BRIEF FOR APPELLANT

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-43

ELLIOT WALLACE,

Appellant,

v.

UNITED STATES,

Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION,
2022 CF2 005858

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RECUSAL NOTICE

[Pursuant to DCCA Rule 28 a(2)]

A. LIST OF ALL PARTIES, INTERVENORS, AMICI CURIAE, AND THEIR COUNSEL IN THE TRIAL COURT OR AGENCY PROCEEDING AND IN THE APPELLATE PROCEEDING:

a. Elliot Wallace
Defendant / Appellant;

b. Attorney Brian Shefferman
Counsel for Elliot Wallace at trial;

c. Attorney Sara Matar
Assistant United States Attorney for the District of Columbia
Counsel for the Government at trial;

d. Attorney Molly Smith
Assistant United States Attorney for the District of Columbia
Counsel for the Government at trial;

e. Attorney Michael Bruckheim
Counsel for Appeal;

f. Attorney Chrisellen R. Kolb
Assistant United States Attorney for the District of Columbia
Counsel for the Government on appeal.

B. THE APPELLANT-DEFENDANT IS NOT A CORPORATION.

C. THE APPELLANT-DEFENDANT IS NOT A PARTNERSHIP.

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STATEMENT OF THE ISSUE

1. Whether the trial court erred as a matter of law when it erroneously admitted expert testimony that was unreliable over defense objection?
2. Whether there was sufficient evidence to prove beyond a reasonable doubt that Appellant had the requisite intent to distribute, in violation of D.C. Code § 48-904.01(a)(1)?

STATEMENT OF THE CASE

On October 6, 2023, following a jury trial, Mr. Wallace was found guilty of (1) Possession with the Intent to Distribute a Controlled Substance (Cocaine); (2) Possession of Liquid PCP; and (3) Possession of Cocaine. *See* Verdict Form dated October 6, 2023. On January 11, 2024, Judge Christian sentenced Mr. Wallace on Possession with Intent to Distribute (merging with Possession of Cocaine for the purpose of sentencing) to: forty (40) months incarceration, five years supervised release, and $100 fine pursuant to the Victims of Violent Crimes Act. The sentence imposed for the charge of Possession of Liquid PCP was: thirty (30) months incarceration, three years supervised release, and $100 fine pursuant to the Victims of Violent Crimes Act. The sentences were ordered to run concurrent to each other and Mr. Wallace was credited for time served. *See* Judgment and Commitment Order dated January 11, 2024. Mr. Wallace filed a timely notice of appeal on January 16, 2024.

Mr. Wallace's conviction for Possession with Intent to Distribute must be overturned because the jury relied upon improper expert testimony and the government failed to provide sufficient evidence upon which to base a conviction beyond a reasonable doubt.

STATEMENT OF FACTS

Based on an incident that occurred October 2, 2022 within the District of Columbia, the government filed an indictment charging Mr. Elliot Wallace with the following counts: (1) Possession with Intent to Distribute a Controlled Substance While Armed, in violation of D.C. Code § 48-904.01(a)(1) and D.C. § 22-4502; (2) Possession of a Firearm During Crime of Violence or Dangerous Offense, in violation of D.C. Code § 22-4505(b); (3) Unlawful Possession of a Firearm (Prior Conviction), in violation of D.C. Code § 22-4503(a)(1), (b)(1); (4) Carrying a Pistol Without a License (Outside Home or Place of Business), in violation of D.C. Code § 22-4505(a)(2); (5) Possession of Unregistered Firearm, in violation of D.C. Code § 7-2502.01(a); (6) Unlawful Possession of Ammunition, in violation of D.C. § 7-2506.01(a)(3); (7) Unlawful Possession of Liquid PCP, in violation of D.C. Code § 48-904.01(d); (8) Attempted Unlawful Possession of a Controlled Substance, in violation of D.C. Code § 48-904.01(d). *See* Indictment 2022 CF2 005858; *see also* 9/22/2023 Transcript (hereinafter "Tr") at 4.

The jury trial before the Honorable Judge Erik Christian commenced on September 28, 2023. At the conclusion of the trial on October 6, 2023, the jury found Mr. Wallace guilty of: (1) Possession with the Intent to Distribute a Controlled Substance (Cocaine); (2) Possession of Liquid PCP; and (3) Possession of Cocaine.

Mr. Wallace was found not guilty on all other counts. *See* Verdict Form dated October 6, 2023.

I. GOVERNMENT'S CASE

The government presented eleven witnesses: (1) Vaibhav Bist; (2) Robert McCollum; (3) Jean-Paul Paskalis; (4) Russell Dawes; (5) Alexandra Polakovic; (6) Jamie Haas; (7) Owais Akhtar; (8) Rylanda Merricks; (9) Kyle Brown; (10) Brittany Argento; and (11) Scott Brown.

A. Vaibhav Bist

The first witness called by the Government was Vaibhav Bist. *Id.* at 148. Mr. Bist is a Forensic Scientist with the D.C. Department of Forensic Science in the Crime Scene Unit Division. *Id.*

On October 2, 2022, he was asked to assist with a "weapon recovery" call at the Third District police station for the Metropolitan Police Department (hereinafter "MPD"). *Id.* at 149-150. At the police station, Mr. Bist took custody of the firearm that was found on the scene, recovered it, and rendered it safe. *Id.* at 150-152.[1]

[1] As Mr. Wallace was found not guilty on all firearm charges, detailed testimony and stipulations regarding the firearm and the DNA analysis related to the firearm is irrelevant to this appeal and will not be included in the statement of facts.

B. Robert McCollum

The second witness called by the Government was Robert McCollum, a crime scene technician with MPD. *Id.* at 166. He processed and swabbed the firearm for DNA and fingerprints. *Id.* at 167-176.

