NOT YET SCHEDULED FOR ORAL ARGUMENT
24-CF-191

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MARQUETTE JORDAN
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From The Superior Court
Of The District Of Columbia
Criminal Division

OPENING BRIEF FOR APPELLANT MARQUETTE JORDAN

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DISCLOSURE STATEMENT

Appellee in this Court is the United States. Counsel who appeared for the United States before the Superior Court was Assistant U.S. Attorney, Natalie Hynum, Emma McArthur.

Defendant in the Superior Court and Appellant in this Court is Mr. Marquette Jordan. Counsel who appeared for Mr. Jordan before the Superior Court were Kevann Gardner, Khadijah Ali, Howard McEachern, Elliott Queen, Michael Madden, Camille Wagner, and Michael Bruckheim. Mr. Queen represented Mr. Jordan at the initial trial. Ms. Wagner and Mr. Bruckheim represented Mr. Jordan at the second trial. Appellate counsel now appearing before this Court is Jason Clark.

RULE 28(A)(5) STATEMENT

This appeal is from a final order or judgment that disposes of all the parties' claims at issue.

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ISSUES PRESENTED

1. Whether the trial court improperly removed Juror 15 during deliberations.
2. Whether the trial court erred in admitting evidence that Mr. Jordan took the decedent's wallet, keys, and cell phone, despite Jordan's prior acquittal and the prejudicial nature of the evidence.
3. Whether the trial court abused its discretion by admitting Jordan's offhand remark to police that he had cancer when he did not, just so they could use testimony and medical records to impeach Jordan with the lie.

STATEMENT OF THE CASE

This case is an appeal from a criminal conviction after a trial by jury. Mr. Jordan was originally charged by indictment with one count of first-degree murder while armed (premeditated) in violation of 22 DC Code §§ 2101, 4502; robbery while armed in violation of 22 DC Code §§ 2801, 4502; two counts of threatening to injure/kidnap a person in violation of 22 DC Code § 1810; assault with a dangerous weapon in violation of 22 DC Code § 402; simple assault in violation of 22 DC Code § 404; carrying a dangerous weapon (outside home or place of business) in violation of 22 DC Code § 4504(a)(2). R. at 981-83 (Indictment).

Mid-trial, counts three and five (threats to injure/kidnap), and count four (ADW) were dismissed. Deliberating on the remaining four counts, on April 12, 2022, the jury returned a partial verdict acquitting Mr. Jordan of robbery while armed. R. at 1337 (First Partial Verdict Form). On April 18, 2022, the jury returned a second partial verdict acquitting Mr. Jordan of first-degree murder while armed (premeditated). R. at 1343 (Second Partial Verdict Form). On the remaining three counts (second-degree murder, simple assault, and carrying a dangerous weapon) the jury was unable to reach a verdict and a mistrial was declared on April 18, 2022.

On April 26, 2022, the government announced its intention to retry appellant on second-degree murder while armed, simple assault, and carrying a dangerous weapon. 4/26/22 Status Hr'g Tr. 2-3.

The second jury trial commenced on November 14, 2023. The jury delivered its verdict on December 19, 2023, convicting appellant of all three counts. R. at 1597 (Verdict Form).

Defense counsel filed a written post-trial Motion for Judgment of Acquittal on 12/21/2023, R. at 1600 (MJOA), to which the government responded on 1/31/2024. R. at 1605 (Opposition to MJOA). The court issued an Order on 2/28/2024 denying the defense motion yet again. R. at 1615 (Order Denying MJOA).

On March 1, 2024, the trial court followed the government's request for an upward departure from the voluntary sentencing guidelines, and sentenced appellant to 30 years with five years of supervised release on the second-degree murder count, two years with 3 years of supervised release on the carrying a dangerous weapon count, and 180 days on simple assault. R. at 1626 (Amended Judgement and Commitment Order). The court specified that the murder and weapons counts run consecutive to each other, and that the simple assault run concurrent to the other two counts. *Id.*

A notice of appeal was timely filed. R. at 1627 (Notice of Appeal).

