Appeal No. 24-CF-156

DISTRICT OF COLUMBIA COURT OF APPEALS

ANTOINE LAYNE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the
District of Columbia
Criminal Division
Case No. 2023-CF2-002579

BRIEF FOR APPELLANT

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DC Court of Appeals Rule 28 (a)(2) Statement

Antoine Layne is Appellant before this Court and is represented by Anne Keith Walton, Esq. Mr. Layne was represented at trial in the Superior Court of the District of Columbia by Daniel Kovler, Esq. Mr. Layne's co-appellant, Elliott Wallace, is represented on appeal by Michael Bruckheim, Esq., and was represented at trial by Brian D. Shefferman, Esq.

The United States of America is Appellee before this Court and is represented by the United States Attorney's Office for the District of Columbia and Assistant United States Attorney Chrisellen R. Kolb, Esq. In Superior Court, the government was represented at trial by Assistant United States Attorneys Sara Matar, Esq., and Molly Smith, Esq.

There are no intervenors or amici curiae. No other provisions of D.C. App. R. 28 (a)(2) apply.

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II. Whether the trial court erred by improperly acting as a partisan by interfering in the testimony of multiple witnesses in a manner that assisted the prosecution and denied Mr. Layne the right to an impartial decision-maker.

STATEMENT OF THE CASE

On October 2, 2022, Antione Layne, co-appellant Elliott Wallace, and Jowan Plummer were arrested after a traffic stop that led to police officers recovering controlled substances from the men and a firearm from the car. S.R.[1] 37-39 (PDF) (Presentence Investigation Report pp. 4-6). Mr. Layne and Mr. Wallace were later indicted on multiple charges related to the controlled substances and the firearm. R. at 144-46 (PDF) (Indictment).

The case proceeded to trial before Judge Erik Christian and, on October 6, 2023, the jury found Mr. Layne guilty of the following offenses: possession with

[1] "S.R." refers to the Sealed Record. "R." refers to the record. "Tr." refers to the Transcript.

intent to distribute a controlled substance (N,N-Dimethylpentylone) while armed, possession of a firearm during a crime of violence or dangerous offense, possession of N,N-Dimethylpentylone, unlawful possession of a firearm (prior conviction), carrying a pistol without a license, possession of an unregistered firearm, and unlawful possession of ammunition. R. at 178-81 (PDF) (Verdict Form); Tr. 10/6/23 at 5. Mr. Wallace was found guilty of several offenses related to the controlled substances that were found in his possession. Tr. 10/6/23 at 4-5.

On February 14, 2024, Judge Christian sentenced Mr. Layne to a total term of incarceration of 210 months (17.5 years) followed by 3 years of supervised release, and he was ordered to pay $600 to the Victims of Violent Crime Compensation fund. R. at 245-47 (PDF) (Judgment & Sentence); Tr. 2/14/24 at 28-30. Counsel for Mr. Layne filed a timely notice of appeal on February 20, 2024. R. at 246-47 (PDF) (Notice of Appeal).

STATEMENT OF THE FACTS

I. Government's Evidence at Trial

The government called the following witnesses to testify at trial: forensic scientist Vaibav Bist, crime scene technician Robert McCollum, crime scene investigator Jean-Paul Paskalis, Metropolitan Police Department ("MPD") Officer Russell Dawes, forensic DNA analyst Alexandra Polakovic, forensic DNA analyst and quality assurance manager Jamie Haas, Detective Sergeant Owais Akhtar, MPD

Officer Roylanda Merricks, forensic chemist supervisor Kyle Brown, forensic chemist Brittany Argento, and MPD Officer Scott Brown.

Sergeant Akhtar testified that, on October 22, 2022, around 5:00 p.m., he was on patrol driving on Rhode Island Avenue NW when he observed a four-door BMW with a heavy tint, as well as a plastic cover on the rear license plate that created a glare. Tr. 9/29/23 at 147-50. At that point, the trial court intervened in the direct examination of Sergeant Akhtar to clarify the reasons for the traffic stop, eliciting testimony that a traffic violation had occurred. *Id.* at 150-52.

According to Sergeant Akhtar, the vehicle stopped in the 1900 block of 5th Street NW after about a minute. *Id.* at 152-53. Sergeant Akhtar exited his vehicle and spoke with Mr. Wallace, who was the driver of the BMW. *Id.* at 153. He observed Mr. Plummer, the owner of the vehicle, in the front passenger seat and Mr. Layne in the back passenger seat behind Mr. Plummer. *Id.* at 153, 155. Sergeant Akhtar testified that he observed Mr. Plummer reach underneath his seat with his hand, making a movement. *Id.* at 156. A portion of Sergeant Akhtar's body-worn-camera footage was admitted into evidence. *Id.* at 158. Sergeant Akhtar described pointing at Mr. Plummer due to his movements, which he made multiple times. *Id.* at 163, 185. Specifically, Mr. Plummer was leaning forward and making a motion, which Sergeant Akhtar believed was consistent with someone trying to shove something underneath the seat to hide an object. *Id.* at 185-86, 191-92.