C. Jean-Paul Paskalis

The third witness called by the Government was Jean-Paul Paskalis. *Id.* at 178. Mr. Paskalis works as a crime scene investigator for MPD in the Crime Scene Investigation Division. *Id.* Mr. Puskalis collected DNA from Jawan Plummer, Mr. Wallace, and Mr. Layne on October 3, 2022. *Id.* at 180-188.

D. Russell Dawes

The fourth witness called by the Government was Russell Dawes, who is an officer with Third District MPD's Crime Suppression Unit. 9/29/2023 Tr. at 13.

On October 2, 2022, he responded to 5th and T Street around 5:10 PM in response to Sergeant Akhtar's request for assistance on a traffic stop. *Id.* at 14. Officer Dawes was not involved in the initial stop. *Id.* at 62. When he arrived, the only officers present were Sergeant Akhtar, Officer Dawes, and his partner, Officer Rider. *Id.*

Officer Dawes saw three individuals in a BMW sedan, one of whom was Mr. Wallace, who was in the driver's seat. *Id.* at 14-16. Officer Dawes observed Mr. Wallace speaking with Officer Ahktar and testified that Mr. Wallace was being cooperative. *Id.* at 64-65, 74.

The occupants were ordered to exit the car and Officer Dawes searched the car. *Id.* at 18. He did not find any drug paraphernalia, powder, or containers in the car. *Id.* He saw an open bottle of alcohol and an open cup with brown liquid in the car that was consistent with the smell of alcohol. *Id.* at 18-19, 28. He also found a firearm in the car tucked underneath the passenger seat. *Id.* at 19-21.

Officer Dawes then assisted Officer Brooks in conducting a search incident to arrest of Mr. Wallace. *Id.* at 20-21, 36-41. There was money and a bag of suspected drugs found in his left front jacket pocket. *Id.* at 22-23, 73.

Officer Dawes subsequently transported Mr. Wallace to the Third District for processing. *Id.* at 23.

E. Alexandra Polakovic

The fifth witness called by the Government was Alexandra Polakovic, who was working at a private laboratory called Signature Science as a forensic DNA analyst in October 2022. *Id.* at 76-78. Ms. Polakovic tested the DNA obtained from the firearm. *Id.* at 79-92.

F. Jamie Haas

The sixth witness called by the Government was Jamie Haas, who is the quality assurance manager, training coordinator, and a DNA analyst for Signature Science. *Id.* at 104. Ms. Haas was qualified as an expert witness in the field of forensic DNA

analyses. *Id.*at 107. She presented her conclusions regarding the results of the DNA analysis on the firearm. *Id.* at 121-124, 139.

G. Owais Akhtar

The seventh witness called by the Government was Owais Akhtar, who was working as a sergeant for MPD's Third District Crime Suppression Team in October of 2022. *Id.* at 148. He is currently a Detective Sergeant for MPD's Seventh District. *Id.* Detective Sergeant Akhtar participated in the arrest of Mr. Wallace on October 2, 2022. *Id.* at 148-149.

Detective Sergeant Akhtar was driving on patrol when he saw the BMW, which had an unlawful cover on the license plate and tinted windows. *Id.* at 150, 193-194. The BMW stopped a minute after Detective Sergeant Akhtar turned on his car's emergency lights. *Id.* at 152-153.

Detective Sergeant Akhtar went to the car and spoke to Mr. Wallace, who was driving the vehicle. *Id.* at 153. He testified that Mr. Wallace was cooperative once he stopped the car. *Id.* Mr. Wallace did not exhibit any signs of drug use. *Id.* at 154. Mr. Wallace gave Detective Sergeant Akhtar his driver's license and the vehicle's registration upon request. *Id.* at 154-155. The vehicle was registered to Mr. Plummer, who was sitting in the passenger seat. *Id.* at 153, 155.

Detective Sergeant Akhtar asked Mr. Wallace to exit the car. *Id.* at 155. Mr. Wallace complied with the request and consented to a pat down. *Id.* Detective

Sergeant Akhtar conducted the pat-down of Mr. Wallace, but did not fully search him. *Id.* at 200.

Sergeant Akhtar processed the drugs recovered during the stop. *Id.* at 173.

H. Roylanda Merricks

The eighth witness called by the Government was Roylanda Merricks, who is a patrol police officer for MPD. 10/2/2023 Tr. at 6. On October 2, 2022, Officer Merricks was working for the Crime Suppression Team and responded to the intersection of 5th and T at approximately 5:10 PM. *Id.* at 7. Mr. Plummer, Mr. Wallace, and Mr. Layne were still in their car when she arrived. *Id.* at 8.

Officer Merricks conducted the search of co-defendant Mr. Layne. *Id.* at 8-9.

I. Kyle Brown

The ninth witness called by the Government was Kyle Brown, who is a forensic chemistry supervisor for a private independent laboratory called NMS Labs. *Id.* at 28-29. Mr. Brown tested the substances found on the scene. *Id.* at 35. The substances were found to be cocaine, N,N-dimethylpentylone, ANPP, fentanyl, and PCP. *Id.* at 36.

Mr. Brown testified that the laboratory testing only examines a tiny shaving of the sample and can only confirm that there is any amount of the substance within the testing material:

> Q. Just to be clear, when you test these substances or when these substances are tested, they're not tested for purity, are [they]?

A. No, they're not.
Q. No. It's just to determine whether there is some even tiny negligible amount of that substance within the testing material. Is that correct?
A. Yes. Only an identification was done…
Q. Okay. So this was just a tiny little shaving off of the substance. Is that correct?
A. Correct, yes.

Id. at 39-40.

No purity testing was performed, so Mr. Brown was unable to testify as to the specific make-up of the substance taken from Mr. Wallace. *Id.* at 45.