Table of Offenses and Outcomes

Count	Offense	Code Section	1st Trial	2nd Trial
1	First Degree Murder While Armed (Premeditated) (Ivan Lynch)	22 D.C. Code § 2101, 4502	Not Guilty	—
1a	Lesser Included: Second Degree Murder While Armed	--	No Verdict	Guilty

2	Robbery While Armed (iPhone, Wallet, and Car Keys)	22 D.C. Code § 2801, 4502	Not Guilty	—
3	Threatening To Injure/Kidnap a Person	22 D.C. Code § 1810	Dismissed	—
4	Assault with a Dangerous Weapon	22 D.C. Code § 402	Dismissed	—
5	Threatening To Injure/Kidnap a Person (Ashley Carmon)	22 D.C Code § 1810	Dismissed	—
6	Assault	22 D.C. Code § 404	No Verdict	Guilty
7	Carrying a Dangerous Weapon (Outside) (Knife)	22 D.C. Code § 4504(a)	No Verdict	Guilty

STATEMENT OF THE FACTS

The appellant, Marquette Jordan was convicted of second-degree murder while armed of Ivan Lynch (Count 1); the simple assault of Ashley Carmon (Count 6); and finally carrying a dangerous weapon (knife) (Count 7). R. at 981-83 (Indictment), 1597 (Verdict Form), 1626 (Amended Judgement and Commitment Order). The government sponsored the testimony of thirty witnesses. The defense did not present any witness testimony.

It was undisputed that on April 29, 2018, a group of people gathered together in a small apartment located at 900 5th Street, SE, Washington, D.C. 11/28/23 Tr. 80. The apartment was a one bedroom apartment designated as senior housing leased to Florence Copeland.[1] 11/28/23 Tr. 80, 100. Copeland's son, Tyrone Johnson, was living with her at the time. *Id*.

On April 29th, Johnson had a group of people over to the apartment.[2] The group included Marquette Jordan, Ivan Lynch, Ashley Carmon, Carmon's two young children (A.C. & T.C.), and Jaunice Beverly. Including Johnson and Copeland, there were eight people in the one-bedroom apartment that evening.

Johnson and Jordan had known each other for approximately five years. 11/28/23 Tr. at 83. Johnson saw Jordan daily, and Jordan was a close enough friend that he would sometimes spend the night at the apartment. 11/28/23 Tr. 84. Ashley

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[1] Ashley Carmon described the apartment as, "[a]ssisted living for elderly people." 11/27/23 Tr. 33.

[2] The group gathered to celebrate Lynch's birthday, which was April 29th. 11/15/23 Tr. 49; 11/28/23 Tr. 86. However, the gathering happened late and may not have actually stated until the early morning hours of April 30th. 11/28/23 Tr. 91.

Carmon was Jordan's girlfriend. 11/28/23 Tr. 84; *but see* 11/27/23 Tr. 35-41 (Carmon denies being Jordan's girlfriend but admits to an inconsistent, sometimes sexual relationship). Johnson and Carmon had known each other for about three years,[3] and Carmon too would sometimes spend the night sleeping at Johnson's and often brought her two young children with her. 11/28/23 Tr. 86; 11/27/23 Tr. 30. Neither Johnson, Lynch, nor Carmon knew Jaunice Beverly—she was a friend of Jordan's. 11/17/23 Tr. 114 (Beverly describes Jordan as a friend); 11/28/23 Tr. 90 (Johnson had never met Beverly prior).

April 29 was Lynch's birthday, 11/15/23 Tr. 49; 11/28/23 Tr. 86, and the group had ostensibly gathered to celebrate. 11/28/23 Tr. 86:25. Johnson considered Lynch a "pretty close" friend. 11/28/23 Tr. 82. Carmon described Lynch as a casual acquaintance that she did not really know, just someone she would say hello to and exchange a few words with. 11/27/23 Tr. 34. According to Carmon, Jordan did not really know Lynch. 11/27/23 Tr. 35.

In the apartment people started drinking and talking. 11/28/23 Tr. 100; 105. Tyrone testified that he had been smoking marijuana throughout the day as well, but it is unclear if anyone else smoked marijuana. 11/28/23 Tr. 103.

