 9). He was also given morphine intravenously, and Percocet for the pain (Rodriguez's Medical Records at 13). Upon discharge, Rodriguez was told to return to the trauma clinic for the removal of the sutures on his right arm, and to take 1-2 tablets of Percocet every 4-6 hours for his pain (Rodriguez's Medical Records at 3).

At trial, Rodriguez identified Palacio as the person who stabbed him in the right arm, wrists, and biceps, but admitted that he did not know the identity of the person who stabbed him in the abdomen (7/22/98 Tr. 233). Rodriguez also identified Palacio from a photo array (7/22/98 Tr. 238).

* * *

Based on the two identifications by Mejia and Gonzalez, Detective Hewick obtained an arrest warrant for Cruz and picked him up at his home. After being read his rights, Cruz said "I was out there. I was drinking. I was there for the soccer. I don't remember anything." (7/22/98 Tr. 305.)¹⁰/ Cruz also told Detective Hewick that the individuals involved in the stabbing were his brother's friends (7/22/98 Tr. 305).

The Defense Evidence

Appellants did not testify but Bolanos called two witnesses:

Detective Michael Millet and Sandra Rosanes. Detective Millet acknowledged that he testified at an earlier hearing that Mejia told him that Bolanos had stabbed him in both the arm and the chest, not just the chest (7/23/98 Tr. 465).

Rosanes, a Lincoln student who was present when the incident took place, testified that she was at the Lincoln playground that afternoon waiting to go to the zoo with her sister, her friends, and Bolanos and some of his friends, when Gonzalez and his friends walked straight towards Bolanos (7/23/98 Tr. 479-480). Gonzalez said "what's up?" to Bolanos, and they all stood there until Palacio said "what are you going to do, just stand there" (7/23/98

 $[\]frac{10}{}$ The government called Victor Molina, a soccer coach at Bell, who testified that no soccer games were played that day (7/22/98 Tr. 342).

Tr. 481). Gonzalez then hit Bolanos (7/23/98 Tr. 481), and the "guys from GK started throwing bottles" (7/23/98 Tr. 483-484). She never saw Bolanos with a weapon (7/23/98 Tr. 483-484). She also testified that she saw Cruz standing by the water fountain, and that when the fighting started, he walked away (7/23/98 Tr. 487). After it was over, Bolanos went with Rosanes and others to the zoo, where they stayed until 5:30 p.m. (7/23/98 Tr. 484, 516-518).

The Government's Rebuttal Evidence

The government called Luis Gabriel Rojos, the case manager for the Transitional Living Program of the Latin American Youth Program, who testified that contrary to Rosanes's claim, Bolanos arrived at the youth center that day at 4:30 p.m. (7/27/98 Tr. 16).

ARGUMENT

I. The Trial Court Did Not Plainly Err in Failing to Dismiss the <u>Indictment for Lack of Jurisdiction Over Palacio and Bolanos.</u>

For the first time on appeal, Palacio and Bolanos claim that the trial court lacked jurisdiction to try them as adults (see Brief for Palacio at 23; Brief for Bolanos at n.1). Specifically, they argued that because the indictment failed to set forth all of the elements of AWIMWA, <u>i.e.</u>, to specify their state of mind and that they lacked justification for their actions (Brief for Palacio

 $^{^{\}underline{11}/}$ On cross-examination, Rosanes admitted that she also never saw anyone get stabbed (7/23/98 Tr. 510).

at 23), those counts were defective and should have been dismissed (Brief for Palacio at 19). If the AWIMWA had been properly dismissed, appellants argue, the trial court would have had no jurisdiction over them because they are juveniles (Brief for Palacio at 23-34). Because the trial court had no jurisdiction over them, their ADW and AAWA convictions should be reversed (<u>id.</u>).

Appellants' claim is without merit. Because they never alleged that the trial court was without jurisdiction over them because the indictment's AWIMWA counts were defective, any review is for plain error only. Because the trial court correctly decided that the AWIMWA charge was not defective, the court's refusal to dismiss that count was not error.

A. Background

On July 6, 1998, Bolanos filed a motion to dismiss counts arguing that the AWIMWA and AWIKWA counts are multiplications because the indictment did not specify which malice theory the grand jury relied upon to indict for AWIMWA. 12 / Palacio joined the

^{12/} The record on appeal for Bolanos does not include the following documents relevant to this issue: the "Motion to Dismiss Counts" dated July 6, 1998; "Government's Opposition to Defendant's Motion to Dismiss Counts" dated July 8, 1998; "Motion to Compel Election of Counts or, in the Alternative, to Compel Discovery Related to Claim of Selective Prosecution" dated July 12, 1998; and "Motion for Hearing On Assault With Intent to Murder Definition and Instruction" dated July 16, 1998. The government will move to supplement the record with these documents which will be referred (continued...)

motion (7/10/98 Tr. 217). Specifically, appellants claimed that, as written, the AWIMWA and AWIKWA counts could be read as relying on the same "malice" theory, <u>i.e.</u>, that appellants' had the specific intent to kill (Govt's Supp. R. at Ex. A), and thus the two counts were actually the same offense. Because the counts were essentially the same offense, the government should be required to elect between AWIMWA and AWIKWA prior to trial. Appellants did not then argue that because the AWIMWA count was deficient, the trial court had no jurisdiction over the juveniles. 13/

At the hearing on Bolanos's motion, the government argued that there was no requirement that the grand jury set forth in the indictment the particular type of malice upon which it relied to indict for AWIMWA (7/10/98 Tr. 218). Rather, because the AWIMWA count stated that appellants had specific intent to commit murder,

^{12/(...}continued)
to as "Govt's Supp. R. at ____."

ordinarily, the Family Division of the Superior Court has exclusive jurisdiction over a "child" accused of committing a delinquent act that would be considered a crime if committed by an adult. D.C. Code § 16-2302 (1989); see Partlow v. United States, 673 A.2d 642, 644 (D.C. 1996) (citing United States v. Hobbs, 594 A.2d 66, 67 (D.C. 1991)) (other citations omitted). The United States Attorney, however, may prosecute as an adult a sixteen or seventeen-year-old who is "charged" with one or more serious crimes enumerated in D.C. Code § 16-2301(3). Although Palacio and Bolanis were juveniles, because they were both charged with one of the enumerated crimes, AWIMWA, they were properly charged in Superior Court as adults. See Partlow, 673 A.2d at 643. AWIKWA is not one of the enumerated crimes.

which includes all types of malice, it was sufficient to defeat a claim that the count was defective, or that it was duplicative of the AWIKWA count (7/10/98 Tr. 218). 14/ Bolanos responded that the government had only charged AWIMWA so that it could obtain jurisdiction over the juveniles, and speculated that the grand jury may not have been properly instructed on the mens rea elements of AWIMWA (7/10/98 Tr. 223). 15/ After a lengthy discussion (7/10/98 Tr. 256-261), the trial court denied the motion to dismiss the AWIMWA counts, stating, in pertinent part, that:

