No. ________________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

Luis M. Palacio,

Petitioner,

v.

United States,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Filed: April 9, 2008

QUESTIONS PRESENTED

1. Whether Petitioner, a juvenile, was deprived of the protection afforded by the Indictment Clause of the Fifth Amendment and limitations imposed by D.C. Code § 16-2301(3)(A) on the jurisdiction of the D.C. Superior Court to try him as an adult because the grand jury was not instructed as to the essential elements of assault with intent to murder while armed, and did not find probable cause as to an element of that crime, malicious intent to kill?
2. Whether the D.C. Court of Appeals, in ruling that the grand jury did not have to be instructed on the *mens rea* element of assault with intent to murder while armed and did not have to find probable cause as to that element to indict Petitioner as an adult, usurped the power of Congress to define the jurisdiction of divisions of the D.C. Superior Court and elements of offenses under the D.C. Code?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION OF THE COURT 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE PETITION 5

- **The Indictment Was Defective** *7*
- **The Court below usurped Congress's power to define the jurisdiction of D.C. Courts and establish procedural protections for young offenders** *11*

CONCLUSION 14

ADDENDA

- **OPINION:** ***Bolaños, et al. v. United States*** **A-3**
- **ORDER DENYING REHEARING** **A-15**

TABLE OF AUTHORITIES

CASES

Bolaños, et al. v. United States, 938 A.2d 672 (D.C. 2007) ---------- 1, 3, 10
Cain v. United States, 532 A.2d 1001 (D.C. 1987) ---------- 10
Comer v. United States, 584 A.2d 26 (D.C. 1990)---------- 8, 9
Hagner v. United States, 285 U.S. 427, 52 S. Ct. 417, 76 L. Ed. 861 (1932)---------- 10
Hamling v United States, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974) ---------- 10
Hobbs v. United States, 816 A.2d 21 (D.C. 1991) ---------- 9, 11
Howard v. United States, 656 A.2d 1106 (D.C. 1995) ---------- 8, 10
In re Bonner, 151 U.S. 242, 14 S. Ct. 323, 38 L. Ed. 149 (1894) ---------- 11
In re D.R.J, 734 A.2d 162 (D.C. 1999)---------- 13
Logan v. United States, 483 A.2d 664 (D.C. 1984)----------7, 8, 9, 11, 12
Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) ---------- 10
United States v. Carll, 105 U.S. 611, 26 L. Ed. 1135 (1882) ---------- 10
United States v. Debrow, 346 U.S. 374, 74 S. Ct. 113, 98 L. Ed. 92 (1953)---------- 10
United States v. Resendiz-Ponce, ___ U.S. ___, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007)---------- 10

STATUTES

2 U.S.C. § 192---------- 10
28 U.S.C. § 1257---------- 1
D.C. Code § 16-2301---------- ii, 2, 5, 7, 8, 11, 12, 13
D.C. Code § 16-2307----------2, 8, 11, 13
D.C. Code § 22- 501---------- 2, 5, 7
D.C. Code § 22- 503---------- 2, 5, 7
D.C. Code § 22- 504.1 ---------- 2
D.C. Code § 22-2403---------- 2, 5, 7
D.C. Code § 22-3202---------- 2, 5, 7
D.C. Code § 22-3204---------- 2

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. V ---------- ii, 1, 5

OTHER AUTHORITIES

116 Cong. Rec. 24,341 (1970) ---------- 13

116 Cong. Rec. 25,204 (1970) ---------- 11, 13

ABA STANDARD FOR CRIMINAL JUSTICE 3-3.9(a) (1979) ---------- 9

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction 4.09, 4th Ed. 1993, 1996 ---------- 7

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction 4.10, 4th Ed. 1993, 1996 ---------- 7, 9

H.R. 16196, 91st Cong., 2d Sess. § 121, 116 Cong. Rec. 8,129 (1970) ---------- 12, 13

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1979) ---------- 9

P.L. 91-358, title 1, § 121(a) (1970)---------- 12

S. 2601, 91st Cong., 2d Sess. (1970). ---------- 12

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OPINION BELOW

The Opinion of the District of Columbia Court of Appeals is reported at *Bolaños, et al. v. United States*, 938 A.2d 672 (D.C. 2007), and is reproduced in the Addendum to this Petition. Add. A-3 – A-14.

JURISDICTION OF THE COURT

The judgment of the D.C. Court of Appeals was entered December 28, 2007. That Court denied Palacio's Petition for Rehearing and Suggestion of Rehearing *en Banc* January 10, 2008. Add. A-15. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

a Grand Jury ….” Also at issue are provisions of the D.C. Code enacted by Congress as part of District of Columbia Courts Reorganization and Criminal Procedure Act of 1970, D.C. Code § 16-2301(3)(A) and D.C. Code § 16-2307. The former permits the U.S. Attorney to prosecute juveniles who are at least 16 years old as adults for a small class of violent crimes without first obtaining permission from the Family Division of the D.C. Superior Court. The latter establishes procedures the government must follow in all other cases in which it wants to try juveniles as adults in the Criminal Division of the Superior Court. Relevant portions of those statutes are set out in the margins below at 5 and 8.

STATEMENT OF THE CASE

Luis M. Palacio was charged April 21, 1998 with one count of assault with intent to murder while armed. The grand jury returned an 11-count indictment against Palacio and codefendants Walter A. Bolaños, Edgar A. Cruz and Uvic D. Gutierrez on June 9, 1998. Palacio and his juvenile codefendants, Bolaños and Gutierrez, were charged with three counts of assault with intent to murder while armed in violation of D.C. Code §§ 22-503,[1] 22-2403 and 22-3202 so they could be prosecuted as adults. Each defendant was charged with three counts of assault with intent to kill while armed in violation of D.C. Code §§ 22-501 and 22-3202; three counts of aggravated assault while armed in violation of D.C. Code §§ 22-504.1 and 22-3202; and one count of carrying a dangerous weapon in violation of D.C. Code § 22-3204. Each series of three counts related to alleged attacks on three individuals, José Mejia, David Rodriguez and Omar Gonzales.

The Trial Court held a hearing on pretrial motions from July 8 to 10, 1998 and the jury trial began July 17. On July 27, the jury acquitted Palacio of assault with intent to murder Rodriguez while armed, but convicted him of the lesser-included offense of assault with a dangerous weapon. It acquitted Palacio of assault with intent to kill Rodriguez while armed, but convicted him of the lesser-included offense of assault with a dangerous weapon. It acquitted him of assault with intent

[1] All D.C. Code citations are to section numbers in effect at the time of trial.

to kill Gonzales while armed, but convicted him as an aider and abettor of the lesser-included offense of assault with a dangerous weapon. The jury convicted Palacio of aggravated assault on Rodriguez while armed, and carrying a dangerous weapon. Jurors acquitted Petitioner on all other counts.

The Trial Judge sentenced Palacio to 40 months to 10 years on each count of assault with a dangerous weapon, seven to 21 years for aggravated assault while armed, and 20 months to five years for carrying a dangerous weapon. All sentences were to run concurrently, and Palacio had to serve a five-year mandatory-minimum term for aggravated assault while armed.

Palacio filed a timely Notice of Appeal December 16, 1998. The D.C. Court of Appeals issued an opinion May 10, 2007 vacating Palacio's conviction for aggravated assault while armed and one count of assault with a dangerous weapon and remanded his case for resentencing. It granted a government motion to make non-substantive corrections to the opinion and reissued the May 10 opinion. Apparently due to a procedural error the Court vacated the May 10 opinion and on December 28, 2007 issued a revised opinion including only minor changes. *Bolaños, et al. v. United States*, 938 A2d 672 (D.C. 2007).

Palacio filed a Petition for Rehearing and Suggestion of Rehearing *en Banc* July 6, 2007, to which the government responded October 10, 2007. In an order filed January 10, 2008 the D.C. Court of Appeals denied Palacio's Petition.

The Trial Court resentenced Palacio February 29, 2008 to consecutive terms of 20 to 60 months on each count of assault with a dangerous weapon and a concurrent term of 180 days for carrying a dangerous weapon. On March 14, two days before his release from prison, the Bureau of Immigration and Customs Enforcement filed a detainer initiating removal proceedings.[2]

[2] Palacio, a native of Nicaragua, came to the United States when he was about eight years old and was in the country legally when he was charged in this case. His father subsequently became a citizen and his mother and four brothers are resident aliens living in the Washington metropolitan area.