At this point, the government and defense theory of what occurred in the apartment diverges. The government argued that Jordan and Carmon got into an argument which prompted Lynch to intervene on Carmon's behalf. Upon

[3] Ashley Carmon says she only knew Tyrone Johnson for about two years while Johnson says it was about three years. 11/27/23 Tr. 29; 11/28/23 Tr. 86.

intervening, Lynch and Jordan's interaction quickly escalated into a physical altercation, culminating in Jordan stabbing Lynch.

The defense argued that Lynch was out of control and attacked Jordan. There was testimony that Lynch attacked Jordan first and put him in a restrictive hold and Carmon explained that Jordan called out for help, saying, "Get – him off of me." 11/27/23 Tr. 81. There was disagreement about the nature of the hold and whether it was a chokehold, which may have caused Jordan to lose consciousness.[4] Regardless of whether Jordan lost consciousness, the defense argued that that someone else in the apartment, most likely Carmon, stabbed Lynch to assist Jordan, as it was Lynch who was out of control. The defense further argued that Tyrone Johnson likely assisted Carmon in covering up her involvement in the stabbing. The defense eschewed any claim of self-defense on the part of Jordan and focused instead on the

[4] Underlying the parties' arguments was knowledge that at the first trial Jordan took the stand to testify that he had blacked out. During his testimony, Jordan explained that Lynch choked him causing him to lose consciousness. 4/5/22 Tr. 195. Jordan explained that he, "blacked out totally." *Id*. Jordan did not know how long he was out, but that when he regained consciousness Beverly and Carmon were gone. 4/5/22 Tr. 199. He awoke to find the two kids pressing at his leg trying to wake him. Johnson was on the couch, but uncommunicative. 4/5/22 Tr. 201. Jordan said he saw Lynch on his back in the kitchen, but thought Lynch was alive because he heard snoring. 4/5/22 Tr. 201. He did not investigate further, instead he took the kids and left the apartment because he felt something was unsafe about the situation. *Id*. Thus, underlying some of the focus on the nature of the hold—whether bear hug, chokehold, or other—was whether one could infer Lynch caused Jordan to lose consciousness.

idea that Carmon's strange behavior following the stabbing could only be explained by her being directly responsible for stabbing Lynch.[5]

A. The Eyewitnesses

1) Juanice Beverly

Juanice Beverly testified for the Government regarding the events of April 30, 2018, at the apartment. 11/17/23 Tr. 112. She stated that she arrived at the location with Marquette Jordan and others, although she did not know the other individuals in the car or recall who was driving, beyond noting the driver was "lighter skin." 11/17/23 Tr. 118.

Among the people in the car was Jordan's girlfriend and her two children, who the witness had not previously met. *Id.* at 119. The plan was to go to the apartment of the dark-skinned male in the car and drink, smoke, and hang out (*Id* at 119-120). Ms. Beverly testified that the children were getting tucked into bed in sleeping bags in the apartment while the adults were drinking and socializing. *Id*. at 121.

At some point, according to Ms. Beverly, Jordan and his girlfriend started arguing and the lighter skinned male tried to get involved; specifically, he told Jordan: "we don't speak to ladies like that." *Id.* at 122, 124. The two men started fighting with fists and Ms. Beverly grabbed the children to comfort them, faced them toward the wall, and covered their eyes and ears with her hands. *Id.* at 126-127. The witness left the apartment when she no longer heard fighting – at which time the

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[5] Jordan's defense counsel advised the court that they did not open on self-defense, were not pursuing a self-defense theory, were not arguing it in closing, and were not requesting a self-defense instruction. 11/28/2023 Tr. 74.

light-skinned man was on the floor, the dark-skinned man was on the couch, and the mother of the children was still in the apartment. *Id.* at 132. Ms. Beverly did not see where Jordan was when she left. *Id.* at 135. She identified herself in surveillance footage walking away from the apartment building at 2:50 a.m. *Id.* at 133.

2) Ashley Carmon

Ashley Carmon, Jordan's girlfriend and mother to the two children, testified to events. In April of 2018, both she and Jordan had a good relationship with Tyrone and had stayed over at the apartment he shared with his mother. 11/27/2023 Tr. 31. Carmon knew Ivan Lynch from growing up in the Hyattsville area and explained that Jordan and Lynch did not know one another. *Id* at 34-35. Carmon testified that, late on April 29, 2018, Ivan, driving his car with Tyrone, picked her, her children, and Jordan up from Hyattsville and another woman from somewhere in D.C. *Id.* at 43-44. The plan was for them to spend the night at Tyrone's apartment. *Id.* at 44.