The elements of AWIMWA are: (1) that the defendant assaulted the complainant; (2) that the defendant did so with the specific intent to kill the complainant; (3) there were no mitigating circumstances (in cases where there is sufficient evidence of provocation) in other words, that the defendant acted with malice; and (4) at the time of the commission of the offense, the defendant was armed. Howard v. United States, 656 A.2d 1106, 1114 (D.C. 1995). This Court has recognized that "malice aforethought" is merely a technical phrase that "denotes four types of murder, each accompanied by distinct mental states." Comber v. United States, 584 A.2d 26, 38 (D.C. 1990) (en banc). Specifically, malice exists where the perpetrator (1) acts with the specific intent to kill, (2) has the specific intent to inflict serious bodily harm, (3) exhibits a "depraved heart," or (4) commits felony-murder. <u>Id.</u> at 38-40.

Bolanos also informed the court that he suspected selective prosecution and would seek discovery of grand jury minutes to support his claim (7/10/98 Tr. 234-235). Bolanos later filed a motion to dismiss the AWIMWA counts alleging that he and Palacio were being discriminated against because of their age because the government had charged them with AWIMWA and AWIKWA, but charged the older Cruz only with AWIKWA (Gov't Supp. R. at Ex. A). After a hearing on this motion, the court concluded that appellants had failed to demonstrate anything to suggest that the government had engaged in selective prosecution (7/13/98 Tr. 9-20).

What I come to as a conclusion on the motion to dismiss counts is that because of . . . alternative proof of intent, these are not multiplicatious charges. . . . the Government is entitled to have these operative facts tried to a jury on those lawful offenses. . .

If the counts in the indictment go to the jury exactly as charged I will, of course, ask on which theory of mens rea assault with intent to commit murder is found, if it is found . . .

I have ruled throughout these proceedings that I read [the word] murder to include the alternative elements and . . . [that the indictment] . . . doesn't have [to have] . . . the word malice aforethought. (7/10/98 Tr. 258-260.)

B. Standard of Review

Because Bolanos and Palacio failed to raise their current jurisdictional claim at trial, it must be reviewed for plain error only. Allen v. United States, 659 A.2d 548, 555-556 n.7-8 (D.C. 1994). To survive plain error review, appellants must demonstrate (1) there is an error, (2) the error is "plain," clear and obvious, (3) the error affected appellants' "substantial rights," and (4) the error resulted in a miscarriage of justice or seriously affected the fairness, integrity or public reputation of the judicial proceedings. Olano v. United States, 507 U.S. 725 (1993); accord Wilson v. United States, 785 A.2d 321, 326 (D.C. 2001). Appellants cannot show any error at all, let alone the plain error required for the reversal of their convictions.

C. Discussion

The basis of Bolanos's and Palacio's claim on appeal is that the trial court erroneously denied their motion to dismiss the AWIMWA counts from the indictment, and thus improperly retained jurisdiction over them. But this is not the argument they made to the trial court. The thrust of appellants' there was that the government should be required to elect between the AWIMWA and AWIKWA counts because they were the same offense. Implicit in such an argument is that the AWIMWA count is valid and that the government could proceed on the AWIMWA if it elected to do so.

Moreover, although Bolanos claimed below that the AWIMWA counts were defective because the grand jury had not specified the type of malice upon which it relied, his challenge was not that the trial court was without jurisdiction to hear the case because the AWIMWA counts were fatally defective, but rather that Bolanos and Palacio were being discriminated against because of their ages. In other words, they were being charged with both AWIMWA and AWIKWA while the "adult" Cruz had been charged only with AWIKWA. At no time did appellants argue that the court's jurisdiction was questionable because the AWIMWA counts should be dismissed. 16/

Indeed, had their claim been that they were entitled to a remand back to Family Court, appellants surely would have sought an interlocutory appeal of the trial court's decision to deny their (continued...)

Whatever standard is applied, Judge Milliken did not err in rejecting Bolanos's challenge to sufficiency of the AWIMWA counts. The sufficiency of an indictment is determined by: (1) whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and (2) whether the record adequately shows that the defendant may plead a former acquittal or conviction in the event any other proceedings are initiated against him later for a similar offense. Pearsall v. United States, 812 A.2d 953, 960 (D.C. 2002). If this standard is met, it is immaterial whether the indictment could have been made more definite and certain. Id. at 960.

Here, the indictment adequately informed Palacio and Bolanos that they were charged with AWIMWA, and cited the applicable code section which sets forth the elements of that crime (R. 8). Moreover, the language of the AWIMWA counts was different from that of the AWIKWA counts because it stated that appellants acted with the intent to "murder" the victims as opposed to with an intent to "kill" them (R. 8).

motion to dismiss the AWIMWA counts. See, e.g., Choco v. United States, 383 A.2d 333, 334-35 (D.C. 1978) (permitting interlocutory appeal of a trial court order denying appellant's motion for a transfer to the Family Division); see also Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). They sought no such appeal.

Even if the indictment was defective, the fact that Palacio and Bolanos were acquitted of the charges of AWIMWA makes their attack on the indictment moot. See Hunter v. United States, 590 A.2d 1048, 1051 (D.C. 1991) ("we need not decide whether the grand jury could properly charge the offense of assault with intent to murder while armed because of any uncertainty regarding whether it understood all the elements of that offense. Since appellant was not convicted of that offense, his challenge to the indictment as to that offense was rendered moot."). In fact, this case is strikingly similar to <u>Hunter</u>. In <u>Hunter</u>, the appellant argued that his conviction should be overturned because, inter alia, the grand jury was not adequately instructed on the differences between killing and murder, making the AWIMWA count defective. Id. at 1051. Like appellants here, Hunter was acquitted of AWIMWA, but convicted of the lesser-included offense of ADW. Id. This Court held that it need not consider whether the AWIMWA count was defective because it in no way affected the ADW conviction. Id. at 1051. Because Palacio and Bolanos too were convicted only of ADW, they cannot demonstrate that the court's rejection of their challenge to the indictment harmed them. See id. (appellant "suffered no prejudice that would require reversing conviction").

Finally, Palacio and Bolanos are incorrect that their

acquittal on the AWIMWA charges meant that the trial court lost jurisdiction over them as to their ADW and AAWA charges. In Partlow, 673 A.2d at 645, this Court held that the fact that the appellant was not ultimately convicted of an AWIMWA charge did not mean that the Criminal Division lost jurisdiction over the case.