STATEMENT OF FACTS

This case involved a fight that broke out on the playground adjacent to Lincoln Middle School and Bell Multicultural High School shortly before 4 p.m. on April 14, 1998. In it three Bell students, Mejia, Rodriguez and Gonzales, were stabbed. All three were taken to the Washington Hospital Center for treatment. The hospital released Rodriguez the next day and Mejia and Gonzales two days after the fight.

Based on testimony at the trial, the origins of the dispute between the victims, members of a gang called the Graffiti Kings, and some of the alleged assailants began in November 1997. Among the assailants, according to the Graffiti Kings, were members of another gang called the Little Brown Union.

The initial encounter April 14th occurred at about 11:45 a.m., when five Graffiti Kings, Gonzales, Rodriguez, Martin Salmeron, Alex Arevalo and Walter Coreas, on their way to lunch in the Lincoln school cafeteria, confronted Bolaños and unidentified male companions on the playground. Gonzales was angry because he believed Bolaños had "tagged" — drawn graffiti — over graffiti the Graffiti Kings had drawn on a wall of Lincoln school. A Bell security guard intervened and told the Graffiti Kings to go into the school for lunch.

At the end of the school day the Graffiti Kings, this time including Mejia, congregated near the entrance to Bell, where members of several other gangs gathered as well. The Graffiti Kings could see Bolaños and from nine to 14 other people, most of them males, standing along a fence at the far end of the playground. The Graffiti Kings walked toward the group near the fence. Members of three other gangs, One-Eight, One-Five, and Park Road, were on the playground during the altercation and may have egged on the Graffiti Kings.

According to the Graffiti Kings who testified, as they approached, one of the people congregated there — some said Palacio — stepped into their path and said something about settling the earlier dispute. One or more of the Graffiti Kings shouted that someone had a knife and that they should run. Three Graffiti Kings got away, but the others received multiple knife wounds. The latter group retreated to Bell for treatment in the nurse's office and eventually were taken by ambulance

to the hospital. Bottles were thrown during the fight, but there was conflicting testimony about whether the Graffiti Kings or the other group threw them.

REASONS FOR GRANTING THE PETITION

Pursuant to D.C. Code § 16-2301 (3)(A),[3] the U.S. Attorney charged Palacio, Bolaños and Gutierrez,[4] who were 17 years old when these crimes occurred, as adults with assault with intent to murder while armed (AWIMWA) and assault with intent to kill while armed (AWIKWA). It charged Cruz, who was 23 years old, with assault with intent to kill while armed. The AWIMWA counts stated:

> On or about April 14, 1998, within the District of Columbia, Walter A. Bolaños, also known as "Droopy"; Uvic D. Gutierrez; Luis M. Palacio, also known as "Casper"; and other persons whose identities are unknown to the grand jury, while armed with a knife, or other deadly or dangerous weapon, assaulted [victim] with intent to murder him. (Assault With Intent To Murder While Armed, in violation of 22 D.C. Code, Section 503, 2403, 3202).

The AWIKWA counts were identical, except that they substituted "kill" for "murder," and cited §§ 22-501 and 22-3202 as the statutory authority for the charges.

Before trial counsel for Palacio and Bolaños moved to dismiss the AWIMWA counts. They argued that those counts lacked sufficient specificity to comply with the Indictment Clause of the Fifth Amendment because they provided no indication of the type of malice on which the grand jury based the charges. In failing to specify the level of malice supporting its probable cause finding, the grand jury did not adequately apprise the younger defendants of the nature of the charges against them and deprived them of the ability to adequately prepare their defenses, according to counsel.[5]

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[3] The statute provides in relevant part:

> (3) The term "child" means an individual who is under 18 years of age, except that the term "child" does not include an individual who is sixteen years of age or older and —
>
> > (A) charged by the United States attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense, or (ii) an offense listed in clause (i) and any other offense properly joinable with such an offense …

[4] Gutierrez was tried separately because his lawyer became unavailable for trial.

[5] Alternatively, counsel moved to dismiss either the AWIMWA or AWIKWA counts, arguing that the indictment was multiplicitous. They also argued that the cumulation of six counts each against the two younger defendants as opposed to only three counts against Cruz would have a greater

Continued on next page …

In an effort to establish their claim, counsel moved unsuccessfully to unseal the grand jury minutes to determine whether its members were properly instructed regarding the findings required to charge the younger defendants with AWIMWA, and to attempt to discern the form of malice found.[6]

In the hearing, the prosecutor acknowledged that the charging decision was driven by the desire to prosecute Palacio and Bolaños as adults, and it was unnecessary to charge Cruz with AWIMWA to obtain jurisdiction over him. Tr. 7/8/98A, 57 – 60.[7] She insisted that the government was not required to announce in advance the form of malice, although it must prove it at trial. Tr. 7/10/98, 217. She added that the grand jurors did not have to be of one mind about the form of malice involved. *Id.* at 218.

The Judge expressed reservations, saying it would be very difficult to instruct the jury in a manner that would address defense concerns. But the Judge later stated that only the jury could decided the appropriate form of malice. *Id.* at 221 – 2.

Because the counts in the indictment charging Palacio with AWIMWA were defective, the Trial Court erred in refusing to dismiss them. The error had significant prejudicial impact on Petitioner because, having been tried and sentenced as an adult, he was deprived of the protection and rehabilitation afforded in the Family Division of the Superior Court and was exposed to a

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… Continued from previous page.
psychological impact on jurors and would be prejudicial. Because the jury acquitted the defendants of all AWIMWA and AWIKWA counts the multiplicity issue is moot.

[6] The Panel ordered the government to submit the grand jury transcript under seal for its review. In its opposition to Palacio's motion to unseal the transcript so his lawyer could review it, the government represented that the transcript provided no significant evidence regarding the instructions given. The Panel denied Palacio's motion.

[7] The transcript of the motions hearing held July 8, 1998 is in two volumes, one prepared by Larry F. Pavlish and the other by Kathleen Peterson Hart. The dates on the first page of the Pavlish transcript are July 8, 9 & 10, 1998, and the 72-page transcript is in two sections. The second section, beginning at page 49, is the transcript of proceedings at 10:05 a.m. July 8, and the first section, beginning at page 1, covers proceedings the same day beginning at 2:45 p.m. The 32-page Hart transcript covers proceedings beginning at 3:15 p.m. The Pavlish transcript will be designated Tr. 7/8/98A and the Hart transcript will be designated Tr. 7/8/98B.

sentence of up to 15 years to life in prison under § 22-3202(a), far greater than the approximately four years of supervision he would have faced if he had been adjudicated delinquent. In addition, because Petitioner was convicted of an "aggravated felony" he faced deportation upon release from prison, which would not be the case if he had been adjudicated delinquent in a juvenile proceeding. *See, Logan v. United States*, 483 A.2d 664, 676 (D.C. 1984).

The Indictment Was Defective

Under D.C. Code § 22-501 the elements of assault with intent to kill are: "1. that the defendant made an assault on the complainant; and 2. that s/he did so with specific intent to kill the complainant." CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction 4.09, 4th Ed. 1993, 1996. "Specific intent to kill means purpose or conscious intention to cause death." *Id.* The penalty upon conviction is at least two years in prison and the maximum sentence is 15 years.

The D.C. Code does not define assault with intent to murder. Rather, it is a construct derived from D.C. Code § 22-503, assault to commit any other offense, and D.C. Code § 22-2403, second-degree murder. The elements of the offense include the two elements of AWIKWA and add that the jury must find that there were no mitigating circumstances and/or that the defendant did not act in self-defense. CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction 4.10, 4th Ed. 1993, 1996. The instruction explains mitigating circumstances and admonishes that "[t]he government must prove beyond a reasonable doubt that there were no mitigating circumstances." *Id.* The maximum penalty is five years in prison.[8]

In *Logan, supra*, the Court analyzed the legislative history of § 16-2301(3)(A) to determine whether the U.S. Attorney could try a juvenile over 16 years old as an adult for AWIKWA under D.C. Code § 22-501. It rejected the government's argument that the distinction between AWIMWA and AWIKWA was merely semantic, and recognized that, if approved, the government's position that § 16-2301(3)(A) permits prosecution under § 22-501 for AWIKWA

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[8] D.C. Code § 22-3202(a)(1), the "while armed" statute, provided an enhanced penalty of 15 years to life in prison, applying in this case to the AWIKWA and AWIMWA charges.

> would make it possible for a seventeen-year-old youth who committed an assault with a specific intent to kill — but who acted with adequate provocation, justification or excuse — to be charged and tried as an adult under § 16-2301(3)(A) only so long as the victim of the assault survived. If the victim died, the crime would be manslaughter and the youth could not be tried as an adult without prior judicial approval pursuant to § 16-2307.[9]

Id. 483 A.2d 674 – 5.