En route to the apartment, Jordan and Lynch were arguing over directions and taking "sarcastic jibes" at each other. *Id.* at 46-47. Once they arrived at the apartment, Carmon and Tyrone started making a bed for the two girls with couch cushions and sleeping bags. *Id.* at 51. At some point, Jordan became agitated and loud. *Id.* at 58. Carmon testified that Lynch approached Jordan and stated, in a calm voice: "Hey, you don't need to, like, get on her. You don't need to be doing all of that. The kids are here." *Id.* at 67-68.

Jordan then called Lynch a "wild nigger" and the two started fighting. *Id*. Carmon did not know who threw the first punch, but said Jordan initiated it. *Id*. at

71-72. Lynch had a hold on Jordan and was trying to "wrestle him down." *Id*. Tyrone was yelling at the two to stop fighting, but never got physically involved in the fight. *Id.* at 73. Carmon was trying to grab the two of them and pull them apart. *Id.* at 75.

Carmon testified that Lynch had his arms around Jordan's waist and his head against Jordan's ribs and stomach, trying to "bring him down," but she never saw Lynch holding Jordan in a way that would restrict his ability to breathe. *Id.* at 80. Carmon said she saw Jordan reach down to the dishwasher and grab a butcher knife; Carmon testified to seeing Jordan stab Lynch in the back. *Id.* at 82-83. After the stabbing motions, the witness saw Lynch fall to the ground. *Id* at 89-90. She testified that, when she moved toward the kitchen area to look at Lynch, Jordan said to her, "I'll kill you too." *Id.* at 90.

Carmon claimed that, while she was holding a couch cushion, Jordan punched her in the face and she was bleeding from the nose. *Id* at 90-91,97. She then ran from the apartment wearing neither shoes nor a jacket, and leaving her children behind, because she was scared (*Id* at 98-99). Carmon admitted that she never called 911 or sought assistance from anyone in the building. She simply ran out the emergency exit door, leaving her children behind. She ran down the street, still holding the pillow, and scooted beneath a car to hide. *Id* at 100-101. Cross-examination elicited that, during the fight, Jordan asked for help and advised that he was having trouble breathing. *Id.* at 158.

3) Tyrone Johnson

Tyrone Johnson testified that he lived with his mother at 900 5th Street, S.E., a senior citizen building. 11/28/23 Tr. at 80. At the apartment that night, everyone drank and talked, and Carmon tried to put the kids to sleep. *Id.* at 100, 103. At some point, Carmon and Jordan got into an argument, and he heard Jordan tell her that he would "whoop her ass," *id.* at 105, after which Jordan "swung at her." *Id.* at 109. Johnson testified that Lynch was trying to defuse the situation and telling Jordan to leave Carmon alone. *Id.* at 113. Johnson testified that the two men were fighting in the kitchen area and that he was yelling at Jordan to stop because "it seemed like he was the aggressor." *Id.* at 115. Jordan had a knife and Lynch did not have a weapon. *Id*. Johnson saw Jordan swinging the knife at Lynch three or four times while Jordan was on top of Lynch and Lynch was on the ground. *Id* at 116, 156.

Right after the stabbing, the Johnson testified that he did not see the knife on the ground. 11/29/23 Tr. 123. He did see Jordan going through Lynch's pockets after stabbing him, and heard keys "jiggling," and thought that Jordan had taken Lynch's keys. *Id*.

Johnson testified that, after the fight, with Lynch on the ground, he told everyone to leave the apartment—everyone, including Jordan—and called 911; his call was entered into evidence and played for the jury. 11/28/23 Tr. 119-120,125. On cross-examination, Johnson explained that he waited about ten minutes before calling 911 because Jordan was still in the house and the witness had no idea what Jordan might do when he heard him calling the police. 11/29/23 Tr. 92, 94.