J. Brittany Argento

The tenth witness called by the Government was Brittany Argento, who is a forensic chemist for NMS Labs. *Id.* at 49-50. Ms. Argento received eight items to test in this case. *Id.* at 53. Ms. Argento's testing concluded that cocaine, N,N-dimethylpentylone, 4-ANPP, cocaine, fentanyl, and phencyclidine (PCP) were present. *Id.* at 56-57.

The sample referred to as Exhibit 1 measured to be half a gram and the testing resulted in a finding of a mixture of cocaine and dimethylpentylone. *Id.* at 60-61. They would not note any non-controlled substances present in the substance in their report. *Id.* at 63.

K. Scott Brown

1. Pre-Trial Objections

The eleventh and final witness called by the Government was Scott Brown, an MPD police officer. 10/2/2023 Tr. at 66.

Prior to trial, Mr. Wallace objected to the inappropriate opinion in Mr. Brown's Expert Notice that characterized Mr. Wallace as being involved in mid-level drug trafficking. 9/29/2023 Tr. at 6. The trial court agreed, stating: "I think this expert's opinion goes to whether or not the items found in his possession were consistent either with personal use or with an intent to distribute," not to the "level" of an enterprise. *Id.* at 8.

Mr. Wallace also objected to the stated opinion that certain items seized from his person are "consistent with crack cocaine" as irrelevant and inadmissible. *Id.* at 9-10. The court did not exclude this testimony, saying it was "fodder for cross-examination." *Id.*

2. Expert Certification

Officer Brown has been an officer with MPD for over thirty-two (32) years and is currently assigned to the Violent Crime Suppression Division and detailed to the FBI Safe Streets Task Force. 10/2/23 Tr. at 66-67. He has worked in the Violent Crime Suppression Division, previously known as the Narcotics and Special Investigations Division, for the past twenty years. *Id.* at 67-68. He has participated in hundreds of drug investigation. *Id.* at 70. Officer Brown had testified that he was familiar with the drug dimethylpentylone, which Officer Brown mispronounced as "dimethylon pentylonen" during his testimony." *Id.* at 74.

Officer Brown testified that he obtains his knowledge about the drug from the arrestees, colleagues, and confidential informants. *Id.* at 73-74. He taught a drug trends class for MPD, the U.S. Attorney's Office, and for security departments at colleges in DC. *Id.* at 77-78. His only publication is an informal drug pricing chart that he created, which does not address dimethylpentylone. *Id.* at 78, 81-82.

Officer Brown testified that the drugs tested in this case were a combination of cocaine and dimethylpentylone. *Id.* at 85-86. Officer Brown testified that he first came across the drug dimethylpentylone within the last six months. *Id.* at 75, 81. He has discussed dimethylpentylone with a Montgomery County police officer and interviewed one or two sources about the drug. *Id.* at 82-83. He admitted on cross-examination that he has not addressed the drug dimethylpentylone during his drug trends class, he has not written any papers about the drug dimethylpentylone, and has not taken any education courses that discussed the drug dimethylpentylone. *Id.* at 81-82. Officer Brown admitted that he has never been qualified as a witness regarding dimethylpentylone. *Id.* at 84.

The defense objected to Officer Brown's qualification as an expert. *Id.* at 29-80, 86; *see also Id.* at 88-89 ("[O]n behalf of Mr. Wallace, I want to respectfully adopt the arguments that [co-defendant's counsel] Mr. Kovler just made"). First, Officer Brown mispronounced the name of the drug throughout his testimony, indicating his lack of expertise and education on the substance. *Id.* at 86; *see also Id.* at 145-146.

Second, other than a few arrests, he has no experience with the drug and no formal training on the drug. *Id.* Third, the only publication attributed to Officer Brown is an informal drug chart that he published, which does not include the drug Dimethylpentylone and was last updated in 2020, prior to the drug coming on the scene. *Id.* The defense argued that qualifying Officer Brown as an expert would be prejudicial because:

> …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.
>
> *Id.* at 86-87.

The trial court overruled the objection, finding that Officer Brown can testify as to whether the drugs in possession were consistent with personal use or with intent to distribute. *Id.* at 87. The court also refused to limit the testimony to general knowledge, ruling that Officer Brown could testify about the specific nature that dimethylpentylone is distributed or taken because "he has sufficient education and training to testify about these narcotics in general." *Id.* at 87-88, 89.

Over objection, the trial court qualified Officer Brown as an expert concerning distribution and use of narcotics, packaging of narcotics, and the manner of distribution and price of narcotics. *Id.* at 89.

3. Direct Examination

Officer Brown was not involved with Mr. Wallace's arrest and did not process the evidence in this case. *Id.* at 89-90, 120. In preparing for his testimony, he reviewed the police report, a drug report, photographs of the drugs, and the drug exhibits. *Id.* at 90.

Officer Brown identified the substance in the baggies in Government's Exhibits 108 and 326, showing thirteen (13) bags, to be crack cocaine or "it could be…[dimethylpentylone,] which we've seen sometimes in that kind of appearance." *Id.* at 92., 95, 107. Officer Brown explained that drug dealers can add substances to drugs "to increase [their] profit margin." *Id.* at 93. Officer Brown testified that dimethylpentylone "was described to me as an inexpensive or cheap version of crack cocaine, so it would be something where someone may have added boot to the powder cocaine before they processed it into crack cocaine." *Id.* at 93-94.

Officer Brown testified that he estimated that the total weight of the drugs without packaging would be between seven (7) and eight (8) grams. *Id.* at 97. Officer Brown testified that a "single serving" of crack cocaine for users is "on average" seventy (70) miligrams or 0.07 grams. *Id.* at 97-98. Officer Brown testified that: "from talking with people that use crack…you're not buying in bulk." *Id.* at 99. He then changed his testimony, saying "[i]f they do buy in bulk, it would be something

where they are trying to, you know, support their habit" by selling some of it. *Id.* at 100.