Instead, the Court concluded that "the purpose of the relevant language in § 16-2301(3)(A) is to authorize the prosecution of certain juveniles as adults only when they are charged with an assault committed with a malicious intent to kill." *Id.* at 676. The Court had recognized four states of mind that satisfy the malice requirement in a murder case: 1) that the defendant had the specific intent to kill; 2) that he had the specific intent to commit serious bodily harm; 3) that he acted in wanton and willful disregard of an unreasonable human risk — "depraved heart" murder; and 4) that the killing occurred during the commission of a felony — "felony murder." *Comer v. United States*, 584 A.2d 26, 38 – 9 (D.C. 1990). Both the defendant's state of mind and the absence of justification, excuse or mitigation are components of malice required to convict a defendant for AWIMWA. *Howard v. United States*, 656 A.2d 1106, 1114 (D.C. 1995). The *Logan* Court instructed that:

> *a prosecutor should not bring* or maintain charges involving malice unless he or she has "sufficient admissible evidence" to persuade the jury that the suspect indeed acted with malice — i.e., acted with an intent to kill and without adequate provocation, justification, or

[9] D.C. Code § 16-2307 states in relevant part:

> (a) Within twenty-one days … of the filing of a delinquency petition, or later for good cause shown, and prior to a factfinding hearing on the petition, the Attorney General may file a motion, supported by a statement of facts, requesting transfer of the child for criminal prosecution, if —
>
> (1) the child was fifteen or more years of age at the time of the conduct charged, and is alleged to have committed an act which would constitute a felony if committed by an adult;
>
> (2) the child is sixteen or more years of age and is already under commitment to an agency or institution as a delinquent child;
>
> …
>
> (4) a child under 18 years of age is charged with the illegal possession or control of a firearm within 1000 feet of a public or private day care center, elementary school, vocational school, secondary school, college, junior college, or university, or any public swimming pool, playground, video arcade, or youth center, or an event sponsored by any of the above entities….

> excuse. ABA STANDARD FOR CRIMINAL JUSTICE 3-3.9(a) (1979); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1979) (*making it unprofessional conduct for a prosecutor to institute* or maintain criminal charges if he or she knows or *it is obvious that the charges are not supported by probable cause*).

Logan, supra, at 673 n. 11 (emphasis added).

Reading *Logan* and *Comer* together, to charge assault with intent to murder the grand jury would have to find both probable cause to believe that at the time of the crime the defendant had one of the four states of mind required for murder and the absence of justification, excuse or mitigation. But in *Hobbs v. United States*, 816 A.2^{d} 21, 35 (D.C. 1991), in explaining why aggravated assault while armed does not merge with assault with intent to murder while armed, the Court held the former requires proof of bodily injury and the latter "requires proof of specific intent to kill and malice." As a result, the notes accompanying Instruction 4.10, *supra*, state,

> [t]he Court of Appeals has not explicitly set out the elements of the offense of assault with intent to murder…. [H]owever, it has indicated strongly that an intent to kill is an essential element…. The conclusion that an intent to kill is required is consistent with the law in virtually all the jurisdictions in which assault with intent to murder is a crime.[10]

Regardless of whether a specific intent to kill is an essential element of AWIMWA, or one of the other three mental states would suffice, the U.S. Attorney could, without approval from the Family Division, transfer Palacio's case to the Criminal Division only if the grand jury found probable cause to believe that Petitioner committed the assault with the requisite state of mind — malicious intent to kill.

The Panel agreed with Petitioner that an indictment for AWIMWA must allege: "(1) defendant assaulted the complainant; (2) defendant did so with specific intent to kill the complainant; (3) there were no mitigating circumstances …; and (4) that at the time of the

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[10] The notes state that the Court's pronouncements in this area are open to some interpretation:

> The Committee recognizes that certain statements in *Logan* might be taken to indicate that intent to seriously injure or awareness of extreme risk of death or serious bodily injury would be sufficient … In view of the other statements from the Court of Appeals and the case law in other jurisdictions [] the Committee recommends that the jury be instructed that intent to kill is a required element.

commission of the offense the defendant was armed." *Bolaños, et al., supra*, 938 A.2d at 684 (citing *Howard, supra*, at 1114; *Cain v. United States*, 532 A.2d 1001, 1004 (D.C. 1987)). But it concluded that, because the government "ordinarily is not obligated to present … evidence that is favorable to an accused" and did not present "evidence of provocation or mitigating circumstances" to the grand jury in this case, the grand jury "did not need to find probable cause as to that element." *Bolaños, et al., supra.*

This Court has held that an indictment serves two main purposes, to inform the defendant of the charge against him so he may prepare a defense, and to enable him to plead acquittal or prior conviction as a bar to future prosecution for the same conduct. *United States v. Debrow*, 346 U.S. 374, 376, 74 S. Ct. 113, 98 L. Ed. 92 (1953); *Hagner v. United States*, 285 U.S. 427, 431, 52 S. Ct. 417, 76 L. Ed. 861 (1932). As a general rule, an indictment is sufficient if it recites the offense in the words of the statute if "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Hamling v United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)(quoting *United States v. Carll*, 105 U.S. 611, 612, 26 L. Ed. 1135 (1882)).

The Court has stated that

> there is an important corollary purpose to be served by the requirement that an indictment set out "the specific offence, coming under the general description," with which the defendant is charged. This purpose … is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

Russell v. United States, 369 U.S. 749, 768, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962). The indictment in Palacio's case was insufficient under this corollary because it did not provide the Trial Court with a basis to conclude that it had jurisdiction to try Petitioner.

Recently this Court recognized that, "while an indictment parroting the language of a … statute is often sufficient, there are crimes that must be charged with greater specificity." *United States v. Resendiz-Ponce*, ___ U.S. ___, 127 S. Ct. 782, 789, 166 L. Ed. 2d 591 (2007)(citing 2 U.S.C. § 192, which was at issue in *Russell, supra*).

In a very real sense jurisdiction is an essential element of every criminal charge. The Trial court must have personal jurisdiction over the defendant and subject matter jurisdiction over the crime charged.

> [I]n all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement …; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms."

In re Bonner, 151 U.S. 242, 256, 14 S. Ct. 323, 38 L. Ed. 149 (1894).

In Palacio's case the statute permitting the U.S. Attorney to circumvent formal transfer proceedings specifically limits the jurisdiction of the Criminal Division over juveniles to a small class of enumerated crimes. The grand jury could indict him for AWIMWA only if it found that when he committed the alleged crime he had a malicious intent to kill. Absent probable cause to believe that he exhibited malicious intent the Criminal Division lacked jurisdiction to prosecute Palacio, and the indictment gave no indication that the grand jury had considered that element of the three AWIMWA charges.

The Court below usurped Congress's power to define the jurisdiction of D.C. Courts and establish procedural protections for young offenders

It is noteworthy that the Panel never discussed the two seminal cases interpreting § 16-2301(3)(A), *Logan* and *Hobbs*. Nonetheless, the Panel's Opinion effectively overrules *Logan*. In doing so it ignores the clear intent of Congress that § 16-2301(3)(A) is to be construed narrowly so that the U.S. Attorney can circumvent the formal transfer procedure established by § 16-2307 only when juveniles have committed "the few most serious offenses." 116 Cong. Rec. 25,204 (1970). In short, the Panel opinion lowers the threshold for prosecuting juveniles in the Superior Court as adults without review by a Judge of the Family Division.

By holding that the government need not present any more or any different evidence to the grand jury to obtain an indictment for AWIMWA than it does to obtain an indictment for AWIKWA, the Panel reduced the jurisdictional barrier defined by the statute to a mere matter of

nomenclature. Its ruling means that in any case involving a juvenile over 16 years of age where there is sufficient evidence to obtain an indictment for AWIKWA, the U.S. Attorney can label the crime AWIMWA in the indictment to usurp the Family Division's jurisdiction.

Congress clearly intended to limit the number of crimes for which the U.S. Attorney could preempt the Family Division's jurisdiction and prosecute a juvenile as an adult, and AWIKWA is not one of those crimes.

The initial House provision in the District of Columbia Court Reform and Criminal Procedure Act of 1970 would have permitted the U.S. Attorney, without permission of the Family Division, to prosecute a juvenile over 16 years old for "murder, manslaughter, rape, mayhem, arson, kidnapping, burglary, robbery, any assault with intent to commit any such offense, or assault with a dangerous weapon." H.R. 16196, 91st Cong., 2d Sess. § 121, 116 Cong. Rec. 8,129 (1970). But the conference committee adopted the Senate version, excluding manslaughter and attempt to commit manslaughter, and Congress passed that version. P.L. 91-358, title 1, § 121(a) (1970). *See, also, Logan, supra*, at 674 (attempt to commit manslaughter would be charged as assault with intent to kill, and could not automatically be transferred to the Criminal Division under § 16-2301(3)(A)).