See also Lucas v. United States, 522 A.2d 876 (D.C. 1987) (where juvenile was originally charged with first-degree murder, Criminal Division of Superior Court retained jurisdiction over the case for second trial of manslaughter despite reversal of conviction for lesser-included offense of murder).

II. The Trial Court Did Not Err in Denying Appellant Cruz's Motion to Suppress Identification.

Cruz argues that the trial court erred in denying his motion to suppress the out-of-court identifications of him by Mejia and Gonzalez. Specifically, he claims that (1) the trial court erred in crediting Detective Hewick's testimony that he showed the victims an array of 11 photographs, over Gonzalez's testimony that he was only shown two or three photographs (Brief for Cruz at 22-23; 7/22/98 Tr. 297; 7/21/98 Tr. 123); and (2) the photo array used was suggestive because Cruz's photograph was more brightly lit than the other photographs, and because Cruz's appearance differed

 $[\]frac{17}{}$ Although Rodriguez also chose Cruz from a photo array (see 7/8/98 Tr. 4), Cruz does not challenge his identification.

substantially from the suspects in the other photographs (Brief for Cruz at 23). 18 Cruz's arguments are without merit.

A. The Hearing

Judge Milliken heard and denied appellants' motion to suppress statements and identification evidence on July 8, 1998, through July 10, 1998 (7/10/98 Tr. 261-264). With respect to Cruz's motion, the government presented the testimony of Mejia, Gonzalez, Detective Hewick, Officer Gil Montanez, and Officer Michael Millet (7/8/98 Tr. 4-22; 7/9/98 Tr. 81-108, 119-132, 164; 7/10/98 Tr. 243-245, 261-264).

Detective Hewick testified that he interviewed Mejia and Gonzalez at the hospital on April 15, 1998, the day after the

^{18/} Cruz filed a motion to supplement the appellate record with color copies of the photographs contained in Government Exhibit 2, which included photographs marked on the back with the letters "C", "E," and "I," and which were admitted during the pretrial suppression hearing and at trial as Government's Exhibit 7A-K. The entire photo array will be referred to herein as "Government Exhibit 7A-K," and each individual photo will be referred to as "Government Exhibit 7."

Although Bolanos and Cruz both filed motions to suppress statements and identification testimony (Cruz R. 14; Bolanos R. 11), Bolanos does not raise this issue on appeal. There are four separate transcripts of the motions hearing which took place on July 8-10, 1998. One transcript is labeled "July 8, 9, 10, 1998" and will be referred to herein as "7/8-10 Tr. _____" The remaining three transcripts are for each consecutive date. The page numbers for portions of the some of the transcripts have been scratched out by the court reporter with new numbers handwritten in. The citations herein will be to the handwritten page numbers.

Stabbing. Mejia told the detective that he had previously seen Cruz around the school area (7/9/98 Tr. 81-83). Gonzalez had also told Detective Hewick that he had seen Cruz in the vicinity of the school (7/9/98 Tr. 86). Mejia and Gonzalez both told the detective that they were face-to-face with Cruz during the assault (7/9/98 Tr. 85-86).²⁰/ Detective Hewick also interviewed Rodriguez who gave him the same "unique" description: i.e., an "Hispanic male, about five feet five, five feet six, and chubby" (7/9/98 Tr. 88).

After interviewing the victims, Detective Hewick developed Cruz as a suspect and put together an 11-photograph spread which included a picture of Cruz as the fifth picture in the array (7/9/98 Tr. 81). In compiling the array, the detective purposefully looked for pictures which showed suspects with hair pulled back in a bun (as Cruz's photo depicts), but was unable to find any (7/9/98 Tr. 103-104). All of the photographs were in color and featured the front and side view of each person from the shoulders up (Government Exhibits 7A-K). All of the photographs were of Hispanic males of a similar age group, with similar skin tone and similar eye color (Government Exhibits 7A-K). Of the 11 photographs, at least three varied in tint due to the poor quality

 $[\]frac{20}{}$ On cross-examination, Detective Hewick stated that Gonzalez and Mejia both told him that Cruz had fine, long hair that he combed straight back (7/9/98 Tr. 106). Neither witness mentioned that Cruz wore his hair in a bun (7/9/98 Tr. 106).

of the photograph, or bad lighting, including one photo which is as light or lighter than Cruz's photograph (id.).

Detective Hewick showed both Mejia and Gonzalez the 11-photograph spread on April 16, 1998. He handed Mejia the stack of photographs, Mejia looked through them. When Mejia got to the picture of Cruz, he took it out of the stack and told Detective Hewick that "this is the one who stabbed me in the shoulder" (7/9/98 Tr. 83). Detective Hewick wrote "this one" on the back of the photograph (7/9/98 Tr. 85; Government Exhibit 7I). Detective Hewick went through the same procedure with Gonzalez. As he looked through the stack of photographs, Gonzalez stopped at the one of Cruz and said "he is the one that got me" (7/9/98 Tr. 85; Government Exhibit 7I). Detective Hewick also recorded Gonzalez's statement on the back of the photograph (7/9/98 Tr. 85).21/

After considering all the evidence, the trial court held that the identification procedure was not so unduly suggestive as to be conducive to irreparable misidentification (7/10/98 Tr. 261-264). The court stated that "the only element of suggestivity is the

 $^{^{21/}}$ At the hearing, Gonzalez testified that although Cruz's hair looked different in the photograph, he had "no doubt" that it was the same person who stabbed because he recognized his features (7/9/98 Tr. 129). Gonzalez confirmed that he had seen Cruz once or twice in the past six months, and that he was "positive" that Cruz was the person who stabbed him (7/9/98 Tr. 128). Gonzalez also testified that he did not recall seeing 11 photographs, only "two or three pictures" (7/9/98 Tr. 121).

hairstyle of Cruz," but added that Gonzalez's testimony that he recognized Cruz regardless of his different hairstyle negated any suggestivity (7/10/98 Tr. 262). As to the number of photographs shown, the trial court implicitly credited Detective Hunter and stated that he believed Gonzalez was mistaken that he was shown only two or three photographs (7/10/98 Tr. 263). Even if Gonzalez was shown only one or two photos, however, the court concluded that the identification procedure was still sound (7/10/98 Tr. 263). Finally, the trial judge said "I will make a reliability finding if asked, but I don't think that is going to be seriously at issue, given a daytime, face-to-face confrontation amongst people who recognize each other, [and] given the promptness and certainty of the identification" (7/10/98 Tr. 263).

Standard of Review and Applicable Legal Principles

To prevail on a motion to suppress a pretrial identification, a defendant must establish that "the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." Lyons v. United States, 833 A.2d 481, 485 (D.C. 2003). Even if suggestive, the identification is admissible if it is nonetheless sufficiently reliable. Id. This Court is bound by the trial court's findings on suggestivity and reliability as long as they are supported by the evidence and in

accordance with law. <u>Turner v. United States</u>, 622 A.2d 667, 672 n.3 (D.C. 1993).