Officer Brown testified that, if it is crack cocaine, the wholesale value of drugs in the exhibit would be approximately $400. *Id.* at 100-101. He estimated the street value is $1,300. *Id.* at 102. Officer Brown testified that it is not common for a user of crack cocaine to possess the amount that is seen in Government's Exhibit 108 and 326. *Id.* at 102. Officer Brown testified that the fact that no crack pipe was found in the vehicle is an indication that they did not possess the substance for their own use. *Id.* at 103. Officer Brown testified that the packaging "would be easy for someone to distribute on the street level side." *Id.* at 103.

Office Brown testified that Government Exhibits 109 and 325, which he describes as amber or yellowish liquid in one glass vial, appear to be PCP or phencyclidine. *Id.* at 106. He opined that the amount is consistent with personal use because it is the amount he normally sees "if someone purchased one at a time." *Id.* at 106, 107.

Officer Brown testified that all of the substances being on one person is consistent with the person selling the drugs because a drug user does not typically carry multiple different substances on them, although he did clarify that it's "not unheard of." *Id.* at 107. Officer Brown testified that a drug dealer can also be a drug user, particularly when it comes to heroin. *Id.* at 108.

He testified that crack cocaine and dimethylpentylone look similar and are both a hard rock substance and are difficult to distinguish. *Id.* at 109-110. A user could not tell the difference until they ingested it. *Id.* at 110-111. Officer Brown admitted that he didn't know what the difference between the effects of the two would be. *Id.* at 111 ("I wouldn't know. I haven't really spoke[n] to any of the sources in terms of, like, smoking the difference, you know, are you able to tell the difference"). The price would be halved for Dimethylpentylone. *Id.* at 113.

Government's Exhibit 321 is a picture of three $100 bills. *Id.* at 117. Government's Exhibit 322 is a picture of three $10 bills. *Id.* Government's Exhibit 322 is a picture of one $20 bill. *Id.* Government's Exhibit 323 is a picture of one $50 bill. *Id.* at 118. Government's Exhibit 324 is a picture of one $5 bill. *Id.* at 118. Officer Brown testified that, while "you don't have the larger denomination differences," the exhibits "would be consistent with someone that's distributing." *Id.* at 118-119.

4. Cross-Examination

A drug with higher purity will have a more intense effect. *Id.* at 129. When using crack cocaine, people might break down the rock before using it. *Id.* at 130.

Officer Brown admitted that he has never heard the term "polysubstance abuser," which describes people who use whatever substance they can. *Id.* at 131-132.

Officer Brown testified that fentanyl can be mixed in with other drugs as a cutting agent and the distributor or buyer may not know. *Id.* at 132-133.

Officer Brown agreed that a drug buyer must have some money on them to purchase the drugs. *Id.* at 134. He also agreed that if a buyer purchases a higher quantity of drugs at one time, he can negotiate a better price. *Id.* at 136.

Crack cocaine does not expire. *Id.* at 138. Officer Brown admitted that he does not know enough about Dimethylpentylone as to testify whether it expires. *Id.* at 139. Dimethylpentylone is hard to distinguish from crack cocaine, but it is half the price. *Id*. Officer Brown described Dimethylpentylone as "an inexpensive form of crack." *Id*.

Officer Brown testified that his knowledge of Dimethylpentylone is based on talking to "probably" fewer than ten people that he has encountered during the arrests involving the substance in the last six months. *Id.* at 139-140, 144. He admitted that he does not know what the pricing of Dimethylpentylone would have looked like in October 2022. *Id.* at 140.

Officer Brown admitted that an addict might go to a dealer and ask for as much of the substance he can get for a certain amount of money, which would be more than the buyer may have expected if the dealer knew that he was selling Dimethylpentylone instead of cocaine. *Id.* at 140.

Officer Brown admitted that he has never written any statements or reports about how Dimethylpentylone is packaged or sold. *Id.* at 144. He does not know anything about the common level of purity of Dimethylpentylone. *Id.*

II. MOTION FOR JUDGMENT OF ACQUITTAL

Prior to the start of the defense's case, the parties approached to make a Motion for Judgment of Acquittal. *Id.* at 150. The court denied the Motion prior to hearing any argument:

> MR. SHEFFERMAN: Your Honor, can we approach?
> THE COURT: Yes.
> (Bench conference)
> MR. KOVLER: I think we need --
> THE COURT: I'm sorry?
> MR. SHEFFERMAN: We both maybe need to --
> THE COURT: You need to make a motion?
> MR. SHEFFERMAN: Yeah, before I start my case.
> THE COURT: Denied, denied, denied.

Id. at 150. Despite this premature determination, the defense argued the Motion. *Id.* at 151. In reference to the charges for which Mr. Wallace was convicted, defense counsel argued that the Government failed to prove that there was any intent to distribute the drugs found in the case. *Id.* at 151. Co-defendant Mr. Layne expanded upon the argument, stating that "the only evidence that the Court has received to indicate that this was possession with intent to distribute is from an officer who admittedly has virtually no experience with this particular drug and…no knowledge of how this drug was distributed back in October of 2022 when this event happened."

Id. at 151-152. The court reiterated its denial of the Motion, stating that it is an issue for the jury to decide. *Id.* at 152.

III. DEFENSE'S CASE

The co-defendant, Mr. Layne, did not call any witnesses. *Id.* at 147, 223. Mr. Wallace called three witnesses: (1) Chenae Priester; (2) Alex Alexander; and (3) Myron Smith.

A. Chenae Priester

The first witness called by Mr. Wallace was Chenae Priester, who is Mr. Wallace's neighbor. *Id.* at 153. She has known Mr. Wallace for over a year. *Id.* at 154. She has observed him use crack cocaine probably one hundred times. *Id.* at 155-156. Ms. Priester testified: "I've known him for a year, and he [uses crack cocaine] every time I've seen him. I see him every day." *Id.* at 156.