B. Police Officers Locate and Collect the Keys, Phone, and Wallet.

1) MPD Officer Christopher John

MPD Officer Christopher John responded to 900 5th Street, SE on April 30, 2018, and observed a person he later identified as Jordan, walking away from the building. 11/15/2023 Tr. 95-96. John made an in-court ID. 11/15/2023 Tr. 95-96. Specifically, as the officer was entering the building, he glanced to his right and saw Jordan walking away from the building with two children. *Id*. at 98. The witness testified to meeting Tyrone Johnson on the fourth floor, and entering apartment 448, where he saw Lynch on the floor, non-responsive and without a pulse. *Id.* at 107.

Officer John broadcast a lookout for the individual he saw leaving the building with two children, and later learned that officers had stopped a suspect in the 600 block of L Street, S.E. *Id*. at 112-113. Ofc. John went to the location and identified the individual stopped as the person he had seen earlier, and that person was Jordan. *Id*. at 114.

2) MPD Officer Marta Spajic

MPD Officer Marta Spajic testified that around 2:45 a.m., she observed an individual walking with two small children, approximately 2 and 4 years old, in the area of 900 5th Street, S.E. 11/17/2023 Tr. 57-59. Ofc. Spajic testified that she and the person locked eyes and that the individual took off running holding one child, and the other child running behind him. *Id*. at 60. About the same time, a lookout was broadcast over the police radio and the officer caught up with the person in the 600 block of L Street, S.E. *Id.* at 61. Ofc. Spajic made an in-court ID of Jordan. *Id.* at

65-66. The officer noticed blood on Jordan's khaki pants but found no weapons on him. *Id.* at 67-68. Ofc. Spajic requested that a canine officer search the vicinity of the 600 block of L Street, S.E. because that's where Jordan was stopped. *Id.* at 98-99. No weapon was ever recovered. *Id.* at 93.

3) MPD Officer James Corcoran recovers a cell phone.

MPD Officer James Corcoran testified that he is a K-9 handler, and was working on April 30, 2018 when he was called to 900 5th Street, SE in reference to a homicide. 11/20/23 Tr. 19. He then searched the 600 block of L Street, SE. *Id.* at 48, and recovered a cell phone at the corner of 6th and L Streets, SE, *Id.* at 38-40, a half block from the building at 900 5th Street, SE. *Id* at 42. The police did not locate a knife. *Id* at 43.

4) Detective Zachary Powell explains that Lynch had no wallet, ID, or cell phone on him.

Detective Zachary Powell testified that only shoes and clothing were recovered from the decedent; Lynch had no wallet, ID, or cellphone. 11/16/2023 Tr. 165-166.

5) Detective Paris White recovers a set of keys to Lynch's vehicle from Jordan and discovers that Lynch's wallet was mailed to Lynch's father.

Detective Paris White testified that he was the lead detective in the instant case 11/30/23 Tr. 62. Detective White requested that the cellphone recovered from 600 L Street, S.E. be extracted, and learned that it belonged to the decedent. *Id.* at 69. He also testified that from Jordan's pockets, he recovered a set of keys to Lynch's

vehicle. *Id.* at 74. Detective Paris visited the decedent's father at his home in Hyattsville, MD, and learned that Lynch's wallet had been returned in the mail, with a return address of Van Ness Elementary School. *Id.* at 86, 92.

C. The Removal of Juror Fifteen During Deliberations

1) After a week of deliberations, the jury sends two notes expressing frustration with a fellow juror.

Jordan's jury began its deliberations on December 5, 2023. After a week of deliberation on December 14, 2023, the court received two notes from separate jurors. 12/14/2023 Tr. 9; *see also* R. at 1587 (Juror 28's Note), 1588 (Juror 13's Note). Both notes expressed frustration with a fellow juror. *Id*. Neither note identified the juror at issue. The court chose to question Juror 28 about the note they sent. According to Juror 28, a fellow juror had become withdrawn and was expressing the inability to make a decision. Juror 28 identified Juror 15 as the juror at issue. 12/14/23 Tr. 15, 19 (Juror 15 is the juror at issue). The second note, from Juror 13, accused a fellow juror of initially misunderstanding the unanimity requirement and exhibiting emotional duress from the perceived burden upon learning what it meant.[6] The court never inquired of Juror 13 directly, and the record does not reveal if the author of that note (R. at 1588) was referring to Juror 15.[7] The court presumed

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[6] The noted attributed to Juror 13 suggested that the subject juror was uncomfortable "making judgments against others . . . ." R. at 1588 (Juror 13's Note). Juror 13's note complained that it is unfair to it that this juror has been confused for four weeks "until now." *Id*..