Sergeant Akhtar testified that the officers "had all the occupants exit the vehicle." *Id.* at 156. The trial court intervened to clarify the manner in which the men were requested to exit the vehicle, eliciting testimony that the men were asked (not told) to step out of the vehicle. *Id.* at 156-57. Sergeant Akhtar further testified that, once the men exited the vehicle, Officer Khan observed an open container of alcohol on the rear passenger compartment. *Id.* at 157. According to Sergeant Akhtar, there was also a Solo cup containing liquid consistent with alcohol in the front passenger side, as well as a firearm underneath the passenger seat. *Id.* at 157. Sergeant Akhtar also testified about processing the arrest at the Third District station and identified the drugs recovered from Mr. Layne, which he described as a sandwich bag containing tied plastic with a rock substance. *Id.* at 173, 182-83.

Officer Dawes testified that he and his partner, Officer Ryder, responded to Sergeant Akhtar's request for assistance with a traffic stop. *Id.* at 14. When Officer Dawes approached Mr. Plummer's vehicle, he observed three individuals in the car. *Id.* at 14-15. Officer Dawes testified that he stayed at the driver's side rear window, which was down, so he could observe Mr. Layne while Sergeant Akhtar and Officer Ryder spoke with Mr. Wallace and Mr. Plummer. *Id.* at 14-16. According to Officer Dawes, Mr. Layne was in the back seat "kind of like fidgeting around." *Id.* at 16. Officer Dawes testified that he observed Mr. Layne moving his hands around and inching his left leg and left foot towards the front portion of the car. *Id.* at 33-34.

Officer Dawes "felt like" Mr. Layne was trying to conceal something, as he learned that Mr. Plummer had placed something underneath the front portion of the seat. *Id.* at 17.

Officer Dawes testified that, after the men were ordered to step out of the vehicle, he observed a jacket, an open bottle of Remy Martin, and brownish liquid in a blue cup in the center console cupholder. *Id.* at 18-19. He did not observe drug paraphernalia, powder on the floor, or containers. *Id.* at 18. According to Officer Dawes, Officer Khan searched the passenger side and observed a firearm under the passenger seat. *Id.* at 19. Officer Dawes testified that he also observed a firearm under the front seat, which "was pretty deep," and that he recovered the firearm. *Id.* at 20. Officer Dawes further testified that he observed Officer Brooks search Mr. Wallace, and that Officer Brooks found a bag of suspected drugs and U.S. currency in a pocket of Mr. Wallace's jacket. *Id.* at 22-23.

Officer Roylanda Merricks testified that she responded to the scene, searched Mr. Layne, and recovered a white rock-like substance and some money from one of his pockets. Tr. 10/2/23 at 8-9. Forensic chemist Kyle Brown, who was qualified as an expert, testified that the suspected controlled substance recovered from Mr. Layne (identified as item or exhibit 7) contained N,N-Dimethylpentylone (hereinafter "dimethylpentylone"). *Id.* at 38. He further testified that the street name for

dimethylpentylone is bath salts. *Id.* Forensic chemist Brittany Argento, who was also qualified as an expert, confirmed the presence of dimethylpentylone. *Id.* at 57.

Forensic scientist Vaibhav Bist testified that he recovered the firearm from the scene from another officer, documented it and took it back to the lab. Tr. 9/28/23 at 148-58. Crime scene technician Robert McCollum testified that he processed the firearm in the lab, which included swabbing the firearm for DNA and fingerprints. *Id.* at 166-72. No fingerprints were obtained from the firearm. *Id.* at 172-73.

Crime scene investigator Jean-Paul Paskalis testified that, after receiving warrants to collect buccal swabs, he collected the swabs from Mr. Plummer, Mr. Wallace, and Mr. Layne in the U.S. Marshall's block. *Id.* at 178-88. After the government concluded direct examination, the trial court questioned Mr. Paskalis about the process of taking a swab and how the swab is stored after it is collected from an individual. *Id.* at 187-88. It was revealed in cross-examination that Mr. Paskalis had a sustained finding against him for mishandling property in 2012. *Id.* at 192-93.

Forensic DNA analyst Alexandra Polakovic testified that she received DNA swabs from the pistol and the magazine, as well as the three buccal swabs collected in this case, and that she performed evidence examination and DNA analysis. Tr. 9/29/23 at 81-87. According to DNA analyst quality assurance manager Jamie Haas, who was qualified as an expert, the DNA profile obtained from the swabs from the

pistol and the magazine were both interpreted as a mixture of three individuals with at least one male contributor. *Id.* at 120, 122. Mr. Haas testified that, with respect to the pistol, the likelihood ratio favored exclusion for Mr. Plummer, and inclusion for Mr. Wallace and Mr. Layne. *Id.* at 120-21. The STRmix estimated that the mixture proportioned for Mr. Layne was 91 percent. *Id.* at 137. With respect to the magazine, the likelihood ratio favored exclusion for Mr. Plummer and Mr. Wallace, and inclusion for Mr. Layne. *Id.* at 123-24. The STRmix estimated that the mixture proportioned for Mr. Layne was 90 percent. *Id.* at 138.

Scott Brown, an MPD senior police officer and task force officer, was qualified over objection as an expert concerning the distribution and use of narcotics, packaging of narcotics, and the manner of distribution and price of narcotics. Tr. 10/2/23 at 89. When the government proffered Officer Brown as an expert, counsel for Mr. Layne objected and conducted voir dire. *Id.* at 80. First, Officer Brown claimed that the correct pronunciation for dimethylpentylone is "[d]emethylon [p]entylone." *Id.* at 80. Officer Brown also acknowledged that he had just "come across" dimethylpentylone in the past six months and had seen it about a dozen times. *Id.* at 81. Officer Brown admitted that he had not discussed the drug in any courses that he taught because "it's fairly new, and I'm still educating myself on . . . how it's used in D.C." *Id.* Officer Brown testified that he had not taken any courses on dimethylpentylone, and that he had only interviewed one or two sources about

the drug, with the last time being three months ago. *Id.* at 82-83. When confronted with a drug chart that he produced, Officer Brown admitted that the last update was in 2020, which was before dimethylpentylone came on the scene in the District. *Id.* at 83-84. Officer Brown also admitted that he had never been qualified as an expert with respect to dimethylpentylone. *Id.* at 84.