Ms. Priester testified that she would not want anything bad to happen to Mr. Wallace, but she also would not lie under oath for him. *Id.* at 161-162.

B. Alex Alexander

The second witness called by Mr. Wallace was Alex Alexander, who owns the roadside assistance company, Fast Lane Auto. *Id.* at 162-163. Mr. Wallace has been working for Mr. Alexander as an independent contractor since 2021 conducting roadside assistance. *Id.* at 164.

Mr. Wallace would get paid in cash, by check, or through a cash app. *Id.* at 165. He would generally pay Mr. Wallace once a week on Friday, but sometimes he would pay him every day. *Id.* at 166.

In October 2022, Mr. Wallace was getting sent out for three or four jobs every day. *Id.* at 166.

Mr. Alexander became aware that Mr. Wallace was using crack cocaine and had a substance abuse problem and talked to him about it one or two times. *Id.* at 165. He saw him using crack a few times a day. *Id.* at 168-169. He recommended that he get treatment. *Id.* at 167. He was not worried about him performing his job. *Id.* at 167-168.

C. Myron Smith

The final witness called by Mr. Wallace was Myron Smith, who is a narcotics expert for Smith Expert Consulting Group, Inc. *Id.* at 172-173. Detective Smith was previously a Detective with the Narcotics and Special Investigations Division of the MPD in DC, working extensively in an undercover capacity. *Id.* at 173. He worked with MPD From 1984 to 1997. *Id.* at 174, 188. He was appointed as the resident narcotics expert at MPD during his last five years with the department and the highest rank that he obtained at MPD was Detective Grade II. *Id.* at 173, 191. He has received citations or commendations from the U.S. Attorney's Office, the Department of Justice, and MPD. *Id.* Detective Smith has testified approximately

2,000 times as an expert witness alone and has never been denied expert qualification. *Id.* at 175-176. He has conducted "too many [narcotics investigations] to even number." *Id.* at 175.

Detective Smith was qualified as an expert witness. *Id.* at 177. As a basis of his opinions, he has witnessed the testimony in the trial, reviewed the discovery package and police reports, and examined all items of evidence. *Id.*

Detective Smith testified that he agreed with Officer Brown that several of the items of evidence, such as the PCP and fentanyl, were within the quantity for personal use. *Id.* at 178, 200.

Detective Smith disagreed with Officer Brown regarding the crack cocaine. *Id.* He testified that the amount of crack cocaine found on Mr. Wallace was "well within personal use also." *Id.* He based this opinion on a number of factors. *Id.* First, the individuals were stopped in a traffic stop, not an observed drug deal, an undercover "buy-bust" operation, or a long-term investigation. *Id.; see also Id.* at 181. Second, the police did not find any tools used for selling drugs, such as empty zip-locks, scales, tallying methods such as rubber bands used to sell packages of drugs. *Id.* at 178-179. Third, there was no large amounts of money found. *Id.* at 179. Fourth, the amount of the substance found was "well within personal use." *Id.* Detective Smith explained that receiving multiple bags of the substance, alone, is not sufficient to determine distribution because the seller may not have had it broken into the

denomination that was desired. *Id.* at 186. Detective Smith also pointed out that there is nothing in the MPD general orders that specifies how much of a substance someone has to have in their possession to change the objective from personal use to distribution. *Id.* at 183.

The fact that Mr. Wallace had different types of drugs on his person does not speak to whether he was selling drugs or not. *Id.* at 179. Detective Smith explained that "an individual just may choose to use different substance[s]; that's their preference." *Id.* Detective Smith testified that polysubstance disorder is "a recognized disorder from the American Psychiatric Association where individuals would choose to use different drugs." *Id.* at 180.

Detective Smith explained that dimethylpentylone is a stimulant that he has been seeing since approximately 2014. *Id.* at 184. He testified that the officers do not know anything about dosing for dimethylpentylone, stating: "law enforcement is – we're not chemists by [any] means. So the dosage and all that, leave that to the chemists. Leave that to the professional, the doctors." *Id.* at 185. The amount of drugs that an individual chooses to purchase is a matter of preference. *Id.* at 194.

On cross-examination, the Government confronted Detective Smith about his testimony in a number of cases from the 1990's in which he believed the amount in possession was consistent with distribution rather than personal use. *See Id.* at 201-219. Detective Smith explained that the first case, *United States v. Vazquez,* differed

from this case because, in that case, there was an observed drug sale, 89 different rocks, and a razor blade, which is indicia of drug distribution. *Id.* at 204. Detective Smith explained that another case, *United States v. Truesdale*, was distinguishable because there was a discussion about the individual putting drugs in a "stash location," or an open-air drug market, which was not present in this case. *Id.* at 221-222.

IV. JURY DELIBERATIONS

The jury submitted a question asking: "Can you explain jury nullification?" 10/4/2023 Tr. at 3. Over defense counsel's objections, the court questioned the juror who wrote the note. *Id.* at 9-12. The juror stated that another juror is deliberating, but had questions about impartiality because they morally did not believe that people who commit certain crimes should be put in jail. *Id.* at 12. After the conversation with the juror, defense counsel again objected to further inquiries of individual jurors, stating that the jurors had already been instructed not to consider sentencing. *Id.* at 14. Defense counsel argued that further inquiry would undermine the deliberations. *Id.* at 15. Over counsel's objection, the court further questioned the juror who wrote the note to determine the juror who had the moral opposition. *Id.* at 17-18. The juror indicated that there were at least three jurors who share the moral concerns about the defendants having to serve jail time for the offenses. *Id.* at 18.

The defense maintained their objection over further questioning or instructing the jurors. *Id.* at 19.