[7] The record does not reflect whether Juror 13's observations were based on direct statements made by the subject juror or merely speculative assumptions about the

the note—ostensibly signed by Juror 13—was referring to Juror 15. While the court questioned Juror 28 about its allegation concerning Juror 15, the court did not question any other jurors on the subject, except Juror 15, who was asked about the allegations lodged against them. 12/14/23 Tr. 38.

2) Juror Fifteen hints that he cannot reach the same agreement.

The court initially questioned Juror 15 about their understanding of the jury instructions and the requirement of a unanimous verdict:

> THE COURT: What is it about the Court's instructions that you did not understand?
>
> [JUROR 15]: I didn't understand that we all have to come to the **same** agreement. And --

12/14/23 Tr. 38-39. The response hinted that Juror 15 had in fact reached a decision—just not the same as his fellow jurors.[8] The court did not explore further. Contrary to what Juror 28 had reported (that Juror 15 was expressing an inability to

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juror's thoughts or motivations. In short, there is no indication that Juror 13 had a basis of personal knowledge concerning the subject juror's state of mind.

[8] In totality, the circumstances indicated Juror 15 was unable to agree to a guilty verdict. Juror 13's note complained that it was unfair that this juror has been confused for four weeks "until now." R. at 1588 (Juror 13's Note). Juror 13's gripe about the extended time, suggested there was frustration in the length of the trial and deliberations. As defense counsel saw it, "everybody else is picking on him because they're getting pissed off." 12/14/23 Tr. 44:22-23. Juror 13's allegation that a juror was uncomfortable "making judgements *against* others," also indicated Juror 15 was not against the defendant, *i.e.*, not for guilt. That, along with Juror 15's statement he could not reach the "same agreement," *rather than any agreement*, and his expressed determination to "hold onto" his idea, indicated Juror 15 had reached a verdict. As defense counsel explained, "he has a verdict and he's not going to sacrifice his own judgment with further deliberation." 12/14/23 Tr. 47:6-7. In totality, Juror 15 appeared likely to be the lone dissenter, holding out for a not guilty verdict. Defense counsel appeared to understood this and Juror 15's removal.

make *any* decision[9]), Juror 15 only expressed issue with reaching the **same** agreement (i.e., decision) as his fellow jurors. Juror Fifteen explains he is an active participant in deliberations.

Next the court turned to the allegations that Juror 15 had not been participating. Juror 15 answered unequivocally that he had:

> THE COURT: You and your fellow jurors have been deliberating for four days and some change now, not counting today. Have you been participating in those deliberations?
>
> [JUROR 15]: Yes.
>
> THE COURT: Okay. And understanding that we all have our different levels of what we will call -- some of us are active participants, meaning we like to talk a lot.
>
> . . . .
>
> [JUROR 15]: Okay. Yeah, I was active. They get us involved in the whole...
>
> THE COURT: So you talk, you engage –
>
> [JUROR 15]: Yeah.
>
> THE COURT: -- with your fellow jurors?
>
> [JUROR 15]: Yes.
>
> THE COURT: Okay. So if -- so the following sentence is true or false: I have been an active participant in the deliberations.
>
> [JUROR 15]: Yes.

12/14/23 Tr. 39-40.

The court then returned asked if Juror 15 was able to continue deliberations:

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[9] During jury selection, Juror 15 had expressed no reservation about sitting as a juror or in passing judgment. When asked if there was any "religious and/or moral reasons that [he] could not sit fairly, attentively or impartially as a juror in this case," 11/14/23 Tr. 35, he expressed no reservations, religious, moral, or otherwise to sitting in judgement. *Id*. at 94.