In advocating Senate passage of the bill Maryland Sen. Joseph Tydings told colleagues,

> The overwhelming majority of 16- and 17-year-olds presently handled in the juvenile court system will be unaffected by the conference report on S. 2601.[11] The District of Columbia crime bill merely provides that in the unusual case where a 16- or 17-year old is the subject of a bona fide charge of murder, forcible rape, first-degree burglary, or armed robbery — or felonious assault with intent to commit one of the aforesaid serious offenses — the 16- or 17-year-old must be sent to adult court for trial and sentencing — like an 18-year-old.
>
> … [U]nlike the House version of S. 2601, the list of offenses for which the age limit may be lowered does not now include manslaughter, mayhem, arson, kidnaping (sic), second-degree burglary, breaking into vending machines, assault with a dangerous weapon, "unarmed" robbery … and assault with intent to commit one of these offenses.
>
> … [O]rdinarily the preferred method for shifting a child to the adult court is by the traditional means of formal transfer proceeding. The Senate conferees fully expect that the Criminal Division will turn back or dismiss the indictment in any case where the prosecutor

[11] S. 2601, 91st Cong., 2d Sess. (1970).

> categorizes as one of the few most serious offenses acts which under other circumstances would not be similarly categorized — whenever, in other words, the prosecutor seeks unfairly to circumvent the preferred transfer proceeding. In fact, the discretion left to the prosecutor with the new definition of "child" can only operate in the child's benefit: the courts will protect against abuses in the nature of unnecessarily high charges….

116 Cong. Rec. 25,204 (1970). The legislative history demonstrates that Palacio's case is the type of case in which Congress expected trial judges to step in and prevent the government from unfairly attempting to circumvent § 16-2307 because, in Sen. Tydings's words, there is no evidence supporting a "*bona fide* charge of … [a] felonious attempt" to commit murder.

The error in the Panel's reasoning becomes even more evident when viewed in light of the legislative history of § 16-2307, which provides the procedure for transferring juveniles who have committed serious felonies to the Criminal Division for prosecution as adults. The highly controversial provision in H.R. 16196, *supra*, would have created a presumption in favor of transfer and would have placed the burden on the juvenile to demonstrate that s/he did not pose a danger to public safety. 116 Cong. Rec. 24,341 (1970).

> In the area of the formal transfer of juveniles for criminal prosecution (until now referred to under the law as "waiver"), the Senate conferees prevailed on the most controversial issues in disagreement. First, the Senate conferees insisted that a juvenile cannot fairly be required to bear the burden of disproving the appropriateness of transfer. Placing such a burden on the child (as under the House version) would have contravened the general rule of law that a moving party, here the government, must establish the grounds for his motion, the House version would have placed the burden on the party, the juvenile, least able to bear it….

Id. at 24,346. *See, also In re D.R.J*, 734 A.2[d] 162, 163 (D.C. 1999)(although statute requires juvenile to come forward with evidence rebutting presumption, burden remains on the government, which, with or without benefit of unrebutted presumption, must prove by preponderance of evidence that transfer is dictated by public safety).

The Panel opinion in Palacio's case creates the anomalous result that in a formal transfer proceeding under § 16-2307 the government must present evidence supporting its motion and the juvenile has the opportunity to present contrary evidence. But when the government proceeds pursuant to § 16-2301(3)(A) in a grand jury proceeding where the juvenile is excluded and has no

opportunity to respond, it has no obligation to demonstrate an essential element of the offense, that the juvenile acted with malicious intent. The error is particularly problematic where, as in Palacio's case, that element is the basis for the Criminal Division's assertion of jurisdiction.

Even if, as a general proposition, the U.S. Attorney has no duty to introduce exculpatory evidence when presenting a case to the grand jury, when seeking to prosecute a juvenile as an adult for AWIMWA without a formal transfer, the grand jury must find probable cause to believe the juvenile acted with malicious intent to kill. It is not enough for the grand jury to find probable cause to believe that the juvenile committed AWIKWA.

CONCLUSION

For the reasons stated above and any others that may appear to the Court, Petitioner Luis M. Palacio respectfully requests that the Court grant this petition, vacate his adult conviction, and remand his case for further proceedings consistent with the Court's Judgment.

Respectfully submitted,

____

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ADDENDA

INDEX OF ADDENDA

1. Opinion of the D.C. Court of Appeals A-3

2. Order denying rehearing A-15

WALTER A. BOLANOS, LUIS M. PALACIO & EDGAR A. CRUZ, APPELLANTS, v. UNITED STATES, APPELLEE.

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

DISTRICT OF COLUMBIA COURT OF APPEALS

938 A.2d 672; 2007 D.C. App. LEXIS 700

March 24, 2005, Argued
December 28, 2007, Decided [1]

1 Order filed December 28, 2007, *sua sponte,* vacating the opinion in *Walter A.* ***Bolanos,*** *Luis M. Palacio & Edgar A. Cruz v.* ***United States,*** 933 A.2d 1251 (D.C. 2007), issued by the court on May 10, 2007.

PRIOR HISTORY: [1]**

Appeals from the Superior Court of the District of Columbia. (F-2764-98, F-2902-98 & F-2827-91). (Hon. Stephen G. Milliken, Trial Judge).

Bolanos v. **United States,** 933 A.2d 1251, 2007 D.C. App. LEXIS 246 (D.C., 2007)

COUNSEL: Thomas L. Dybdahl, Public Defender Service, with whom James W. Klein and Jaclyn S. Frankfurt, Public Defender Service, were on the brief, for appellant Walter A. Bolanos**.**

Robert S. Becker, appointed by the court, for appellant Luis M. Palacio.

Joseph A. Virgilio, appointed by the court, for appellant Edgar A. Cruz.

Florence Pan, Assistant United States Attorney, with whom Kenneth L. Wainstein, United States Attorney, at the time the brief was filed, John R. Fisher, Assistant United States Attorney, at the time the brief was filed, Barbara J. Valliere, and Margaret A. Sewell, Assistant United States Attorneys, were on the brief, for appellee.

JUDGES: Before Washington, Chief Judge, Farrell, Associate Judge, and Schwelb, Senior Judge. [2]

2 At the time this case was argued, Judge Washington was an Associate Judge on the court. His official term as Chief Judge began on August 6, 2005.

At the time this case was argued, Judge Schwelb was an Associate Judge on the court. His official term as Senior Judge began on June 24, 2006.

OPINION BY: Washington

OPINION

[*676] WASHINGTON, *Chief Judge:* Appellants **[**2]** Walter A. Bolanos ("Bolanos"), Luis M. Palacio ("Palacio"), and Edgar A. Cruz ("Cruz") appeal from their convictions of aggravated assault while armed ("AAWA"), [3] assault with a dangerous weapon ("ADW"), [4] and carrying a dangerous weapon ("CDW"). [5] Appellants' convictions stem from an altercation at school, during which Jose Mejia ("Mejia"), Omar Gonzalez ("Gonzalez"), and David Rodriguez ("Rodriguez") were

stabbed. Each appellant contends that there is insufficient evidence to support the "serious bodily injury" element of AAWA. Separately, Palacio contends that there was insufficient evidence to support his conviction for ADW. Appellants Bolanos and Palacio contend that the trial court erred when it failed to dismiss the indictments for the AWIMWA counts. Cruz contends that the trial court erred by denying his pretrial motion to suppress out-of-court identifications by the victims and that his conviction should be reversed on grounds that his indictment was improperly amended. Finally, all appellants contend that if their convictions for AAWA are upheld, then their convictions for ADW merge into them as lesser-included offenses and that two convictions as to the same victim should **[**3]** also merge. We affirm in part, reverse in part, and remand in part.

3 In violation of D.C. Code §§ 22-504.1 & -3202 (1981).

4 All appellants were charged with assault with intent to kill while armed ("AWIKWA"), but the jury acquitted on those charges. D.C. Code §§ 22-501 and -3202 (1981). Additionally, Palacio and Bolanos were charged with assault with intent to murder while armed ("AWIMWA"). D.C. Code §§ 22-503,-2403, and -3202 (1981). They were acquitted of AWIMWA. Instead, the jury convicted appellants of ADW as a lesser-included offense of both AWIKWA and AWIMWA.