2. Discussion

The trial court's ruling that the photo array of Cruz was not impermissibly suggestive was well-supported by the evidence. First, the trial court did not "clearly err" in crediting Detective Hewick's testimony over that of Gonzalez as to the number of photographs that he was shown (Brief for Cruz at 22-23). Detective Hewick's testimony that he used an 11-photograph array with each witness is supported by the fact that the government admitted such a spread at trial (Exhibit 7A-K), and by the fact that Detective Hewick discussed in detail how he composed the array. The writing on the back of the photographs also revealed that the array was shown to Mejia (who testified that he was shown "photos") and Gonzalez within minutes of each other (Government Exhibit 7I). Assessing the credibility of the witnesses is a unique function of the trial court and this Court will not reverse unless the credibility finding is plainly wrong or lacking evidentiary support. (Reginald) Hill v. United States, 664 A.2d 347, 351 (D.C. Here, he trial court did not clearly err in crediting Detective Hewick's testimony that he used the same 11-photograph array with Gonzalez as he did with Mejia.

The evidence also amply supports the trial court's finding

that the photo array itself was not suggestive. As stated above, all of the photographs were of Hispanic males of a similar age group, with similar skin tone, and similar eye color. Although there is some variation among the hairstyles, they all have relatively short hair, and several of them have hair that is "combed back," which matched the description Mejia and Gonzalez gave to Detective Hewick the day after the stabbing. Indeed, the individual seen in the photograph labeled "B" bears a strong And, there are at least three other resemblance to Cruz. photographs that vary in tint, and one photo is as light or even lighter than that of Cruz. This Court has upheld identifications as non-suggestive in cases where the differences in characteristics of persons in the photo array are more pronounced than here. McCoy v. United States, 781 A.2d 765, 770 (D.C. 2001) (rejecting an argument that the photo array was unduly suggestive where appellant's complexion was the darkest in the array); McClain v. United States, 460 A.2d 562, 566 (D.C. 1983) (finding no suggestivity where appellant had the darkest complexion and he was one of only two individuals with a full beard).

Assuming, <u>arguendo</u>, that the photo array was unduly suggestive, Cruz's claim still fails because the identification was independently reliable. In assessing the reliability of an eyewitness identification, the Court considers the following: (1)

opportunity for observation; (2) length of observation; (3) lighting conditions; (4) lapse of time between identification and observation; (5) factors affecting witness perception during observation; and (6) witness confidence in identification. See Beatty v. United States, 544 A.2d 699, 701 (D.C. 1988).

The evidence set forth at the suppression hearing established that both Mejia and Gonzalez viewed Cruz face-to-face for several seconds during the stabbing, that the incident took place during daylight hours in the afternoon, and that both had recognized Cruz as someone they had previously seen in the neighborhood. Mejia, Gonzalez, and Rodriguez all gave detailed and accurate descriptions of Cruz. Mejia and Gonzalez picked Cruz out from the photo array without hesitation and said that they were certain that he was the one who stabbed them. Under the totality of the circumstances, these identifications were reliable. See Lyons, 833 A.2d at 486 (finding no error in the court's denial of motion to suppress where the victim viewed robber, whom victim had never seen before, under good lighting conditions and was certain of her identification); McCoy, 781 A.2d at 770-771 (identification made by the victim who

 $[\]frac{22}{}$ Cruz argues that Gonzalez's the description that the individual had "fine long hair that was combed straight back" did not match the photograph he selected (Brief for Cruz at 23). Gonzalez testified that even though the hair on the person in the photograph was different, he had no doubt that it was the same person who stabbed him (7/9/98 Tr. 129).

had never seen the assailant before, but who had time to view her assailant, describe his weapon, and give an accurate description prior to the photo array was reliable).

Finally, Mejia and Gonzalez's testimony at trial supports that their identifications were reliable. See Clark v. United States, 755 A.2d 1026, 1028 (D.C. 2000) (Court of Appeals may consider both the evidence offered at the suppression hearing and the undisputed trial testimony). At trial, Gonzalez testified that he had saw the person who stabbed him for 5 to 10 seconds, and recognized him from seeing him in the neighborhood two or three times prior to the stabbing (7/21/98 Tr. 79; 7/22/98 Tr. 117, 329). Detective Hewick also testified that Gonzalez told him that the person who stabbed him was a Hispanic male, 20 to 21, "chubby and had chino eyes," had hair that was combed back, and that when he picked out Cruz from the photo array, Gonzalez said, "he is the one that got me" (7/22/98 Tr. 296, 326, 329). Mejia's trial testimony also confirms the reliability of his identification. He testified that "there was no doubt in his mind" that Cruz was the one who stabbed him in the shoulder because he had seen Cruz about six times prior to the stabbing (7/21/98 Tr. 16).

III. There Was Sufficient Evidence To Support Appellants' Convictions.

All three appellants claim that there was insufficient evidence to support their convictions for AAWA because the government did not prove that the three victims suffered "serious bodily injury" (Brief for Bolanos at 18; Brief for Cruz at 30; Brief for Palacio at 29). In addition, Palacio argues that his conviction for ADW as to Gonzalez must be reversed because there was no evidence that he aided and abetted Cruz in stabbing Gonzalez (Brief for Palacio at 29). Further, Cruz contends that the identification evidence against him was not sufficient to support his convictions (Brief for Cruz at 26). All of appellants' sufficiency arguments lack merit. 23/

Bolanos and Cruz argue that if their convictions for AAWA are upheld, then their convictions for ADW merge into them because ADW is a lesser-included offense of AAWA (Brief for Bolanos at 33-35; Brief for Cruz at 42-44). The government agrees that the ADW convictions of both appellants would merge with each other and with their AAWA convictions. Beaner v. United States, 845 A.2d 525, 540-41 (D.C. 2004). Bolanos also argues that he was never convicted of ADW as to Mejia because the verdict read in open court was that he was "not quilty" even though the verdict form clearly states that he was "guilty" (Brief for Bolanos at 34). None of the cases cited by Bolanos support his contention that the oral pronouncement of the verdict takes precedence over the written verdict form. The one case upon which appellant relies relates to a mistake in sentencing. Valentine v. United States, 394 A.2d 1374, 1376 (D.C. Further, Bolanos did not object when the court sentenced him for that ADW conviction (11/16/98 Tr. 31-32). In any event, because Bolanos's two convictions stem from a single stabbing incident against a single victim, Mejia, and therefore they merge, (continued...)