Over defense counsel's objection, the judge brought the jury back into the courtroom and reiterated the instruction that they should not consider sentencing during their deliberations. *Id.* at 20.

V. VERDICT AND SENTENCING

The jury reached a verdict on October 6, 2023 finding Mr. Wallace guilty of: (1) Possession with Intent to Distribute a Controlled Substance, cocaine; (2) Possession of Cocaine; and (3) Possession of Liquid PCP. 10/6/2023 Tr. at 4-5.

The jury found Mr. Wallace not guilty of: (1) Possession with Intent to Distribute a Controlled Substance, Cocaine, While Armed; (2) Possession of a Firearm During a Crime of Violence or Dangerous Offense; (3) Unlawful Possession of a Firearm with a Prior Conviction; (4) Carrying a Pistol without a License; (5) Possession of an Unregistered Firearm; and (6) Possession of Ammunition. *Id.* All jurors were polled and agreed with the verdict. *Id.* at 6-7.

In sentencing, the trial court determined that possession with intent to distribute cocaine merged with the lesser-included simple possession of cocaine. 11/1/2024 Tr. 14. The court sentenced Mr. Wallace on the charge of Possession with the Intent to Distribute cocaine to forty (40) months incarceration, five (5) years supervised release, and a fine of $100 to the Victims of Violent Crime Compensation Fund. *Id.*

at 15. The court sentenced Mr. Wallace on the charge of possession of liquid PCP to thirty (30) months incarceration, three (3) years supervised release, and a fine of $100 to the Victims of Violent Crime Compensation Fund. *Id.* at 15. The court ordered the sentences to run concurrent to each other. *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING THE UNRELIABLE EXPERT TESTIMONY OF OFFICER BROWN OVER DEFENSE OBJECTION

No one witnessed Mr. Wallace participating in any stage of distribution and there was no distribution paraphernalia found on Mr. Wallace or in the vehicle. The only evidence that the Government presented to address whether Mr. Wallace possessed the mixture of cocaine and dimethylpenthylone for the purpose of distribution was Officer Brown's expert testimony that the amount suggested an intent to distribute. However, Officer Brown did not have the requisite specialized knowledge or experience in dimethylpentylone to aid the triers of fact in rendering their verdict. *See Motorola Inc. v. Murray,* 147 A.3d 751 (D.C. 2016)(en banc). As such, the trial court erred in certifying Officer Brown as an expert for this case.

In *Motorola Inc. v. Murray,* this Court modified the standard for the admission of expert testimony and adopted the standards embodied in Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 597, 125 L. Ed. 2d 469

(1993). The requirements for the admissibility of expert testimony pursuant to Rule 702 are:

> 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.

The trial court has to perform a gatekeeping function to ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Motorola Inc.*, 147 A.3d at 755 (quoting *Daubert*, 509 U.S. at 597). It is the role of the trial court to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" and trustworthy. *Id.* at 754 (quoting *Daubert.*, 509 U.S. at 592-3); *see also State v. O'Key*, 321 Or. 285, 899 P.2d 663 (1995) ("The role of trial court as 'gatekeeper' is to ensure that trier of fact does not attach undue aura of reliability to proffered expert scientific testimony that is not scientifically valid, in order to prevent jury from being misled, confused, or mystified by evidence which purports to be based on science beyond common knowledge of average person but which does not meet judicial standard for scientific reliability").

The standard of review for a claim of error that was properly preserved by timely and proper objection, as in this case, is for abuse of discretion. *Gardner v.*

United States, 140 A.3d 1172 (D.C. 2016). The Court must determine whether "after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Id.* (citing *Clayborne v. United States*, 751 A.2d 956, 968 n.12 (D.C. 2000)).

Though the trial court's ruling is discretionary the trial court must "take no shortcuts" and "exercise its discretion with reference to *all* the necessary criteria." *Girardot v. United States*, 92 A.3d 1107, 1109 (D.C. 2014)(quoting *Ibn-Tamas v. United States*, 407 A.2d 626, 635 (D.C. 1979))(emphasis in original). "Thus, the court's determination must be case-specific [and] based on the proffered expert testimony." *Id*.

In *Johnson v. District of Columbia,* this Court found that the trial court appropriately refused to certify a proposed expert in a claim involving a defective water heater because, while the witness was generally knowledgeable about water heaters, he was not sufficiently knowledgeable about the specific commercial water heater at issue. 728 A.2d 70, 74-75 (D.C. 1999). This Court explained: "[w]hile a witness may be qualified to testify as an expert on the basis of his experience in a particular field, a trial judge is not obliged to qualify a proffered expert when there are articulable reasons to doubt his competency." *Johnson*, 728 A.2d at 74 (quoting *Glorious Food, Inc. v. Georgetown Prospect Place Assocs.*, 648 A.2d 946, 948 (D.C. 1994)). The DCCA agreed with the trial court that the proposed expert was not

sufficiently knowledgeable about the specific item at issue to be qualified as an expert in the case. *Id.* at 75 ("As to the expertise of the witness regarding adequate warnings associated with commercial water heaters, the record showed that he had little or no experience with such heaters or the regulations governing their use"); *see also Govan v. Brown,* 228 A.3d 142, 155 (D.C. 2020)("While a[n expert] need not be a specialist in a particular field to provide expert testimony, he or she must still be a qualified [expert] and have familiarity with the particular subject matter in order to render an expert [ ] opinion")(quoting *Dickerson v. District of Columbia,* 182 A.3d 721, 729 (D.C. 2018)); *see also GE v. Joinder,* 522 U.S. 136 (1997)(The exclusion of expert testimony is appropriate when "there was too great an analytical gap between the data and the opinion proffered")(citations omitted).