5 In violation of D.C. Code § 22-3204 (1981).

I.

During the afternoon of April 14, 1998, victims Mejia, Gonzalez, Rodriguez, and three of their friends left Bell Multicultural School, where they attended high school. Although claiming not to be a gang, the group called themselves the Graffiti Kings because they liked to "tag" -- *i.e.,* write their **names** -- on the school's walls. As **[*677]** they crossed the school playground, they encountered a group of approximately fifteen young men, including appellants Bolanos**,** Palacio, and Cruz. According to the three victims, the appellants were members of a rival group called the Little Brown Union. **[**4]** Allegedly, as the two groups crossed paths, Palacio confronted the Graffiti Kings regarding an earlier dispute. [6] A fight soon ensued between the two groups. At one point, a member of the Graffiti Kings shouted that someone from Little Brown Union had a knife. Almost immediately three members of the Graffiti Kings ran. Mejia, Gonzalez, and Rodriguez, however, could not get away and each was stabbed multiple times during the fight.

6 Earlier that day Gonzalez, accompanied by Rodriguez and two other members of the Graffiti Kings, had a verbal encounter with Bolanos and other unnamed members of Little Brown Union. Gonzalez approached Bolanos and asked whether Bolanos tagged over the Graffiti Kings' tags. The encounter ended when Gonzalez and his friends left, while the school security guard was approaching the group.

At trial, all three victims testified about the extent of their injuries. Their medical records, documenting their injuries, were stipulated. There was, however, no testimony, expert or otherwise, explaining the medical records or their contents.

Following trial, the jury convicted Bolanos of: two counts of ADW as a lesser-included offense of both AWIMWA and AWIKWA, both as **[**5]** to the victim Mejia; one count of AAWA, as to Mejia; and, one count of CDW. Palacio's convictions are: two counts of ADW as a lesser-included offense of both AWIMWA and AWIKWA, both as to the victim Rodriguez; one count of ADW as a lesser-

included offense of AWIKWA, as to the victim Gonzalez; one count of AAWA, as to Rodriguez; and, one count of CDW. Cruz's convictions are: two counts of ADW as a lesser-included offense of AWIKWA, as to Mejia and Gonzalez; two counts of AAWA, as to Mejia and Gonzalez; and, one count of CDW.

II.

Sufficiency of the Evidence Claims with Respect to Appellants' AAWA Convictions

All three appellants argue that there was insufficient evidence to permit a reasonable trier of fact to find that they inflicted "serious bodily injury," an essential element of AAWA, on any of the victims in this case. *See e.g., Riddick v. United States,* 806 A.2d 631, 639 (D.C. 2002). [HN1] This court reviews sufficiency of the evidence claims "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). The evidence **[**6]** is insufficient when the government produces "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Id.*

This court defines [HN2] serious bodily injury to encompass "bodily 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." *(Troy) Nixon v. United States,* 730 A.2d 145, 149 (D.C. 1999). Since *Nixon,* this court has emphasized the "high threshold of injury" that "the legislature intended in fashioning a crime that increases twenty-fold the maximum prison term for simple assault." *Swinton v. United States,* 902 A.2d 772, 775 (D.C. 2006) (citing *Jenkins v. United States,* 877 A.2d 1062, 1069 **[*678]** (D.C. 2005)). For example, the fact that an individual suffered from knife or gunshot wounds does not make that injury a *per se* "serious bodily injury." *Zeledon v. United States,* 770 A.2d 972, 977 (D.C. 2001). We have found *grievous* stab wounds, however, to be sufficient to satisfy the definition of serious bodily injury. *See Jenkins,* 877 A.2d at 1071 (multiple deep stab wounds to victim's chest, stomach **[**7]** and arm, inflicted with a seven or eight-inch knife); *Baker v. United States,* 867 A.2d 988, 995, 1009 (D.C. 2005) (victim stabbed in stomach, head and arm, with substantial loss of blood); *Hart v. United States,* 863 A.2d 866, 875 (D.C. 2004) (woman stabbed multiple times in the arms and in the vagina). The difference is a matter of degree. Serious bodily injury usually involves a life-threatening or disabling injury, but the court must also consider all the consequences of the injury to determine whether the appropriate "high threshold of injury" has been met. *See Swinton, supra,* 902 A.2d at 776 (internal quotations omitted).

In the present case, the trial was held before we issued our opinion in *Nixon,* and as a result the trial court failed to instruct the jury on two of the *Nixon* prongs -- extreme pain and unconsciousness. Instead, the trial court defined serious bodily injury as an injury that causes substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the functions of a bodily member or organ. Because the trial court only instructed the jury on three of the five factors, the instruction was incorrect. *See Johnson v. United States,* 520 **U.S.** 461, 467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) **[**8]** (new criminal rules will apply retroactively to cases pending on direct review).

This instructional error, however, does not result in *per se* reversal. If there was sufficient evidence to convict based upon the instruction given, then, necessarily, the verdict satisfies one of the *Nixon* elements of serious bodily injury. In addition, [HN3] where this court

finds instructional error but sufficient evidence in the record to support a conviction under the correct instruction, we will remand for further proceedings to allow the government, at its election, to re-try the appellant on the original charge. *Gathy v. United States,* 754 A.2d 912, 920 (D.C. 2000). [7] It is only when the evidence is insufficient to permit a trier of fact to conclude guilt beyond a reasonable doubt under either the instruction given or the *Nixon* instruction that we reverse the conviction with instructions to the trial court to enter judgment on any appropriate lesser-included offenses. *Id.*

7 We take this moment to explicitly join our sister jurisdictions that have adopted the Supreme Court's conclusion that in reviewing sufficiency of the evidence claims the evidence "must be applied with explicit reference to the substantive **[**9]** elements of the criminal offense as defined by state law." *Jackson v. Virginia,* 443 **U.S.** 307, 324 n.16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see, e.g., Malik v. State,* 953 S.W.2d 234, 238 (Tex. Crim. App. 1997); *United States v. Zanghi,* 189 F.3d 71, 80 (1st Cir. 1999).

Cruz's AAWA Conviction for Assaulting Gonzalez

Gonzalez testified that Cruz stabbed him through his arm, that the knife then penetrated into his stomach, and that he underwent surgery. Gonzalez's medical records state that to repair the perforation of his intestine, Gonzalez underwent surgery to suture the laceration. In addition, Gonzalez's medical records state that after three days and upon discharge, Gonzalez was prescribed Percocet for pain and given a follow-up appointment at the trauma clinic. There was no expert testimony presented regarding the **[*679]** effects of the knife wounds, or whether these types of wounds could be considered life-threatening. [8] The evidence in the record also fails to demonstrate if the wounds or incisions from the surgery physically scarred Gonzalez and the extent of the scarring, if any. Based on this record, we conclude that the evidence presented to the jury was insufficient to support a finding that Gonzalez faced a substantial **[**10]** risk of death, serious permanent disfigurement, or protracted loss or impairment of the functions of any bodily organ.

8 The government contends in its brief that expert medical testimony was not required. While the government may be correct, expert testimony would have been properly admitted because many of the medical terms used in the medical records and the effects of the wounds on the victims were beyond the ken of the average layperson. *See (Gregory) Nixon v. United States,* 728 A.2d 582 (D.C. 1999). Therefore, although expert testimony was not required, it certainly would have assisted the jury in its understanding of the medical questions involved in this case.

Nevertheless, the government, relying on this court's holding in *Wilson v. United States,* 785 A.2d 321, 329 (D.C. 2001), argues that the jury could reasonably conclude that Gonzalez suffered an impairment of the function of a bodily organ because Gonzalez underwent surgery to repair the perforation of his bowel. *Id.* at 329. The victim in *Wilson,* however, sustained a laceration in his right eye, which required four interrupted stitches, and a cut in his left eye. In addition, medical testimony was presented as to the seriousness **[**11]** of the injury and that the victim required close monitoring for development of complications. Moreover, because the victim was legally blind in his right eye at the time, the cut to his left eye was even more serious because the victim's entire vision could be compromised. The victim, after three months and presumably after the return of his vision, returned to work, but testified that he was reading at an appreciably slower rate. Based on this evidence, this court

concluded the victim suffered an impairment of a bodily organ sufficient to support a finding of serious bodily injury. *Id.* (affirming on other grounds). In contrast, there was no evidence presented to the jury in this case regarding the severity of Gonzalez's perforated intestine or whether Gonzalez suffered lingering effects from the knife wounds. Nor is there any indication that Gonzalez required additional monitoring, except for the one follow-up appointment scheduled upon discharge. Instead, Gonzalez's medical records state that upon discharge, a mere three days later, Gonzalez was on a regular diet. Based on these facts, we cannot conclude that the evidence could reasonably support a jury's finding that Gonzalez suffered **[**12]** impairment of a bodily function as a result of his being stabbed by Cruz.