A. Standard of Review

The standard of review for a challenge to the sufficiency of the evidence is well-established. In reviewing such a claim, this Court "views the evidence in the light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences from fact." Gibson v. United States, 792 A.2d 1059, 1065 (D.C. 2002), cert. denied, 536 U.S. 972 (2002). See also Curry v. United States, 520 A.2d 255, 263 (D.C. 1987). No distinction is drawn between direct and circumstantial evidence, Moore v. United States, 757 A.2d 78, 82 (2000), and the evidence need not compel a finding of quilt, or negate every possible inference or hypothesis of Curry, 520 A.2d at 263. The government must only present "at least some probative evidence on each of the essential elements of the crime." Jennings v. United States, 431 A.2d 552, 555 (D.C. 1981), cert. denied, 457 U.S. 1135 (1982). It is only where there is "no evidence upon which a reasonable mind might fairly conclude quilt beyond a reasonable doubt" that the evidence is insufficient and the trial court should grant a defendant's motion for judgment of acquittal. Lewis v. United States, 767 A.2d

^{23/(...}continued)
the Court need not decide this issue. See Hanna v. United States,
666 A.2d 845, 857 (D.C. 1995) (holding that four separate ADW counts
arising out of collective assault merge).

219, 222 (D.C. 2001).

B. There Was Sufficient Evidence of "Serious Bodily Injury" to Support Appellants AAWA Convictions.

Appellants argue that the evidence was insufficient to prove that Mejia, Gonzalez, and Rodriguez suffered "serious bodily injury" and, consequently, that their convictions must be reversed. Specifically, appellants argue that the government failed to demonstrate any of the victims' wounds created a substantial risk of death, caused serious permanent disfigurement, or caused protracted loss or impairment of functions of any bodily member or organ. Moreover, Bolanos argues that this Court is precluded from considering whether the evidence was sufficient to demonstrate that the victims suffered extreme pain, because the jury was not specifically instructed that extreme pain satisfied the serious bodily injury element. Appellants are wrong. As demonstrated infra, the evidence was more than sufficient to show that each of the three victims suffered serious bodily injury as that term is defined by statute.

To establish AAWA, the government was required to show that each appellant (1) by any means, knowingly and purposefully caused serious bodily injury to another person; or (2) under circumstances manifesting extreme indifference to human life, intentionally or knowingly engaged in conduct which created a grave risk of serious

bodily injury to another person, and thereby caused serious bodily injury. Riddick v. United States, 806 A.2d 631, 639 (D.C. 2002). "Serious bodily injury" is defined as:

[B]odily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

Nixon v. United States, 730 A.2d 145, 149 (D.C. 1999); see D.C. Code § 22-4104(7).24/

Applying that definition, the record plainly demonstrates that the government sufficiently proved through the victims' trial testimony and stipulated medical records²⁵/ that each of them

Although this Court had not yet decided <u>Nixon</u> at the time appellants' trial, appellants requested that the trial court define the term "serious bodily injury" for the jury. The court asked the parties to submit draft definitions. Appellants submitted the definition of "serious bodily injury" contained in the Model Penal Code, while the government submitted the definition provided in the sex abuse statute later adopted in <u>Nixon</u> (7/23/98 Tr. 456, 535; R. 28). The trial court agreed with appellants, and thus instructed that "serious bodily injury" was bodily injury which: (1) creates a substantial risk of death; (2) causes serious permanent disfigurement; or (3) causes protracted loss or impairment of functions of any bodily member or organ (Bolanos R. 28; 7/27/98 Tr. 12-13, 51).

Appellants argue that the medical records are of limited probative value because they contain "undefined and indecipherable medical terms" and the government failed to call a medical expert to explain them (Brief for Bolanos at 26-27). Appellants cite no case law to support that the government must call an expert, and the only cases they do cite are in the medical malpractice context (Brief for Bolanos at 26-27). As far as we can tell, this Court (continued...)

suffered serious bodily injury.

1. Mejia

Contrary to Bolanos's claim (at 21-29), the evidence plainly showed that Mejia suffered a substantial risk of death. Read in a light most favorable to the government, the evidence -- i.e., testimony and medical records -- showed that he sustained serious stab wounds to the chest, shoulder, and back (7/20/98 Tr. 74); that he was taken from the scene in an ambulance (7/20/98 Tr. 72); that he told the police officer in the ambulance that he was in pain, and that he could not breathe (7/20/98 Tr. 75); and that he was hospitalized for two nights and three days, during which time he had a chest tube inserted, his stab wounds were repaired with sutures, he had "difficulty breathing," and he received oxygen (Mejia's Medical Records at 1, 7, 9). Mejia specifically testified that while he was being transported to the hospital, he was bleeding, his muscles and chest were in pain, and he had to keep reassuring himself that he was "not going to die" (7/20/98 Tr. 61,

 $[\]frac{25}{}$ (...continued)

has never held that the government must present expert testimony on the serious bodily injury element. In <u>Nixon</u>, this Court concluded only that the evidence of serious bodily injury was insufficient because there was "no medical evidence was introduced through health professionals who treated either man, <u>or</u> through any of their medical records." 730 A.2d at 150 (emphasis added). In <u>Riddick</u>, the Court found the evidence of serious bodily injury sufficient despite the fact that no expert testimony was presented. 806 A.2d at 641.

80). After his discharge from the hospital, he was told to return to the trauma clinic for follow-up (Mejia's Medical Records at 13).

See People v. Rodriguez, 769 N.Y.S.2d 257, 257-258 (N.Y. App. Div. 2003) (evidence sufficient to prove serious bodily injury where victims suffered severe and life-threatening stab wound to the chest that penetrated the muscle and caused blood to accumulate, he was in the hospital for three days and had two permanent scars).

Mejia also suffered "serious bodily injury" because he suffered serious and protracted disfigurement in the form of scarring. See Hudson v. United States, 790 A.2d 531, 533 (D.C. 2002) (scar on leg caused by burn constitutes disfigurement sufficient to support aggravated assault conviction). The jury had evidence from which it could conclude that the disfigurement was protracted because Mejia still had the scars despite the fact that the trial took place months after the incident occurred, and it had evidence that the disfigurement was serious because Mejia displayed the scars on his body from the stab wounds during the trial. Halsering v. State, 474 So.2d 196, 198 (Ala. Crim. App. 1985) (recognizing the significance of the jury having opportunity to view scars from bullet wounds in determining the sufficiency of the evidence of serious physical injury); cf. People v. Irwin, 774 N.Y.S.2d 237, 238 (N.Y. App. Div. 2004) (jury could infer that sutured wounds seen only in photographs resulted in

permanent scars).