After Mr. Wallace's counsel conducted voir dire, counsel for Mr. Layne again objected to the qualification of Officer Brown as an expert with respect to dimethylpentylone. *Id.* at 86-88. As grounds for the objection, counsel argued that Officer Brown could not even pronounce dimethylpentylone, had almost no experience with the drug, had no formal training, and was relying on a weight and pricing chart that was updated three years before the drug came on the scene. *Id.* Mr. Layne's counsel also argued that Officer Brown did not have the level of knowledge and experience necessary to qualify him as an expert regarding the distribution of dimethylpentylone. *Id.* The trial court denied the objection, stating that:

> I think he has sufficient education and training to testify about these narcotics in general. He indicated that he has had experience based upon its new use in the Washington, District of Columbia area along with the neighboring jurisdiction of Montgomery County. So you can pretty much have at it in cross-examination.

Id. at 88. The trial court also ruled that Officer Brown could testify about whether the drugs found in the possession of the defendants were consistent with intent to

distribute, but that counsel could cross-examine Officer Brown about the pronunciation of dimethylpentylone or any other drug. *Id.* at 87.

Counsel for Mr. Wallace adopted Mr. Layne's counsel's arguments and raised the issue that there is no way to tell what percentage of the drugs found on Mr. Wallace was dimethylpentylone, and that Officer Brown had insufficient knowledge to testify about dimethylpentylone. *Id.* at 88-89. In response, the trial court stated:

> All right. So that's even more of a reason why I'm going to permit him to testify, if there's a mixture of cocaine and dimethylpentylone that hasn't been extracted in a fashion which can readily [be] discerned by these forensic chemists who you had no objection to qualifying as experts. I'm going to allow it to come in, but you can argue as to, you know, the weight and clearly the sufficiency of the evidence if there's a charge pertaining to that solely. But your objection is noted.

Id. at 89.

After Officer Brown was qualified as an expert, he testified about the narcotics trade in general and then turned to the drugs found on Mr. Wallace and Mr. Layne. With respect to the dimethylpentylone found on Mr. Layne, Officer Brown relied heavily on his knowledge and experience with crack cocaine and ultimately opined that the amount of dimethylpentylone (which he compared to two "eightballs" of crack) found on Mr. Layne was consistent with distribution. *Id.* at 108-15. On cross-examination, Officer Brown again mispronounced dimethylpentylone and admitted that he had probably discussed it with fewer than ten people, and that he didn't know what the price was in 2022 (when the offenses at issue in this case occurred). *Id.* at

139-40, 145-46. He also admitted that his drug weight and pricing chart did not include dimethylpentylone, and that he had never written any statements or reports about how dimethylpentylone is packaged and sold. *Id.* at 144-45.

II. Motion for Judgment of Acquittal

When counsel for Mr. Wallace and Mr. Layne tried to make a motion for judgment of acquittal, the trial court immediately stated, "[d]enied, denied, denied." Tr. 10/2/23 at 150. When counsel for Mr. Wallace reminded the trial court that he had to make a record, the trial court allowed the attorneys to speak. *Id.* at 151. Counsel for Mr. Layne argued that Officer Brown's testimony was functionally useless and had no value as to possession with intent to distribute dimethylpentylone. *Id.* at 151-52. The trial court denied the motion. *Id.* at 152

III. Defense Evidence at Trial

Mr. Layne did not call any witnesses at trial and chose not to testify. Mr. Wallace called three witnesses to testify in his defense. Mr. Wallace's neighbor, Chenae Priester, testified that she frequently observed Mr. Wallace using cocaine. Tr. 10/2/23 at 153-56. Mr. Wallace's former employer, Alex Alexander, testified that Mr. Wallace regularly smoked crack. *Id.* at 162-69. Mr. Alexander also knew Mr. Layne, who had applied for a job at his company. *Id.* at 170-71.

Myron Smith, a former MPD detective and current subject matter expert, was qualified as an expert in the field of use, distribution, packaging and trends in

narcotics in Washington, D.C. *Id.* at 172-177. During Mr. Smith's many years at the MPD, he worked extensively in an undercover capacity and became a Detective Grade II with the Narcotics and Special Investigations Division. *Id.* at 173. He was the resident narcotics expert during his last five years at the MPD and has testified as an expert about 2,000 times. *Id.* at 173-75.

Mr. Smith testified that the narcotics recovered from Mr. Wallace were "well within personal use." *Id.* at 178. Mr. Smith came to this conclusion for multiple reasons, including that there were no empty zip-locks, scales, other tallying methods such as rubber bands, large amounts of money, or hand-to-hand transactions. *Id.* at 178-81. Mr. Smith also explained that firearms are becoming quite common and do not necessarily indicate that someone is selling drugs. *Id.* at 180. With respect to dimethylpentylone, Mr. Smith testified with that there is no agreed upon price. *Id.* at 184. Since it is a new drug, law enforcement is "coming behind, trying to find out what it is, what does it do, the pricing, so forth." *Id.* Regardless of pricing, Mr. Smith emphasized that there was no evidence of anybody buying anything in this case. *Id.* Finally, Officer Smith testified that two eightballs of crack cocaine are not necessarily indicative of possession with intent to distribute. *Id.* at 186.