Palacio's AAWA Conviction for Assaulting Rodriguez

Rodriguez testified that Palacio stabbed him in his arm and cut his wrist, and that another unknown assailant stabbed him in his abdomen. Rodriguez's medical records described the upper arm wound as "without complication" and the wrist wound as "superficial," requiring only stitches. Rodriguez was also stabbed in the abdomen, but the medical records state that there were no life threatening or potentially disabling injuries identified from the abdomen wound. In addition, Rodriguez's records state he was able to "ambulate[] independently." After Rodriguez stayed in the hospital for less than eighteen hours, the hospital discharged him with a prescription for Percocet to be taken as needed for pain, and he was given a follow-up appointment at the trauma clinic. Finally, we note that the record **[*680]** was void of any evidence of the medical, consequential or lasting effects of the wounds inflicted on Rodriguez. Therefore, even viewing this evidence in a light most favorable to sustaining the jury's verdict, we conclude that there is insufficient evidence **[*681]** from which a reasonable **[**13]** jury could find that Rodriguez faced a substantial risk of death, or suffered from either protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member as a result of the stabbing wound he received from Palacio. *Cf. (Troy) Nixon, supra,* 730 A.2d at 149 (holding that despite evidence that a victim was shot in the shoulder and back, there was insufficient evidence to support a finding of serious bodily injury because the record was silent as to the effects of shooting on the victim).

Bolanos' and Cruz's AAWA Convictions for Assaulting Mejia

Turning now to Mejia's injuries, Mejia testified that Bolanos and Cruz approached him, armed with knives, and that Bolanos stabbed him once in the chest and Cruz stabbed him once in the left shoulder. [9] After being stabbed, Mejia ran towards the school and, from there, was transported to the hospital. Mejia's medical records state that he had an "uneventful transport" to the hospital with no loss of consciousness. Mejia testified that upon arrival at the hospital he was bleeding, his muscles hurt, and he had pain in his chest. Nevertheless, his medical records indicate that despite complaints of shortness of **[**14]** breath related to pain, Mejia arrived "alert, speaking and appropriately obeying commands." Mejia remained in the hospital for two nights and three days and had "surgery" on the day of the incident. [10] Mejia's wounds were characterized as small and round. The medical records also indicated that Mejia had a "small left apical pneumothorax" and a "left basilar atelectasis"; however, no medical testimony was provided to the jury about the meaning of those terms. Mejia was discharged after forty-eight hours. Upon discharge, the doctors gave Mejia a prescription for Percocet and instructed him not to lift anything greater than ten pounds.

9 Mejia was also stabbed once in the back by an unknown assailant.

10 It appears from the medical records that the surgery Mejia was referring to was the insertion of a chest tube.

Looking at the nature and extent of the injuries described in the record, and the high threshold of injury required for AAWA, a reasonable juror could not reasonably find that Mejia suffered a serious bodily injury under the pre-*Nixon* instruction given to the jury. The government argues that Mejia faced a substantial risk of death, as evidenced by his own statement that he believed **[**15]** he was going to die. That testimony alone, however, is not sufficient to support a conviction for AAWA. Unlike in *Zeledon,* where this court concluded that there was sufficient evidence in the record from which a reasonable juror could conclude that the victim suffered a serious bodily injury based on the medical testimony that the bleeding was severe enough to cause death, *Zeledon, supra,* 770 A.2d at 974, no such evidence was produced by the government in this case. In fact, the government failed to produce any expert testimony as to the life-threatening nature of Mejia's injuries. [11] Although Mejia's medical records were available to the jury, there is nothing in the medical records from which a reasonable jury could conclude that Mejia was inflicted with a life-threatening injury.

11 See *supra,* note 7.

In the same vein, we reject the government's argument that Mejia suffered a "protracted and obvious disfigurement" in the form of scarring. [12] [HN4] To be "protracted and obvious," the scar must be "a serious permanent or physical disfigurement." *(Troy) Nixon, supra,* 730 A.2d at 150. And "to be permanently disfigured means that the person is appreciably less attractive or that a part of his **[**16]** body is to some appreciable degree less useful or functional than it was before the injury." *Perkins v. United States,* 446 A.2d 19, 26 (D.C. 1982). Medical records characterized Mejia's wounds as one centimeter or smaller. Such small scars to the chest and shoulder do not make Mejia "appreciably less attractive," nor do these scars make any part of his body to "some appreciable degree less useful or functional." *Id.; cf. Gathy, supra,* 754 A.2d at 919 ("protracted and obvious disfigurement" found when victim suffered 48 stitches to the face and a chipped piece of bone in his nose). Also, "obvious" disfigurement "indicates a degree of genuine prominence." *Swinton, supra,* 902 A.2d at 777. In the present case, the scars' location and the size of the wounds are appreciably less prominent. Therefore, we find that there is insufficient evidence in the record from which a reasonable jury could conclude that Mejia suffered a serious bodily injury as that concept was defined to the jury. Despite our conclusion that there was insufficient evidence presented at trial to support appellants' convictions for AAWA under the trial court's pre-*Nixon* instruction, our inquiry is not complete. Under *Nixon* **[**17]** and *Gathy,* we are obligated to review the record to determine whether there is sufficient evidence to support a reasonable conclusion that the victims suffered extreme physical pain. [13]

12 The government, wisely, makes no contention that Mejia suffered from a protracted loss or function of a bodily member or organ. Because the record is silent as to any evidence that might suggest Mejia suffered from loss or function of a bodily organ, we do not address the point here.

13 The evidence showed that each of the victims either ran to the school nurse's office or was escorted to the nurse's office with the assistance of another. There was no evidence to suggest that at any point the victims were rendered unconscious; therefore,

unconsciousness is not a factor that this court needs to examine.

Extreme Physical Pain

[HN5] The extreme physical pain necessary to satisfy *Nixon* is a level of pain that "must be exceptionally severe if not unbearable." *Swinton, supra,* 902 A.2d at 777; *cf. (Troy) Nixon, supra,* 730 A.2d at 150 (referring to "immobilizing pain"); *Alfaro v. United States,* 859 A.2d 149, 162 (D.C. 2004) ("vicious" whipping of a child with a wet telephone cord did not create "extreme" pain). We **[**18]** have held that the victim need not use the specific word "extreme" to describe the pain, but rather that "a reasonable juror may be able to infer that pain was extreme from the nature of the injuries and the victim's reaction to them." *Swinton,* 902 A.2d at 777 (citing *Anderson v. United States,* 857 A.2d 451, 464 (D.C. 2004); *Gathy, supra,* 754 A.2d at 918). Should we conclude that there is sufficient evidence in the record to support such a finding, the case will be remanded to give the government an opportunity, should it so choose, to re-try the appellant for AAWA under that theory of the case. *Gathy, supra,* 754 A.2d at 912.

Turning first to Rodriguez and Gonzalez, the record indicates that after being stabbed, Rodriguez walked to the **[*682]** nurse's office with the assistance of a friend and that Gonzalez was also able to walk with the assistance of a security guard. Neither victim, however, testified as to how much pain, if any, he felt. Although at trial Detective Hewick testified that all the victims were in pain and that each was given Percocet for pain, this evidence is not enough to satisfy the showing of extreme pain that the statute requires. Therefore, we reverse both Cruz's AAWA **[**19]** conviction for the assault on Gonzalez and Palacio's AAWA conviction for the assault on Rodriguez. Upon remand the trial court shall vacate these convictions; however, the convictions for ADW, as lesser-included offenses, shall stand. *Gathy, supra,* 754 A.2d at 919 (ADW is a lesser-included offense of aggravated assault while armed).

On the other hand, a reasonable juror could find beyond a reasonable doubt that Mejia suffered extreme physical pain from the multiple stab wounds he received, sufficient to satisfy the threshold required for a conviction of AAWA. Specifically, Mejia testified that he told an officer that he was in pain and that he could not breathe. He also testified that his muscles hurt, his chest was in pain, and he kept thinking that he was going to die. In addition, Mejia's medical records indicate that, upon his arrival at the hospital, Mejia complained of shortness of breath related to pain. To combat the pain, the hospital prescribed Mejia pain medication both during his hospital stay and upon discharge. Under these circumstances, a jury could reasonably infer that Mejia suffered "extreme physical pain."