Similarly, in this case, while Officer Brown is generally familiar about narcotics, he was not sufficiently knowledgeable about the substance at issue in this case to provide a relevant, reliable, and trustworthy expert opinion for the jury. The substance that Mr. Wallace was convicted of possessing with the intent to distribute was found to be a mixture cocaine and dimethylpenthylone. Officer Brown admitted that he had first found out about dimethylpentylone only six months prior to the trial, which was two years after the arrest occurred. He was unaware of the drug when the arrests occurred.

Officer Brown admitted that his only experience with dimethylpentylone was a

handful of arrests, a discussion about the drug with another police officer, and interviewing one or two sources about it. He had no formal training or education about the drug that would allow him to provide the requisite specialized knowledge that would assist the jury to determine whether the drugs were possessed for the purpose of distribution or personal use. He testified that he did not even know how to visibly tell the difference between cocaine and dimethylpentylone and he did not know what the different effects of the two drugs would be. He had never before been certified as an expert in dimethylpenthylone. In fact, he mispronounced the name of the drug throughout his testimony, emphasizing a lack of expertise on the manner.

This testimony demonstrates that Officer Brown did not have the requisite knowledge to testify as to the substance found on Mr. Wallace. While he may be qualified to generally testify about some narcotics, his lack of familiarity with dimethylpenthylone rendered his expert opinion about whether the amount in possession was suggestive of distribution unreliable and untrustworthy. As such, the qualification of Officer Brown as an expert in this case was manifestly erroneous because he did not possess sufficient knowledge or experience in dimethylpenthylone to aid the triers of fact in their search for the truth. *See Motorola Inc.*, 147 A.3d at 756.

The certification of Officer Brown as an expert over Mr. Wallace's objection when he did not possess the required specialized knowledge contributed

substantially to the verdict because, as will be discussed in more detail below, the government did not otherwise present sufficient evidence that Mr. Wallace intended to possess the substance for the purpose of distribution. *See Doreus v. United States*, 964 A.2d 154, 157-158 (D.C. 2009)(Reversing a possession with intent to distribute conviction when the trial court erroneously admitted evidence in the form of a DEA report and there was insufficient corroborating evidence to support a conviction). As such, the improper certification of Officer Brown as a narcotics expert when he had insufficient experience with the actual narcotic at issue necessitates a reversal of Mr. Wallace's conviction for Possession with Intent to Distribute.

II. A *DE NOVO* REVIEW OF THE JURY'S VERDICT REQUIRES A REVERSAL OF THE CONVICTION BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. WALLACE IS GUILTY OF POSSESSION WITH INTENT TO DISTRIBUTE

The Due Process Clause of the United States Constitution prohibits a criminal conviction unless the government establishes guilt of all of the essential elements of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). In assessing the sufficiency of the evidence, this Court views the record in the light most favorable to the government, "leaving to the trier of fact the resolution of credibility and the right to draw justifiable inferences." *In re R.H.M.*, 630 A.2d 705, 707 (D.C. 1993)(quoting *Beatty v. United States*, 544 A.2d 699, 701 (D.C. 1988)).

In *In re As.H,* this Court recognized that "the 'reasonable doubt' standard of proof is a formidable one. 851 A.2d 456, 459 (D.C. 2004). The standard 'requires the factfinder to reach a subjective state of near certitude of the guilt of the accused.'" *Rivas v. United States,* 783 A.2d 125, 133 (D.C. 2001)(en banc)(quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781 (1979)). The *As.H.* Court further expressed that "[A]lthough appellate review is deferential, we have 'the obligation to take seriously the requirement that the evidence in a criminal prosecution must be strong enough that a [trier of fact] behaving rationally really could find it persuasive beyond a reasonable doubt.'" *As.H.* 851 A.2d at 459 (quoting *Rivas*, 783 A.2d at 134).

"The standard of proof beyond a reasonable doubt is not merely a guideline for the trier of fact but also furnishes a standard for judicial review of the sufficiency of the evidence." *Workman v. United States*, 96 A.3d 678 (D.C. 2014)(internal quotations omitted)(citation omitted). The reversal of a conviction is warranted when the government "has failed to produce evidence upon which a reasonable mind might fairly find guilt beyond a reasonable doubt." *In re As.H.,* 851 A.2d at 459 (quoting *In re T.M.,* 577 A.2d 1149, 1151 (D.C. 1990) (citing *Rivas,* 783 A.2d at 133-35). The reasonable doubt standard requires proof sufficient for a rational jury to reach a "state of near certitude" as to the defendant's guilt, proof "more powerful"

than what the jury would need just to find something "more likely than not" or even "highly probable." *Rivas*, 783 A.2d at 133.

This elevated proof requirement "means more than that there must be some relevant evidence in the record in support of each essential element of the charged offense." *Id*. at 134. "Slight evidence is not sufficient evidence; a 'mere modicum' cannot 'rationally support a conviction beyond a reasonable doubt.'" *Id*. (quoting *Jackson v. Virginia*, 443 U.S. at 320).

In this case, Mr. Wallace's conviction must be reversed as a matter of law because the Government failed to provide sufficient evidence to allow the jury to reach near certitude that Mr. Wallace had the intent to distribute the substance as required by D.C. Code § 48-904.0. *See Cash v. United States*, 648 A.2d 964 (D.C. 1994)(In order to convict, the jury must be satisfied that the government proved that the defendant had the specific intent to distribute the controlled substance).

The only evidence that the Government introduced to support the charge of Possession of Intent to Distribute was the narcotics found on Mr. Wallace. There was no corroborating evidence such as drug distribution paraphernalia, e.g. empty ziplock bags, dilutants, a scale, or documents listing amounts purchased or prices, and there were no witnesses claiming to have observed Mr. Wallace participate in any part of a drug transaction.