Even if the Court were to conclude that this evidence did not establish that Mejia's wounds created a substantial risk of death or resulted in disfigurement, there was ample evidence that Mejia was in extreme pain. The medical records showed that Mejia suffered "shortness of breath" (i.e., "SOB") "related to pain" (Mejia's Medical Records at 1, 7, 9), and that he was given medication (i.e., Percocet) for his pain both during his hospital stay and upon discharge (Mejia's Medical Records at 13). Mejia also testified his muscles and chest hurt so much that he had to reassure himself that "he was not going to die" (7/20/98 Tr. 80). Detective Hewick testified that when he visited Mejia in the hospital the day after the incident, despite being heavily medicated, he was "still in pain" (7/22/98 Tr. 292).26/

In rejecting appellants request for an MJOA because there was insufficient evidence of serious bodily injury, the trial court specifically stated that not only had appellants' acts created a substantial risk of death as to each victim ("knife plunged in their trunks or the chest or the abdomen"), but that the victims' wounds resulted in "serious scarring," and that reasonable-minded jurors could conclude that each suffered "extreme physical pain" (see 7/23/98 455-456). The court noted that each complainant was "prescribed pain medication," which meant that "it had to be contemplated by a physician that there would be significant pain over a sustained period" (7/27/98 Tr. 128-129). The court specifically noted that Rodriguez was required to take a double dose of pain medication because he sustained "a greater number of blows" making his injuries "in the aggregate . . . more severe" (7/27/98 Tr. 128-129).

evidence was sufficient to show that he suffered serious bodily injury. See Gathy v. United States, 754 A.2d 912, 918-919 (D.C. 2000) (jury could infer that victim had suffered "serious bodily injury" after hearing evidence that the victim had been struck in the face with a beer bottle, bled profusely, was in "pain," entered a semi-unconscious state, and received forty-eight stitches); see also Riddick, 806 A.2d at 641 (evidence sufficient to prove serious bodily harm where the victim testified that she moaned in pain, cried and screamed for help after being stabbed with a broken stick and a piece of glass).

Despite this evidence that Mejia (as well as Gonzalez and Rodriquez, see <u>infra</u>) were in extreme pain, Bolanos argues (at 21) that the Court is precluded from even considering whether there was sufficient evidence Mejia so suffered because the jury was never instructed that "extreme pain" made out serious bodily injury under the AAWA statute. 27 Citing <u>Griffin v. United States</u>, 502 U.S. 46 (1992), for the proposition that "a general jury verdict [is] valid so long as it was legally supportable on one of the submitted

Appellants do not claim that they are entitled to a reversal of their convictions because the jury instruction on serious bodily injury was erroneous, nor could they. Appellants requested the narrower instruction. It was the government who requested that the court give the instruction used in sex abuse cases under D.C. Code \S 22-4104(7), which was later adopted by this Court in Nixon. Any error that the trial court made in giving the instruction appellants requested was therefore invited.

grounds," Bolanos argues that "this Court cannot measure the legal sufficiency of the evidence based on terms that the jury was never given" (Bolanos Brief at 31). $\frac{28}{}$

Bolanos's legal argument is incorrect and his reliance on Griffin misplaced. In Griffin, the jury was instructed on two possible theories of conspiracy, one of which the government conceded was legally insufficient. 502 U.S. at 49. When the jury returned a general verdict of guilty, it failed to specify on which theory it had relied. Id. at 48. The Supreme Court held that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Id. at 56. Nothing in Griffin supports that this Court must measure the sufficiency of the evidence supporting a conviction based on an erroneous jury instruction outlining the offense's elements.

In fact, Bolanos's view of <u>Griffin</u> appears to be at odds with the Supreme Court's decision in <u>United States v. Jimenez Recio</u>, 537 U.S. 270 (2003). In <u>Jimenez Recio</u>, the police seized a truckload of narcotics and set up a sting by having the drivers page their

^{28/} Cruz has not joined Bolanos's legal argument on this point and fails to address altogether whether the government's evidence that Mejia or Gonzalez suffered extreme pain satisfies its burden to show serious bodily injury.

contact as if nothing had happened. The defendants were arrested when they arrived on the scene and attempted to drive the truck The district court, consistent with Ninth Circuit law, instructed the jury that a conspiracy terminates when "'there is affirmative evidence of . . . defeat of the object of the conspiracy.'" Jimenez Recio, 537 U.S. at 272 (quoting United States v. Cruz, 127 F.3d 791, 795 (9th Cir. 1992)). After a jury convicted them of conspiring to possess and to distribute unlawful drugs, the judge ordered a new trial because, under Cruz, it concluded that the jury could not have convicted unless it believed they had joined the conspiracy before the police seized the drugs, and it had not been so instructed. A new jury convicted the defendants, who appealed. The Ninth Circuit reversed, holding that the evidence presented at the second trial was insufficient to show that respondents had joined the conspiracy before the drug seizure. See United States v. Jimenez Recio, 258 F.3d 1069, 1074 (9th Cir. The Supreme Court, in turn, reversed the Ninth Circuit, rejecting the premise that, because the seizure rendered the object of the conspiracy impossible to achieve, the defendants could not be prosecuted in the absence of evidence that they joined the conspiracy prior to the seizure. Jimenez Recio, 537 U.S. at 276.

In reversing the Ninth Circuit's sufficiency ruling, the Supreme Court concluded, in effect, that the sufficiency of the

evidence is judged against the statute or the crime properly construed, and not as erroneously instructed to the jury. See also <u>Jackson v. Virginia</u>, 443 U.S. 307, 318-19, 324 n.16 (1979) (the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, a standard that "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law"). Although this Court has not specifically spoken on the issue, other courts have explicitly held that the sufficiency of the evidence is to be measured by the "elements of the offense as defined by the hypothetically correct jury charge for the case." Malik v. State, 953 S.W.2d 234, 238 (Tex. Crim. App. 1997); see id. (evidence to be measured by hypothetically correct jury charge which "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried"); see also United States v. Zanghi, 189 F.3d 71, 80 (1st Cir. 1999) ("[a] patently erroneous . . . instruction does not establish the standard by which we measure the sufficiency of the evidence on appeal"); Commonwealth v. Bruneau, 386 N.E.2d 29, 29 (Mass. App. 1979) (judge's erroneous instruction did not become the law of the case, requiring that the evidence conform to the requirements of the instruction rather than those of the statute).

Moreover, such a result is consistent with this Court's decisions. For example, in Gathy, although this Court concluded that the trial court erred in failing to instruct the jury on the definition of "serious bodily injury" adopted in Nixon, nonetheless went on to assess the sufficiency of the evidence on that element by applying the Nixon definition. See Gathy, 754 A.2d at 916 (government was required to show that injury "involve[d] a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty") (citing Nixon, 730 A.2d at 149 & quoting D.C. Code § 22-4101(7)); see also Beaner v. United States, 845 A.2d 525 (D.C. 2004) (holding that the failure to define "serious bodily injury" was of no consequence where the jury was instructed as to each element of AAWA and there was testimony that the complainant lost consciousness).