Nevertheless, because the trial judge failed to instruct on **[**20]** this part of the definition of serious bodily injury, we must reverse the AAWA convictions of Bolanos and Cruz for the assault of Mejia and remand to the trial court for further proceedings. Upon remand, the government shall have the option to retry Bolanos and Cruz on the AAWA charge because the evidence established sufficient evidence of extreme pain. If the government elects not to retry them, then Bolanos and Cruz shall stand convicted of ADW for the assault of Mejia. [14]

14 The government, however, may not elect to re-try Palacio because the jury acquitted Palacio of the AAWA count for the assault of Mejia.

III.

Palacio's ADW Conviction for Assaulting Gonzalez

Palacio argues that the evidence was insufficient to support his conviction for ADW for assaulting Gonzalez because Gonzalez identified Cruz as his attacker. The government counters that while there is no direct evidence that Palacio stabbed Gonzalez, there was sufficient evidence presented to convict Palacio of ADW as an aider and abettor during the attack on Gonzalez. [15] [HN6] To establish aiding and abetting, the government must prove that: (1) the offense was committed by someone; (2) the accused participated in the commission **[**21]** of the offense; and (3) he did so with guilty knowledge. *Hawthorne v. United States,* 829 A.2d 948, 952 (D.C. 2003) (citation and quotations omitted).

15 The trial court instructed the jury that, "[it] may find the defendant guilty of the crime charged in the indictment without finding that he personally committed each of the acts that make up the crime." The court then proceeded to instruct the jury on the elements that constitute aiding and abetting.

The question before this court is whether there was sufficient evidence to support the finding that Palacio participated as an **[*683]** aider and abettor in the assault on Gonzalez. It is well established that [HN7] the government must present evidence from which a juror could reasonably conclude that the accused was not only present at the crime, but also that his conduct encouraged or facilitated the commission of the offense. *See Price v. United States,* 813 A.2d 169, 177 (D.C. 2002). To that end, *Price* is particularly instructive in this case. In *Price,* the uncontroverted evidence showed that the appellant's co-defendants committed the assault on the victim; nevertheless, this court found there was sufficient evidence to convict the appellant as an **[**22]** aider and abettor. *Id.* Price was not only armed and present during the commission of the crime, but fled the scene along with his cohorts after the assault. Moreover, Price never distanced himself from the crimes and instead demanded to know, from the victim, who shot at his car. "From [Price's] action it was reasonable to infer that he knew about the crimes, took some part in the confrontation, facilitated its commission by his demand [for an answer to his inquiry] and armed presence, and remained until making his escape after the offenses were completed. This evidence [was] sufficient to support the conviction[]." *Id.* at 178; *cf. Jones v. United States,* 625 A.2d 281 (D.C. 1993) (concluding that the evidence was insufficient to support a conviction under the aiding and abetting theory because although the appellant was seen talking with the assailant and left with him after the assault was committed, the appellant walked past the victim and continued up the street during the commission of the offense because it did not demonstrate that the appellant did anything to encourage or facilitate the assault).

Similarly, in this case, there was uncontroverted evidence that Palacio was with **[**23]** Cruz -- Gonzalez's attacker -- not only from the beginning of the fight, but throughout. In fact, each of the victims testified that Palacio was the one who initiated the confrontation by stepping forward from his group and telling the Graffiti Kings that if they have a problem with Little Brown Union then they should say something. Moreover, the evidence showed that Palacio was the first to draw his knife, thereby encouraging the other members of his group to do the same. Finally, the record is devoid of any evidence that Palacio effectively withdrew from the conflict prior to any assault taking place. *Settles v. United States,* 522 A.2d 348, 358 (D.C. 1987) (appellant's failure to avail himself of opportunities to withdraw from the scene could lead a reasonable juror to conclude that appellant tacitly approved and encouraged the commission of the crime). For these reasons, we are satisfied that there was sufficient evidence to support Palacio's conviction, as an aider and abettor, for the assault on Gonzalez.

IV.

Defective AWIMWA Indictments

Appellants Palacio and Bolanos argue that their indictments for AWIMWA were defective because there was no indication in the indictment that the **[**24]** grand jury considered whether there were any mitigating circumstances that would have excused their conduct. If the AWIMWA indictments were defective, then the trial court's error in failing to dismiss the AWIMWA counts was severely prejudicial because neither appellant had attained the age of majority, and each would have been in the exclusive jurisdiction of the Family Division of the Superior Court, which affords far more protection and rehabilitation to juveniles than adults receive in the Criminal Division. D.C. Code § 16-2301.02 (2001). Accordingly, appellants argue that their ADW and AAWA convictions should **[*684]** be reversed. For the reasons discussed below, we reject appellants' argument.

In *Cain v. United States,* 532 A.2d 1001, 1004 (D.C. 1987) this court held that an indictment must allege all essential elements of the crime charged. We reasoned that all the essential elements must be alleged in a proper indictment so that the indictment accurately reflects the intent of the grand jury and the facts on which the grand jury based its probable cause determination. *Id.* Thus, [HN8] a proper indictment for an AWIMWA charge would indicate that the grand jury determined probable cause existed **[**25]** for each of the following elements: (1) defendant assaulted the complainant; (2) defendant did so with specific intent to kill the complainant; (3) there were no mitigating circumstances (in cases where there is sufficient evidence of provocation); and (4) that 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). Palacio and Bolanos argue that the indictments charging them with AWIMWA are defective because the indictments fail to allege that the grand jury found probable cause to believe that there were no mitigating circumstances. Appellants' argument fails, however, because this court has held that [HN9] "a jury need not be instructed on the issue of mitigation unless either the defendant or government has generated some evidence of that factor." *See Bostick v. United States,* 605 A.2d 916, 918 (D.C. 1992) (quoting *Comber v. United States,* 584 A.2d 26, 41 n.17 (D.C. 1990)) (internal alterations omitted). In a grand jury proceeding, the government "ordinarily is not obligated to present a grand jury all evidence that is favorable to an accused." *Miles v. United States,* 483 A.2d 649, 654-55 (D.C. 1984) (internal citation **[**26]** omitted). Thus, because the government did not submit evidence of provocation or mitigating circumstances, the grand jury did not need to find probable cause as to that element.

Nevertheless, appellants argue that this general rule is subject to the exception that "where a prosecutor is aware of substantial evidence negating a defendant's guilt which might reasonably be expected to lead a grand jury not to indict, his failure to disclose such evidence to a grand jury may lead to a dismissal of the indictment." *Id.* at 655. Appellants' reliance on this court's dictum in *Miles* is misplaced, especially in light of the Supreme Court's subsequent holding in *United States v. Williams,* 504 **U.S.** 36, 46-47, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992). In *Williams,* the Court of Appeals for the Tenth Circuit, relying on the supervisory powers of the judiciary, affirmed the district court's dismissal of the petitioner's indictment because the government withheld exculpatory evidence from the grand jury. *Id.* at 39. The Supreme Court reversed, holding that a district court may not dismiss an otherwise valid indictment because the government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession. *Id.* at 45. **[**27]** In reaching its decision, the Court relied heavily on the

traditional role and function of the grand jury. Justice Scalia, writing for the majority, explained that the function of the grand jury is "not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge," *id.* at 51, and because the grand jury's role is to only examine the foundation of the charge laid by the prosecutor, the accused does not "have a right to testify or have exculpatory evidence presented." *Id.* at 51-52.

In addition, this court has favorably cited to the *Williams'* holding in several of our cases. *See Bruce v. United States,* 617 A.2d 986, 993 **[*685]** (D.C. 1992) ("In general . . . courts will not entertain the contention that the evidence before the grand jury was insufficient to indict."); *Feaster v. United States,* 631 A.2d 400, 414 (D.C. 1993) (King, J., concurring) (noting that although not required to do so, the prosecutor presented potential exculpatory evidence to the grand jury). Based on these authorities, we conclude that the trial court did not err in refusing to dismiss the AWIMWA indictments. However, even assuming, without deciding, that the prosecutor had **[**28]** an obligation to present mitigating evidence to the grand jury, our review of the record indicates that there were no mitigating circumstances or other evidence presented at trial that would have led the grand jury not to indict. Therefore, appellants' argument that the indictments were defective, because the indictments failed to allege that there was no mitigation, is without merit.

V.

Out-of-court Identifications

Cruz next contends that the trial court erred by denying his pretrial motion to suppress his out-of-court identification by the victims. Cruz's principal contention is that the photo array used in this case was impermissibly suggestive because based on the testimony of victims Mejia and Gonzalez, that is, they were shown only two to three photographs as opposed to the eleven photographs that the detective testified that he showed to both victims. Cruz also claims that the out-of-court identifications should be suppressed because even if the full photograph array was shown to Mejia and Gonzalez, his photograph differed from the others in the array because his photo's background was more brightly lit, and his physical appearance in the photo differed from that of the other people **[**29]** in the array.