IV. Verdict & Sentencing

The jury found Mr. Layne guilty of all charges. R. at 178-81 (PDF) (Verdict Form); Tr. 10/6/23 at 5. At sentencing, the government requested that Judge

Christian impose a term of incarceration of 72 months (6 years) for possession of a firearm during a crime of violence or dangerous offense, and a term of incarceration within the guidelines range for the other offenses. Tr. 2/14/14 at 24-25. This was consistent with the government's request for a term of incarceration of 72 months in its sentencing memorandum. R. at 224, 228 (PDF) (Government's Memorandum in Aid of Sentencing pp. 1, 5). Judge Christian tripled the government's request and sentenced Mr. Layne to a total term of incarceration of 210 months (17.5 years) followed by 3 years of supervised release. R. at 245-47 (PDF) (Judgment & Commitment Order); Tr. 2/14/24 at 28-30.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion by allowing an officer to testify as an expert with respect to the only drug found on Mr. Layne – dimethylpentylone – where the officer was unqualified to do so, and where the officer's opinion regarding possession with intent to distribute the drug was speculative and unreliable. The standard for admission of expert testimony in the District of Columbia requires trial courts to act as gatekeepers. In Mr. Layne's case, the trial court failed to act as a gatekeeper where it was clear that the government's expert had next to no knowledge or experience with respect to dimethylpentylone and could not base his testimony on sufficient facts or data. As a result, a speculative and unreliable opinion regarding

Mr. Layne's alleged possession with intent to distribute dimethylpentylone was improperly admitted at trial, severely prejudicing Mr. Layne.

The trial court also erred by improperly acting as a partisan by interfering in the testimony of multiple witnesses in a manner that assisted the prosecution and denied Mr. Layne the right to an impartial decision-maker. As such, Mr. Layne's convictions should be reversed.

ARGUMENT

I. The trial court abused its discretion by allowing an officer to testify as an expert with respect to the only drug found on Mr. Layne – dimethylpentylone – where the officer was unqualified to do so, and where the officer's opinion regarding possession with intent to distribute the drug was speculative and unreliable.

A. The standard for admission of expert testimony in the District of Columbia requires trial courts to act as "gatekeepers."

In *Motorola Inc. v. Murray*, 147 A.3d 751, 757 (D.C. 2016) (en banc), this Court adopted Federal Rule of Evidence 702 as the standard for admission of expert testimony in the District of Columbia. The *Motorola* court expressed concern that the standard used at the time – the *Dyas/Frye* test – "avoids, even forbids, looking at the crucial question of whether the testimony offered in a particular case is reliable." *Id.* at 756. In evaluating the admissibility of proposed expert testimony under Rule 702, a trial court now needs "to determine whether the opinion 'is the product of reliable principles and methods[,] . . . reliably applied.'" *Id.* at 757 (quoting Fed. R. Evid. 702 (c), (d)).

Under Rule 702, as amended after the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and subsequent cases:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The trial court now has a "gatekeeping" obligation under Rule 702 when a party proffers expert scientific testimony to "make 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" *Motorola*, 147 A.3d at 754 (quoting *Daubert*, 509 U.S. at 592-93). In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999), the Supreme Court explained that the gatekeeping obligation applies to all expert testimony, not just to scientific testimony.

B. The trial court failed to act as a "gatekeeper" where it was clear that Officer Brown was not qualified to testify as an expert about dimethylpentylone.

A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *See Motorola*, 147 A.3d at 756; *Kumho Tire Co.*, 526 U.S. at 142. A trial court "abuses its discretion when it "either 'abdicate[s] its role as gatekeeper' by failing to assess 'the scientific validity or methodology of [an expert's] proposed testimony,' or 'delegate[s] that role to the jury' by 'admitting the expert testimony without first finding it to be relevant and reliable.'" *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1189 (9th Cir. 2019) (citation omitted); *see also City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1069-71 (9th Cir. 2017) (holding that the district court abdicated its gatekeeping role and abused its discretion by admitting expert testimony after failing to make any findings regarding the reliability and efficacy of the expert's opinions)).

As a gatekeeper, a trial court should "undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos v. Amtrak*, 303 F.3d 256, 267 (2d Cir. 2002). A trial court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*,

526 U.S. at 152. "*Daubert* requires the trial court to act as a gatekeeper to insure that speculative and unreliable opinions do not reach the jury." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005) (citation omitted).

In Mr. Layne's case, the trial court abdicated its role as a "gatekeeper," allowing "speculative and unreliable opinions" about dimethylpentylone to reach the jury, thereby abusing its discretion. *See id.* First, the government failed to establish a proper foundation for expert testimony with respect to dimethylpentylone, which was the only drug found on Mr. Layne. When asked "what type of drugs specifically have you worked on," Officer Brown listed marijuana, cocaine, heroin, PCP and fentanyl as the common drugs that he most often worked with. Tr. 10/2/23 at 71. He did not include dimethylpentylone in that list and proceeded to explain his very limited experience with the drug. For example, he mispronounced dimethylpentylone as "dimethylon pentylone," and identified it with its street name "boot," but was unable to say why it was called "boot." *Id.* at 74-75. Officer Brown also acknowledged that the only thing analogous to a publication that he had produced was a drug chart that included cocaine, heroin, fentanyl, PCP, and marijuana, but not dimethylpentylone or "boot." *Id.* at 78.