2. Gonzalez

Gonzalez similarly suffered "serious bodily injury" as that term is defined in Nixon. As to substantial risk of death, Gonzalez's testimony and his medical records showed that he was in

the hospital for three days; that he had surgery to repair the wound he suffered from the stabbing that went through his left arm, into his intestines, and perforated his bowel (7/21/98 Tr. 84-86) (Gonzalez's Medical Records at 2); and that he was taken to the hospital by ambulance (7/21/98 Tr. 85). A wound deep enough to cause a perforated bowel could result in death if not properly treated. Gonzalez also suffered a vein injury as a result of the stab wound in his left arm, and a blood vessel injury near his abdominal wall (Gonzalez's Medical Records at 21), injuries that likewise could be life-threatening.

Gonzalez also suffered "protracted and obvious disfigurement" from his scars, see supra p. 34-35, and "impairment of the function of a bodily member" from the fact that his bowel was punctured and needed to be repaired. Cf. Wilson v. United States, 785 A.2d 321, 329 (D.C. 2001) (evidence sufficient to establish serious bodily injury where doctor testified that the injury was very serious and victim testified as to the impairment to his eye). The evidence also strongly supports that Gonzalez suffered "extreme pain" from his serious stab wound: namely, he was administered morphine at the hospital (7/21/98 Tr. 120); he was instructed to take Percocet for the pain upon discharge (Gonzalez's Medical Records at 2); and Detective Hewick, as mentioned supra p. 35, confirmed that Gonzalez, like Mejia and Rodriquez, was still in visible pain the

day after the incident despite the fact that he then was on pain medication. All this evidence amply supports that Gonzalez suffered serious bodily injury.

3. Rodriquez

A reasonable juror could also conclude that Rodriguez suffered a substantial risk of death from his multiple wounds. Rodriguez was stabbed twice in the right arm, once in the wrist, once in the biceps, once in the abdomen, and he was hit in the head with a beer bottle (7/22/98 Tr. 232). He was transported to the hospital in an ambulance, and his medical records show that he had to be medicated and sedated before the doctors could perform a "laproscopy" on his abdominal wound (Rodriguez's Medical Records at 9; 7/22/98 Tr. Such evidence demonstrates serious bodily injury. See Colorado v. Sanchez, 751 P.2d 1013 (Colo. Ct. 1988) (exploratory surgery to ascertain damage to liver to eliminate risk of death is "serious bodily injury" even if no damage to liver).

Rodriguez also suffered "protracted and obvious disfigurement" from the multiple scars caused by his multiple stab wounds. And, his medical records likewise contain entries revealing that Rodriguez was in extreme pain, and that he had to be medicated and sedated so that the "laproscopy" could be performed while he was hospitalized (Rodriguez's Medical Records at 9). He too was given

morphine intravenously in addition to Percocet (Rodriguez's Medical Records at 13), and, upon discharge, told to take Percocet as needed for pain. In fact, because of his size, Rodriguez was given more pain medication than were the other victims. 29/ Such evidence supports that Rodriguez suffered extreme pain from the multiple stab wounds.

C. There Was Sufficient Evidence To Support Palacio's Conviction for Aiding and Abetting.

Palacio argues that the evidence is insufficient to support his conviction for ADW as to Gonzalez because Gonzalez identified Cruz as his assailant (Brief for Palacio at 29). $\frac{30}{}$ Palacio's

Appellants rely heavily on Nixon (Brief for Bolanos at 21-32; Brief for Cruz at 30-35; Brief for Palacio at 25-28). However, in Nixon, the victims did not testify, and no medical evidence was introduced either through expert testimony or in 730 A.2d at 150. medical records. Here, all three victims testified as to their injuries, Detective Hewick confirmed that the victims were in pain when he visited them at the hospital the day after the attacks, and the medical records describe and confirm the treatment that took place. This case is more comparable to Gathy, where the Court held the evidence of "serious bodily injury" was sufficient where the victim testified that he was "semiunconscious," "not totally coherent" after the assault, and where the government introduced photographs revealing deep cuts around the victim's nose and left eye, and the medical records established that victim received 48 stitches. 754 A.2d at 918-919.

palacio also argues that the verdicts were inconsistent but fails to explain the basis for his argument (Brief for Palacio at 29). General assertions made without supporting argument in a brief are considered abandoned. Bardoff v. United States, 628 A.2d 86, 90, fn.8 (D.C. 1993). Even if this argument were properly articulated, it is without merit because inconsistent verdicts by (continued...)

argument must be rejected because a reasonable juror could infer that he participated in stabbing Gonzalez.

To establish that Palacio aided and abetted the commission of the crime alleged, the government was required to prove that (1) the offense was committed by someone, (2) the accused participated in the commission of the offense, and (3) he or she did so with guilty knowledge. Price v. United States, 813 A.2d 169, 176 (D.C. 2002). In other words, the government had to prove that Palacio associated himself with the criminal activity, participated in it as something he wanted to bring about, and took some action to make it succeed. Id.

Palacio clearly participated in the attack on Gonzalez as an aider and abetter. The evidence showed that it was he who stepped forward and made a statement to the Graffiti Kings initiated the brawl (Brief for Palacio at 30; see 7/22/98 Tr. 230). Palacio himself characterized the incident as a "brawl between two groups of young men" (Brief for Palacio at 30), and the evidence is uncontroverted that he was a member of one of the two groups. The government's evidence also established that Palacio was the first to draw his knife. All of this evidence demonstrates that Palacio

^{30/(...}continued)
themselves do not mandate reversal. (Diane) Smith v. United States,
684 A.2d 307, 312 (D.C. 1996).

participated with Cruz in the stabbing of Gonzalez as something he wanted to bring about.

In fact, this case is strikingly similar to <u>Price</u>, in which this Court held that Price was an aider and abetter because his conduct encouraged or facilitated the commission of the offense even though he was not the actual shooter. Specifically, the evidence showed that Price was present when the murder and assault took place, exchanged words with the victim, associated with the principal shooter, had a weapon in view and made his escape at the same time as his companions. 813 A. 2d at 177. The identical conclusion can be reached with respect to Palacio's involvement in the stabbing of Gonzalez. Palacio approached the group, made a provocative statement that instigated the brawl, and was the first to pull his weapon (7/22/98 Tr. 356). Based on this evidence, a reasonable juror could conclude that Palacio's conduct encouraged Cruz to follow suit, draw his weapon, and stab Gonzalez.