[HN10] To prevail on a motion to suppress a pretrial identification, the appellant 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 this court finds that the identification procedure employed was impermissibly suggestive, the identification is nevertheless admissible so long as it is of sufficient reliability. *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 are in accordance with the law. *See Turner v. United States,* 622 A.2d 667, 672 n.3 (D.C. 1993). It is the role of the trial court to assess the credibility of witnesses, and this court will not reverse a credibility finding unless it is clearly erroneous or lacking evidentiary support. *See Hill v. United States,* 664 A.2d 347, 351 (D.C. 1995).

While there was conflicting testimony presented about how many photographs were shown to Mejia and Gonzalez, with Detective Hewick testifying that he had shown one photo spread, comprised of eleven photographs to both Mejia and Gonzalez, **[**30]** and Gonzalez testifying that he remembered looking through only two to three photographs, the trial court credited the testimony of Detective Hewick when it denied Cruz's motion to suppress. Cruz fails to offer any evidence to this court as to why the trial court's credibility

finding is plainly wrong; thus, we will not reverse the trial court's credibility finding. *Hill, supra,* 664 A.2d at 351. Because the trial court credited Detective Hewick's testimony regarding the size of the photo array shown to the victims, appellant's argument that the out-of-court identifications were obtained through the use of a limited number of photos has no merit.

[*686] Cruz also argues that the trial court erred because his photo differed from the other photos used in the spread in several respects. Our review of the record, however, does not support Cruz's complaint. Each photograph in the array was of an individual with relatively short hair. All of the photos were of Hispanic males of similar age, with similar skin tone and eye color. Although three of the photos were darker due to the poor quality of the photograph or bad lighting, most of the photographs were similar in context to Cruz's photograph and **[**31]** there was at least one photograph that was as light or lighter than Cruz's photograph. Thus, the record fails to establish a level of suggestivity that would create a substantial likelihood of misidentification.

Even assuming *arguendo* that the photo array was impermissibly suggestive, Cruz's claim still fails because the trial court concluded that the identification was independently reliable, and we discern no basis to disturb that finding. [HN11] In assessing the reliability of an eyewitness, the court must consider: (1) the opportunity for observation; (2) the length of observation; (3) the lighting conditions; (4) the lapse of time between identification and observation; (5) the factors affecting witness perception during observation; and (6) the witness's confidence in the identification. *See Beatty v. United States,* 544 A.2d 699, 701 (D.C. 1988). Both Mejia and Gonzalez testified that they were face to face with Cruz for several seconds during the assault, which occurred during daylight hours. More significantly, both had seen Cruz several times before the day of the assault; Mejia testified that he had seen Cruz around school many times and Gonzalez testified he had seen Cruz around **[**32]** the neighborhood. Additionally, each victim gave detailed and accurate descriptions of Cruz to Detective Hewick before the photo spread was shown to each of the victims. Finally, Mejia and Gonzalez expressed confidence in their identifications. When picking out Cruz from the photo array, Gonzalez said, "he is the one that got me." Mejia testified that "there was no doubt in [his] mind" that Cruz stabbed him in the shoulder. Based on the totality of the circumstances, we are satisfied that the identifications were reliable. *See Lyons, supra,* 833 A.2d at 486. The trial court, therefore, did not err in denying Cruz's motion to suppress the out-of-court identifications. *See Beatty, supra,* 544 A.2d at 701; *Turner, supra,* 622 A.2d at 672 n.3; *Lyons, supra,* 833 A.2d at 485.

VI.

Improper Amendment of Indictment

Cruz alleges that the trial court's instruction on AAWA improperly amended the indictment; thus, violating his Fifth Amendment right to be tried only on charges returned by a grand jury. The argument is without merit. [HN12] Under the statute, an individual commits AAWA if he either: (1) "knowingly or purposely causes serious bodily injury to another person"; or (2) "under circumstances manifesting **[**33]** extreme indifference to human life, . . . 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 & -4502 (2001). Cruz's indictment states that he "knowingly and purposefully cause[d] serious bodily injury" to the victims. However, the trial court's jury instructions to the jury also included the second means of committing aggravated assault, that is, the defendant

manifested extreme indifference to human life by knowingly engaging in conduct which created a grave risk of serious bodily injury.

[HN13] Since Cruz did not object to the instruction at the trial level, we review for plain **[*687]** error. Super. Ct. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."); *see also Wilson-Bey v. United States,* 903 A.2d 818, 828 (D.C. 2006) (en banc). Accordingly, reversal is warranted "'only in exceptional circumstances' where a miscarriage of justice would otherwise result." *Gordon v. United States,* 783 A.2d 575, 581 (D.C. 2001) **[**34]** (quoting *Robinson v. United States,* 649 A.2d 584, 586 (D.C. 1994)). While the indictment failed to state both subsections of the aggravated assault statute, it did include a citation that encompassed both subsections; thus, Cruz had notice that he would be required to defend against both prongs. We find that Cruz has failed to show that a miscarriage of justice occurred, in light of the notice he received through the citation to the aggravated assault statute included in the indictment. *See Smith v. United States,* 801 A.2d 958, 962 (D.C. 2002) (holding that there is no risk that fairness or integrity is affected where the indictment, although including only the language of the first subsection of the aggravated assault statute, also includes a citation that encompasses both subsections).

VII.

Merger

Appellants make various merger arguments. The government concedes that if appellants' AAWA convictions are upheld, then their convictions for ADW merge because [HN14] ADW is a lesser-included offense of AAWA. *See Beaner v. United States,* 845 A.2d 525, 539 (D.C. 2004). The government also agrees that two ADW convictions as to the same victim would merge.

The jury convicted Palacio of two counts of **[**35]** ADW, both for the assault of Rodriguez, and one count of AAWA, also for the assault of Rodriguez. The two counts of ADW merge into one, and upon remand the trial court shall vacate one ADW conviction. Because we reverse Palacio's AAWA conviction for assaulting Rodriguez, the ADW conviction does not merge with any other conviction. Similarly, the jury convicted Bolanos of two counts of ADW, both for the assault of Mejia. These counts must also merge and upon remand the trial court shall vacate one ADW conviction. There are also no merger issues between the AAWA and ADW convictions because we reversed Bolanos' AAWA conviction for the assault of Mejia. Finally, the jury convicted Cruz of two counts of ADW, one as to Gonzalez and one as to Mejia, and two counts of AAWA, also one as to Gonzalez and one as to Mejia. Because we reverse each of Cruz's AAWA convictions, both the ADW convictions must stand.

Conclusion

To summarize, we reverse with instructions to the trial court to vacate Cruz's AAWA conviction for assaulting Gonzalez and Palacio's AAWA conviction for assaulting Rodriguez. We also reverse Cruz's and Bolanos' AAWA convictions for assaulting Mejia. Upon remand, if the government **[**36]** so elects then it may retry either Cruz or Bolanos, or both, on the original charge of AAWA for the assault of Mejia. Should the government elect to not re-try Cruz or Bolanos, their convictions for the lesser-included offense of ADW for the assault of Mejia shall stand. In all other respects, we affirm.

So ordered.

District of Columbia Court of Appeals

No. 98-CF-1871

LUIS M. PALACIO,

Appellant,

FEL2902-98

v.

UNITED STATES,

Appellee.

BEFORE: *Washington, Chief Judge; *Farrell, Ruiz, Reid, Glickman, Kramer, **Fisher, Blackburne-Rigsby, and Thompson, Associate Judges; *Schwelb, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, appellee's unopposed motion for leave to file opposition to petition, and the motion of D.C. Lawyers for Youth for leave to file brief as amicus curiae in support of petition, and it appearing that this court's opinion filed on May 10, 2007, *see* 933 A.2d 1251 (D.C. 2007), was vacated and a new opinion issued on December 28, 2007, it is

ORDERED that the motions are granted and the Clerk is directed to file the lodged opposition of appellee to petition and the lodged brief of D.C. Lawyers for Youth as amicus curiae in support of petition. It is

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

FURTHER ORDERED that the petition for rehearing en banc is denied. However, if the parties determine that the new opinion, issued on December 28, 2007, raises issues that were not raised in the opinion filed on May 10, 2007, the parties may file a petition directed at the December 28, 2007, opinion, within 10 days of the date of this order.

PER CURIAM

**Associate Judge Fisher has recused himself from this case.