The trial court's failure to act as a gatekeeper became clear from voir dire and from the trial court's findings and reasons for qualifying Officer Brown as an expert. After objecting and requesting to conduct voir dire, defense counsel first asked

Officer Brown how to pronounce dimethylpentylone, and Officer Brown responded "dimethylon pentylone," which is clearly not the correct pronunciation, as both forensic chemists pronounced it "dimethylpentylone." Tr. 10/2/23 at 36-38, 56, 80. Officer Brown also acknowledged that he had very little experience with dimethylpentylone, admitting that it "[m]ay have been around longer, but me personally have maybe come across it in the last six months more frequently." *Id.* at 80-81. Officer Brown admitted that he had seen it maybe a dozen times. *Id.* at 81. Voir dire proceeded as follows:

> Q: ***And you said that you -- I just want to be clear. You do a drug trends class; right? You teach one?***
>
> A: ***Yes.***
>
> Q: Okay. When was the last one you taught?
>
> A: I want to say maybe three months ago.
>
> Q: ***Okay. And you had a lot of details in that about dimethylon pentylone. Is that right?***
>
> A: ***I didn't discuss it during that***.
>
> Q: Okay. So can you tell me about the courses that you've taught about dimethylon pentylone. Is that right?
>
> A: Yes.
>
> Q: ***Can you tell me about the courses you've taught about that.***
>
> A: ***I haven't really discussed it in any of the courses only because it's fairly new, and I'm still educating myself on, you know, how it's used in D.C.***

Q: ***Okay. And can you tell me about the academic papers you've written on that subject?***

A: ***I haven't***.

Q: ***Can you tell me about the courses you've taken on boot or dimethylon pentylone.***

A: ***I haven't taken any***.

Q: Okay. You said that you will often inquire or talk to other officers about drug trends. Is that correct?

A: Yes.

Q: Can you tell me the last time you spoke with another officer about boot or this substance?

A: I believe it was last week that I talked to a Montgomery County officer.

Q: Okay. And that was a Montgomery County officer, obviously not a District of Columbia officer; right?

A: Yes.

Q: Okay. And that was just an informal conversation that you had?

A: Yes.

Q: Okay. And you said that you interview a number of witnesses about boot. Is that correct?

A: I don't know if it's witnesses, but, like, sources.

Q: Sources, yes. ***And can you tell me the last time you interviewed a source specifically on that subject?***

A: ***It's probably three months ago***.

Q: Okay. ***And you've interviewed one or two sources about that subject?***

A: ***Correct***.

Id. at 81-83 (emphasis added). Finally, when confronted with a drug chart that he produced, Officer Brown admitted that the last update was in 2020, which was before dimethylpentylone came on the scene in the District. *Id.* at 84. Officer Brown also admitted that he had never been qualified as an expert with respect to dimethylpentylone. *Id.* at 84.

Thus, the voir dire of Officer Brown revealed that he had next to no "knowledge, skill, experience, training, or education" with respect to dimethylpentylone and could not base his testimony on "sufficient facts or data." *See* Fed. R. Evid. 702. In fact, he was not even able to pronounce it correctly. He had only become familiar with the drug within the past six months and had only spoken with one or two sources about it, as well as a Montgomery County officer in an informal conversation, though he provided no details about those conversations and whether or not he learned anything specific about the drug. He did not include dimethylpentylone in his drug trends class or drug chart, clearly because he knew almost nothing about the drug and thus clearly could not reliably teach law enforcement about it. Yet, the trial court allowed Officer Brown to testify as an

expert with respect to dimethylpentylone despite counsel's request to limit his testimony to the drugs with which he did have extensive experience.

The trial court clearly failed to appreciate or fulfill its responsibility as a "gatekeeper," and its rulings did not comport with the standard for admission of expert testimony under Rule 702 and *Daubert*. This is clear from the trial court's findings following robust argument by Mr. Layne's counsel:

> MR. KOVLER: So, Your Honor, first off, this witness can't even pronounce the name of the drug correctly. He's been mispronouncing it this whole time. It's dimethylpentylone not dimethylon pentylone, though he insisted otherwise. He has almost no experience with this particular drug, other than maybe a couple of arrests here and there, and no formal training whatever on this particular drug. He's relying on a weight and pricing chart and details that was last updated in 2020, so three years before this -- before now, before this drug came on the scene really.
>
> This is a new drug, Your Honor. It requires an individual that has some actual knowledge of this particular drug. And to qualify him as an expert on drug distribution generally and have him opine on drug distribution for dimethylpentylone, Your Honor, is prejudicial against Mr. Layne because, again, even if he's testifying in regards to other drugs, he's going to be making opinions and making statements regarding drug distribution generally when he has absolutely no knowledge, certainly not to the level of someone with specialized or expert knowledge in regards to this particular drug.
>
> As the Court's certainly aware, different drugs have different distribution mechanisms. They have different potency, different quantities that a person would take. And this individual simply can't testify with any level of expertise greater than myself or government counsel or any other average person about this particular drug.
>
> THE COURT: Yeah. I think this, however, goes to the weight of his testimony because I think the government is proffering him as an expert