In *McRae v. United States*, 148 A.3d 269, 271 (D.C. 2016), this Court found that there was insufficient evidence to affirm the conviction for Possession with Intent to Distribute when the government presented evidence of McRae's possession of 22.7 grams of marijuana on his person and a digital scale, 175 empty Ziplock bags in varying sizes and colors, and a loaded handgun in his apartment. The Court determined that "the quantity and packaging of the marijuana and the physical evidence of drug trafficking activity found in [his] apartment" was merely evidence of the "inferences that might be drawn," rather than "direct evidence that appellant had been selling the marijuana found in his jacket or that he intended to sell it rather than consume it himself." *Id.* at 273. The Court reversed the conviction, finding that "a reasonable jury readily could find it *more likely than not* and perhaps even *highly likely* that appellant possessed the marijuana with the intent to distribute it…[but] '[i]f the standard of proof beyond a reasonable doubt means anything, the factors on which the government relies are not compelling enough to permit a reasonable jury to find [appellant] guilty' of PWID." *Id.* at 275.

Similarly, here, the evidence was deficient for a number of reasons. First, the only direct evidence presented was that Mr. Wallace possessed the drugs. There is no evidence that Mr. Wallace was observed packaging, soliciting, or participating in any part of a drug transaction. There was no drug distribution paraphernalia found on Mr. Wallace's person or in his possession.

While there was no consumption paraphernalia found, this Court explained in *McRae* that "the absence of such [apparatus for personal consumption] might corroborate affirmative evidence of drug trafficking, [but] it cannot take the place of such evidence." *McRae,* 148 A.3d at 271. Similarly, the money that was found on Mr. Wallace is similarly not probative of the issue. As the D.C. Circuit Court of Appeals has explained, the possession of money is only probative if it is accompanied by corroborating evidence of drug distribution: "the presence of a large sum of unexplained cash *in connection with other evidence of drug trading* is probative of the previous occurrence of drug transactions,' and may support an inference of future intent to distribute." *United States v. Stephens*, 23 F.3d 553, 556 (D.C. Cir. 1994)(emphasis in original)(quoting *United States v. Brett*, 872 F.2d 1365, 1370 (8th Cir.), *cert denied*, 493 U.S. 932 (1989)(citing *United States v. Gibbs*, 284 904 F.2d 52, 57 (D.C. Cir. 1990))). Here, similar to the Circuit Court's finding in *Stephens*, "[i]n the absence of some independent evidence of prior or contemporaneous drug sales…it would be mere speculation for the jury to infer that the [money] recovered from his person were proceeds from prior drug transactions indicative of his future intent to distribute." *Id.* at 556. Therefore, the fact that Mr. Wallace did not have consumption paraphernalia and had money on his person is not probative as to whether he intended to distribute the drugs.

As such, the only evidence presented by the government was that Mr. Wallace possessed the drugs. The mere fact of possession, without more, is insufficient for a conviction beyond a reasonable doubt. *Hinnant v. United States*, 520 A.2d 292, 294 (D.C. 1987)("A finding of intent to distribute cannot usually be based on possession alone")(internal citations omitted).

There was unrebutted evidence from multiple witnesses that Mr. Wallace was a heavy, daily user of crack cocaine and therefore could have possessed the substance for his own consumption. Similar to *McRae,* "given the limitations of the government's proof and the unrebutted evidence that appellant could have possessed the [drugs] for his own consumption…[a reasonable jury] could not fairly reach a "state of near certitude" that appellant had the intent to distribute the specific amount of [drugs] in his possession." *McRae*, 148 A.3d at 275. As such, the fact that Mr. Wallace possessed drugs alone is insufficient to support a finding that he intended to distribute them beyond a reasonable doubt.

Further, as discussed previously, the evidence presented regarding the inferences based on the quantity of the substance by the government's expert was unreliable and internally inconsistent. Officer Brown testified that dimethylpentylone was described to him as "an inexpensive or cheap version of crack cocaine" and that the cost of dimethylpentylone would be half of the price of

cocaine. The price could have been even lower when the arrest, as Officer Brown admitted that he did not know the price of dimethylpentylone in October 2022.

His opinion that the amount and his valuation of the narcotics would indicate possession for personal use versus distribution was based on cocaine, not a mixture that included the "inexpensive" dimethylpentylone. It would be inconsistent with his testimony to find that a heavy user would not require more of the "inexpensive," and presumably less potent, substance for his personal use. However, there is no indication that Officer Brown took this into consideration when making his determinations. Further, Officer Brown testified that he does not know what the cost of This inconsistency renders his opinion that the drugs were possessed with the intent to distribute, upon which the jury relied, irrelevant and unreliable.

For the reasons stated above, there is insufficient evidence to prove beyond a reasonable doubt that Mr. Wallace intended to distribute a controlled substance, as required for a conviction. The guilty verdict was based on possibilities and incomplete information that were debunked by Mr. Wallace's witnesses, which is not the standard for beyond a reasonable doubt. Therefore, a rational jury could not decide with near certitude that Mr. Wallace was guilty of the offense. As the Government did not satisfy its burden that Mr. Wallace committed the office of Possession with Intent to Distribute pursuant to D.C. Code § 48-904.01 and Jury

Instructions 6.201 beyond a reasonable doubt, Mr. Wallace's conviction must be reversed as a matter of law.

CONCLUSION

As set forth herein, the evidence was insufficient to establish the appellant's conviction for Possession with Intent to Distribute. Therefore, a reversal of the appellant's conviction is mandated as a matter of law.

RELIEF SOUGHT

Appellant Elliot Wallace's conviction for Possession with Intent to Distribute pursuant to D.C. Code § 48-904.01(a)(1) must be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 18, 2024, a copy of the forgoing Appellant's Brief, was e-filed attention Chrisellen R. Kolb, Esq., Assistant United States Attorney, via D.C. Court of Appeals E-Filing System.

/s/ Michael Bruckheim /s/
Michael Bruckheim