D. There was Sufficient Identification Evidence To Support Cruz's Conviction for Assault with A Deadly Weapon.

Cruz also argues that his ADW conviction should be reversed because the identifications made by Mejia and Gonzalez were unreliable in three respects: (1) the victims had little opportunity to observe the perpetrator during the attack; (2) Mejia's identification was less than certain and made after he

stated that only Bolanos stabbed him; and (3) Gonzalez was under the influence of painkillers when he made the identification (Brief for Cruz at 29). As demonstrated supra p. 25-28, however, these identifications, along with the other evidence admitted at trial, was more than sufficient to support Cruz's conviction. See Lyons v. United States, 833 A.2d. 481, 486 (D.C. 2003) (upholding an identification as sufficient where the victim had seen the perpetrator during the robbery, had good lighting conditions, and was certain of her identification); (Kevin) Hill v. United States, 541 A.2d 1285, 1287 (D.C. 1988) (holding that testimony of single eyewitness, an undercover officer, was sufficient where he was only a few feet from the perpetrator and had ample time to observe him in a well-lit area and made the identification within 25 minutes of seeing the person). Both Gonzalez and Mejia testified that they had both seen Cruz in the neighborhood prior to the stabbing, they had a good opportunity to see him that day, and that they were certain about their identifications of Cruz. Although Gonzalez testified that he was on painkillers, and Mejia did not immediately identify Cruz as the person who stabbed him in the arm, the jury heard this evidence and nonetheless credited their testimony. (Ronald) Robinson v. United States, 797 A.2d 698, 706-707 (D.C. 2002) jury could determine that (holding that the identification testimony was credible despite the fact that the victim initially refused to identify appellants as the shooters and misidentified one of the participants in the crime). $\frac{31}{2}$

IV. The Trial Court Did Not Plainly Err When it Instructed the Jury on AAWA.

A. Background

Cruz's indictment, which stated that he "knowingly and purposefully cause[d] serious bodily injury to Jose Mejia" (Cruz R. 11), specifically cited aggravated assault statute, D.C. Code § 22-504.1 (now recodified as D.C. Code § 22-404.01). That statute provides that a person commits AAWA if: (1) that person "knowingly or purposely causes serious bodily injury to another person; or (2) "under circumstances manifesting extreme indifference to human life, the person knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury." D.C. Code § 22-404.01. When instructing the jury on AAWA, the trial court set forth both grounds listed in § 22-404.01, and told the jury that the government must prove beyond a reasonable doubt that Cruz either "intended to cause

Even if this Court were to conclude that the trial court improperly admitted the photo identifications, it still must consider them in assessing the sufficiency of the evidence. See Lockhart v. Nelson, 488 U.S. 33, 40 (1988) (upholding a conviction where evidence, whether erroneously admitted or not, would have been sufficient to sustain a guilty verdict); Thomas v. United States, 557 A.2d 599, 601 (D.C. 1989) (en banc) (considering evidence wrongfully admitted in determining that here was sufficient evidence to withstand a motion for judgment of acquittal).

serious bodily injury to another person or knew that serious bodily injury to another person would result from his conduct" or that he "intentionally or knowingly engaged in conduct which created a grave risk of serious bodily injury to the complainant; which manifested an extreme indifference to human life" (R.28). Cruz did not object to the court's instruction.

B. Standard of Review

Cruz concedes that he did not object to the instruction as given (Brief for Cruz at 36). This Court in (Alexander) Smith v. United States, 801 A.2d 958 (D.C. 2002), clearly stated that "plain error review applies to a claim that an indictment has been constructively amended if an objection has not been made at the trial court level." Id. at 961; see United States v. Cotton, 535 U.S. 625, 631 (2002). Under the plain-error standard, Cruz must show that there was error, that the error was "plain" or "clear under current law," and that the error affected substantial rights. (Danny Lee) Johnson v. United States, 812 A.2d 234, 242 (D.C. 2002). With regard to substantial rights, Cruz must show that the error "seriously affect[ed] the fairness, integrity, or public

Cruz claims that <u>Carter v. United States</u>, 826 A.2d 300 (D.C. 2003), holds that a constructive amendment of an indictment requires per se reversal (Brief for Cruz at 36). Cruz is wrong. In <u>Carter</u>, this Court stated that reversal per se is only warranted where the defendant objected in the trial court. <u>See id.</u> at 303 n.7.

reputation of the judicial proceedings." Id.

C. Discussion

In light of Smith, Cruz's argument that his conviction should be reversed on grounds that his indictment was improperly amended is frivolous. Smith involved circumstances identical to those presented here: the trial court instructed the jury at trial using the entire aggravated assault statute rather only the language used in the indictment. 801 A.2d at 961. Applying the plain-error standard, the Court held that because the indictment included a citation that encompassed both subsections of the aggravated assault statute, and the evidence amply supported the conviction, the trial court did not plainly err. See id. at 962 ("Even if we assume that the evidence and instruction plainly amended the language of the indictment, there is no risk that the fairness, integrity or public reputation of the judicial proceedings will be affected where the indictment included a citation that encompassed both subsections of the aggravated assault statute and the evidence amply supported appellant's conviction of aggravated assault). 33/

The same result must be reached here. Cruz had notice that he

Appellant tries to skirt <u>Smith</u> by arguing that the instant case is analogous to <u>Hayward v. United States</u>, 612 A.2d 224 (D.C. 1992). However, the <u>Smith</u> Court distinguished <u>Hayward</u> because the government in that case conceded that the amendment of the indictment constituted reversible error. 801 A.2d at 961. The same distinction applies here.

was being charged under D.C. Code § 22-404.1, and thus knew he would be required to defend against both prongs of the statute. Moreover, on appeal Cruz claims only that the evidence that the victim actually suffered "serious bodily injury" was insufficient, not that the jury had insufficient evidence to conclude that he had intended to inflict serious bodily harm. Even if error occurred, therefore, Cruz fails to show it harmed him.

CONCLUSION

Wherefore, the government respectfully requests that this Court affirm the judgment below.

KENNETH L. WAINSTEIN, United States Attorney.

JOHN R. FISHER,

BARBARA J. VALLIERE,

Assistant United States Attorneys.

MARGARET A. SEWELL, IL BAR #6243855 Assistant United States Attorney 555 Fourth Street, N.W., Room 8104

Washington, D.C. 20530

(202) 514-7088

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief for Appellee have been mailed to counsel:

for Bolanos: James Klein, Esquire

Thomas L. Dybdahl

Public Defender Service 633 Indiana Avenue, N.W. Washington, D.C. 20004

for Palacio: Robert S. Becker

5505 Connecticut Avenue, N.W.

No. 155

Washington, D.C. 20015

and for Cruz: Joseph Virgilio

1000 Connecticut Avenue, N.W.

No. 1, Suite 613

Washington, D.C. 20006

on this 3rd day August, 2004.

MADCADET A SEWELL.

Assistant United States Attorney