> primarily to determine whether the drugs that were in the possession -- or in the possession of the defendants were consistent with personal use or with intent to distribute. ***So these are all narcotics or controlled substances, as defined by other experts at least, perhaps by Officer Scott Brown. So I think he can testify as to those particular areas. And then you can cross-examine him into his knowledge of the correct pronunciation of this particular drug or any other drug***.
>
> MR. KOVLER: And, Your Honor, I would at least move the Court to give a -- to instruct the government and instruct the witness not to testify to the specific way or nature dimethylpentylone is distributed or is taken because he's proven no expertise in that. If he wants to -- if he's going to testify to just general knowledge about drugs, that's one thing. But he has not been – again, we would object to him being qualified as an expert on those specific areas.
>
> THE COURT: I'm going to deny it. ***I think he has sufficient education and training to testify about these narcotics in general. He indicated that he has had experience based upon its new use in the Washington, District of Columbia area along with the neighboring jurisdiction of Montgomery County. So you can pretty much have at it in cross-examination***.

Tr. 10/2/23 at 86-88 (emphasis added). After Mr. Wallace's counsel pointed out that, with respect to the drugs found on Mr. Wallace, there was no way to tell what percentage was dimethylpentylone, the trial court made the following findings:

> All right. ***So that's even more of a reason why I'm going to permit him to testify, if there's a mixture of cocaine and dimethylpentylone that hasn't been extracted in a fashion which can [be] readily discerned by these forensic chemists who you had no objection to qualifying as experts.*** I'm going to allow it to come in, but you can argue as to, you know, the weight and clearly the sufficiency of the evidence if there's a charge pertaining to that solely. But your objection is noted.

Id. at 89.

Voir dire exposed Officer Brown's near total lack of "knowledge, skill, experience, training, or education" with respect to dimethylpentylone. *See* Fed. R. Evid. 702. Yet, the trial court qualified him as an expert due to his "sufficient education and training" with respect to "narcotics in general," and left it to cross-examination to expose his lack of qualifications with respect to dimethylpentylone, including whether or not he could pronounce it correctly. Tr. 10/2/23 at 87-88. The trial court even suggested that the forensic chemists' inability to testify regarding percentages of various drugs found on Mr. Wallace was a valid reason to permit expert testimony by Officer Brown, who was obviously not a forensic chemist and had nothing to offer with respect to percentages. *Id*. at 89.

The trial court had a duty to "undertake a rigorous examination of the facts on which [Officer Brown] relie[d]," and make findings with respect to not just all narcotics, but specifically the narcotics that were at issue in the trial, including dimethylpentylone. *See Amorgianos*, 303 F.3d at 267. Instead, the trial court made findings such as, "***these are all narcotics or controlled substances, as defined by other experts at least***," and "***I think he has sufficient education and training to testify about these narcotics in general***," and ultimately qualified Officer Brown as an expert "concerning distribution and use of narcotics, packaging of narcotics, and the manner of distribution and price of narcotics." Tr. 10/2/23 at 87-89. The trial court failed to make a reliability determination with respect to dimethylpentylone

specifically, allowed Officer Brown to provide an opinion with respect to intent to distribute dimethylpentylone, and then left it to cross examination to expose the lack of reliability. The trial court thus abdicated its role as a gatekeeper and delegated that role to the jury, thereby abusing its discretion. *See Ruvalcaba-Garcia*, 923 F.3d at 1189.

C. Officer Brown's testimony and opinion with respect to dimethylpentylone and Mr. Layne's alleged possession with intent to distribute it was speculative and unreliable and should not have been admitted at trial.

As previously explained, Officer Brown knew almost nothing about dimethylpentylone. Due to his lack of knowledge and experience with respect to dimethylpentylone, Officer Brown had to rely heavily on a comparison with crack cocaine before rendering his opinion that the amount of dimethylpentylone recovered from Mr. Layne was consistent with possession with intent to distribute. In *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1244-47 (11th Cir. 2005), "speculation replace[d] science" where an expert witness relied heavily on an unreliable analogy between two drugs in a toxic tort case, and the Third Circuit found that the trial court erroneously admitted the plaintiffs' expert's testimony. The drug at issue in *McClain* was ephedrine, which was a component of an herbal supplement Metabolife and was at issue in the case, yet the expert witness testified about a different drug – phenylpropanolamine – as a basis for rendering an opinion with respect to ephedrine and Metabolife's toxicity. *Id*. The court found that the expert

failed to show that the analogy was valid, and that his presumptions did not make for a reliable opinion. *Id.* at 1246. As the court noted, "'[s]ubjective speculation that masquerades as scientific knowledge' does not provide good grounds for the admissibility of expert opinions." *Id.* at 1245 (quoting *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001)).

In Mr. Layne's case, Officer Brown relied heavily on a comparison between dimethylpentylone and crack cocaine because, though he had extensive experience with crack, he knew very little about dimethylpentylone. When presented with the exhibits of the dimethylpentylone found on Mr. Layne, Officer Brown was asked what it looked like, and he replied that it looked like crack cocaine. Tr. 10/2/23 at 108. When asked if he remembered what the drug results were, he replied that he thought it was crack cocaine, and the prosecutor had to refresh his recollection with the drug report. *Id.* at 109. Officer Brown then testified that it would be easy to confuse dimethylpentylone with crack. *Id.* at 110. When asked what the difference would be between a person using dimethylpentylone and crack, Officer Brown replied:

> ***I wouldn't know. I haven't really spoke to any of the sources in terms of, like, smoking the difference, you know, are you able to tell the difference***. But my general sense would be it's a cheap version of crack cocaine, and they would -- you know, if a user is generally used to a certain substance, then they'd be able to tell the difference between, you know, whether it's crack cocaine or not.

Id. at 111 (emphasis added). Given that he began his reply with "I wouldn't know," the above opinion was entirely speculative. It is also striking that, though he claimed to have spoken with several sources about dimethylpentylone, Officer Brown had apparently never inquired about how dimethylpentylone effects the user in comparison with crack. All he could provide was his "general sense" that a user could tell the difference because dimethylpentylone is cheaper than crack. This was followed by a speculative opinion that a drug dealer may not know whether the drug he was selling was dimethylpentylone or crack. *Id.* at 111-12.

Officer Brown proceeded to testify about the price of dimethylpentylone based on the price of crack. Though he had learned at some point that dimethylpentylone was "a cheap version of crack," he testified about the price under an assumption that it was half the price of crack, and he provided very specific calculations without any basis to do so. *Id.* at 110, 112-14. Since crack was Officer Brown's only reference point, the government asked him about the wholesale value of eight grams of crack, assuming that a drug dealer was distributing dimethylpentylone as crack. *Id.* at 112-13. Officer Brown replied that the wholesale value of two eightballs of crack cocaine would be $300 to $500, and the street value would be "anywhere from, ***I guess***, [$]300 to $600." *Id.* (emphasis added). The government then asked about the wholesale value and street value of the drugs if the dealer were distributing them as "boot," and Officer Brown stated that "[i]t would

be half." *Id.* at 113. Next, the government grouped the two drugs together in order to elicit an opinion with respect to possession with intent to distribute dimethylpentylone:

> Q: Now, regardless of whether or not it's boot or whether or not someone thought it was crack cocaine, in your experience, is what we're seeing on the exhibit here . . . in your training and experience, is possessing that drugs more consistent with personal use or distribution?
>
> A: For distribution only that the number of doses that you would get from each eightball, like I said, anywhere from 30 to 35 ten-dollar doses -- so you'd have 60 -- potentially 60 ten-dollar doses, which isn't consistent with someone with personal use.

Id. at 113-14. Officer Brown's testimony with respect to dimethylpentylone was thus entirely based on his experience with crack cocaine and his assumption that dimethylpentylone cost half the price. He also threw in an assumption about the doses at the end, thereby bolstering his totally speculative testimony about the drugs found on Mr. Layne being more consistent with distribution, the inference being that a drug dealer would not have 60 doses of drugs on him.

On cross-examination, defense counsel was able to expose Officer Brown's ignorance as to the price of dimethylpentylone at the time of Mr. Layne's arrest:

> Q: Okay. And you said cheaper by half?
>
> A: Yes.
>
> Q: What do you base that on?
>
> A: Just people we talk to and when we purchase the drugs and that they say it's an inexpensive form of crack.

Q: And that's -- you're talking about people -- that's a handful of arrests that you've made and the handful of people that you've discussed this with?

A: Yes.

Q: Okay. So it's fewer than 10 people that you've talked to probably; right?

A: Probably.

Q: Okay. And that's based on the past six months of experience; right?

A: Yes.

Q: ***Okay. So you don't really know what the pricing would have looked like in October of 2022?***

A: ***No.***

Id. at 139-40 (emphasis added). Clearly, Officer Brown should never have been qualified as an expert in any capacity with respect to dimethylpentylone, and certainly not its price. Since the trial court left it to cross-examination to expose the lack of reliability of Officer Brown's testimony, unreliable and speculative "expert" opinions reached the jury. Therefore, the trial court abused its discretion. *See Ruvalcaba-Garcia*, 923 F.3d at 1189.

II. The trial court erred by improperly acting as a partisan by interfering in the testimony of multiple witnesses in a manner that assisted the prosecution and denied Mr. Layne the right to an impartial decision-maker.

"A fair trial demands an impartial judge and an unbiased jury." *Davis v. United States*, 567 A.2d 36, 39 (D.C. 1989) (citing *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). A trial court "must not take on the role of a partisan," and "[p]rosecution and judgment are two separate functions in the administration of justice; they must not merge." *Robinson v. United States*, 513 A.2d 218, 222 (D.C. 1986) (quoting *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945)). "When the roles of neutral magistrate and partisan prosecutor become intertwined . . . the defendant's right to an impartial decision-maker is denied." *Davis v. United States*, 567 A.2d 36, 39 (D.C. 1989) (citing *Marzano*, 149 F.2d at 926)).

A trial judge is not required to be a "passive onlooker" and, in some circumstances, is permitted to play a more active role. *See Davis*, 567 A.2d at 39. Indeed, a trial judge has "not only the right but the duty . . . to participate directly in the trial, including the propounding of questions when it becomes essential to the development of the facts of the case." *Womack v. United States*, 350 A.2d 381, 383 (D.C. 1976) (citations omitted)). However, "[t]his power should be sparingly exercised . . . for it is primarily the task of counsel, not the court, to develop the facts essential to the jurors' understanding of the case." *Davis*, 567 A.2d at 39-40 (citations omitted). "Even though a judge may intervene, to a limited extent, in order

to correct a patent omission in the testimony of a witness, a judge's substantial interference in the trial when there is no such omission can so prejudice the affected party as to require a new trial." *Id.* at 40-41 (citations omitted).

In Mr. Layne's case, the trial court improperly took on the role of a partisan and interfered in the examination of witnesses in a manner that assisted the prosecution. First, the trial court unnecessarily intervened in the government's direct examination of Officer Akhtar after he testified that he observed a plastic cover on the license plate before he conducted the traffic stop. Apparently anticipating potential concerns by the jury about the lawfulness of the traffic stop, the trial court intervened in the following manner:

> THE COURT: ***Well, what light would you shine on this -- on a plastic cover if a car is moving?***
>
> OFFICER AKHTAR: ***A flashlight. And especially these are illegal because of the photo radar and the -- when you get a speeding ticket from a camera, the flash from the camera would create a glare, and you can't read the tag number***.
>
> THE COURT: Right. But what glare did you see on this particular day coming from this tag?
>
> OFFICER AKHTAR: That -- that day I remember seeing, when I activated my emergency light, the light bars were reflecting off of the tag.
>
> THE COURT: ***But I thought you indicated that it was a violation when the glare comes off of the tag***.
>
> OFFICER AKHTAR: ***Yes, sir***. I have done past traffic stops with the plastic covers, and every time when you shine a flashlight on it, it

creates a glare, so I knew that it was -- it was a cover that would create a glare.

THE COURT: ***But what caused you to find that this car needed to be stopped?***

OFFICER AKHTAR: ***Because of the plastic cover and the -- and the tint on the vehicle.***

THE COURT: ***But just the plastic cover? The plastic cover, did that plastic cover have a glare on it?***

OFFICER AKHTAR: ***It -- it did, sir, yes***.

THE COURT: When did you notice the glare, after you turned your emergency lights on or before that?

OFFICER AKHTAR: The actual glare, I noticed it when the emergency lights were turned on, it was reflecting off the cover.

Tr. 9/29/23 at 151-52 (emphasis added). None of the above was necessary to develop the facts of the case, and nothing relevant had been omitted by Sergeant Akhtar during his testimony. The defendants were not charged with traffic offenses. As such, there was no need for the above exchange, which emphasized that a traffic violation had occurred. The trial court thus intervened for the sole purpose of clarifying for the jury that the traffic stop was lawful.

Should there be any doubt about that, the trial court intervened again in the direct examination of Officer Akhtar:

THE COURT: ***And just tell the jurors how you separate a person from a car, a vehicle.***

> OFFICER AKHTAR: ***They were escorted -- they were asked to exit the vehicle***, and away from -- they were placed away from the vehicle.
>
> MS. SMITH: And –
>
> THE COURT: ***I mean, do you ask them, or do you tell them? I mean, what -- can you recall the exact words you used on this occasion?***
>
> OFFICER AKHTAR: I don't remember exactly what I said; however, normally we will ask them to step out. If no one complies, then we will order them to exit the vehicle.

Id. at 156-57 (emphasis added). Again, none of the above questions were necessary to develop the facts of the case. The trial court clearly asked the above questions to assist the government in establishing that Mr. Layne's rights were not violated so that the jury would not look upon the government with disfavor.

The trial court also intervened in the government's direct examination of crime scene investigator Jean-Paul Paskalis in a clear attempt to defeat an argument that Mr. Layne presented in his opening statement – that the buccal swabs were switched, and that Mr. Layne was not the major contributor of DNA on the pistol or the magazine:

> THE COURT: Did you discuss how you actually take a swab from an individual?
>
> INVESTIGATOR PASKALIS: I'm sorry?
>
> THE COURT: ***Did you discuss how you actually took a swab or would take a swab from an individual?***
>
> INVESTIGATOR PASKALIS: Not --

> THE COURT: ***Can you just explain it to the jury.***
>
> INVESTIGATOR PASKALIS: Okay. So the process of taking a swab would be to place the cotton tip of the applicator inside the person's mouth and kind of scrub the inside of the mouth, the fleshy part, to collect that saliva and skin cells.
>
> THE COURT: ***And then what would you do with that item? What would you do with the item?***
>
> INVESTIGATOR PASKALIS: The swab?
>
> THE COURT: Right.
>
> INVESTIGATOR PASKALIS: ***So then the swab goes into the swab box, and then that box is closed. It goes into an envelope***.

Tr. 9/28/23 at 187-88. The trial court knew that it was especially important to bolster Mr. Paskalis's testimony because he had a sustained finding against him for mishandling property. *Id.* at 192-93. There was absolutely no other reason for asking the above questions, as nothing had been omitted from Mr. Paskalis's testimony.

The trial court also intervened in defense counsel's cross-examination of Officer Brown to clarify why it could be dangerous for a drug dealer to allow a buyer to enter his car. Tr. 10/2/23 at 142. In context, this was for the clear purpose of thwarting defense counsel's attempt to show that Mr. Layne could have been a buyer who got into the car with a dealer. In response to the trial court's question, Officer Brown replied that it could be dangerous in the event that the buyer was going to rob the dealer, which clearly bolstered the government's case against Mr. Layne. *Id.* By acting as a partisan and interfering in the testimony of multiple witnesses in a manner

that assisted the prosecution, the trial court effectively denied Mr. Layne the right to an impartial decision-maker. *See Davis v. United States*, 567 A.2d at 39. As such, the trial court erred.

CONCLUSION

For the reasons stated above, Mr. Layne respectfully requests that this Court reverse his convictions in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 21, 2025, a copy of the foregoing Brief for Appellant was served via the court's e-filing system on Chrisellen R. Kolb, Esq., Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia, and on Michael Bruckheim, Esq., counsel for co-appellant Elliott Wallace.

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