> THE COURT: Okay. So -- but now that you understand that the jury has to reach a unanimous verdict are you able to continue with your deliberations?
>
> [JUROR 15]: I'm going to say no.
>
> THE COURT: Why?
>
> [JUROR 15]: I have -- **I get my own little idea that I hold onto and I think I'm going to hold onto it.**

Id. at 43:8-14. The court did not ask any follow up or attempt to draw distinction between being unable to continue to participate in discussions versus being unable to commit to switching positions just for the sake of reaching unanimity.[10] The obvious follow up, "Are you willing to try?" was left unasked. Defense counsel recognized the potential confusion and asked the court to question Juror 15 further and suggested using language from the *Gallagher* anti-deadlock instruction,[11] explaining "based on what he just said, he has his mind made up." 12/14/23 Tr. 44:5-9. The court refused saying, "I can't give that instruction until I know that—until they signal to me that they are deadlocked. And I haven't gotten that signal yet from them." 12/14/23 Tr. 44:11-13. Defense counsel countered:

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[10] Based upon the juror's responses, it appears likely Juror 15 interpreted the court's question as inquiring whether they were willing to switch positions for the sake of unanimity. Juror 15's response, that "I [have] my own little idea . . . I think I'm going to hold onto it," 12/14/23 Tr. 43:8-14, was to say they would not surrender an honest conviction or otherwise sacrifice their judgment for the sake of agreement. Juror 15 never stated that they were unwilling to continue participating in discussions. Juror 15's answer was only that he would not be coerced into a verdict he did not agree with.

[11] *See* Criminal Jury Instructions for the District of Columbia, No. 2.601, III. C. (5th ed. 2023, Rel. 21, Sep. 2023). "[The Gallagher instruction], proposed by Judge Gallagher in his concurring opinion in *Winters v. United States.*, 317 A.2d 530, 539 (D.C. 1974) (en banc), may be used in the Superior Court as a substitute for either of the alternative instructions listed as Alternative III (A) and Alternative III (B) above." *Id*. at No. 2.601 III (C) Comment.

> [Defense Counsel]: Well, the only thing I would say is I'm not asking the Court to give the deadlock instruction, I'm asking the Court to ask that question using this language or similar to this juror to see if it's really about not the meeting of the minds or if he's close. I mean, this goes right back to what I said from the beginning, does he have a closed mind or is it because he is siding on one side and **everybody else is picking on him because they're getting pissed off**.

12/14/23 Tr. 44:15-23. Counsel then continued:

> **From what he said, he has his mind made up.** I think the next question would be, would further deliberation -- despite continued deliberations, would you -- would that sacrifice your individual judgment if you further deliberate, something to that effect. I think -- the way I interpret his answer to you, he literally said he has his own idea that he's held onto and will continue to hold onto it. For me, that means he has a verdict and he's not going to sacrifice his own judgment with further deliberation.

12/14/23 Tr. 47:6-17. Government counsel asked for the juror to be removed.

12/14/23 Tr. 62.

3) The trial court determines Juror 15 is *unavailable*.

Rather than address the ambiguities in Juror 15's response or the possible motivations at play, the court instead focused on the juror's "level of availability [] to continue deliberating." 12/14/23 Tr. 65:18-21. The court expressed skepticism that Juror 15 would continue to participate in the deliberative process. Ultimately, the court—without addressing a specific legal standard—determined Juror 15 was simply *unavailable*. "[Juror 15] not being able to continue to deliberate makes him unavailable under the rules. And I've **got no choice** but to remove him from this jury." 12/14/23 Tr. 66:3-7.

Defense counsel objected to the removal, taking the position that any perceived lack of participation was the result of Juror 15 having reached his decision after "understand[ing] everything he needs to know . . . ." *Id*. at 56:14; *see also id*. at 55:19-56:16; 60:10-13. In the view of defense counsel, Juror 28—and presumably[12] 13—were simply frustrated with Juror 15 for continuing to holdout. From the defense's point of view, the issues with Juror 15 stemmed from his refusal to adopt the same agreement as the majority, and that, in any case, there was an insufficient record to find a genuine refusal to deliberate:

> [Defense Counsel]: We shouldn't remove Juror 15 simply based on what other jurors say. He was here — and he says that he's been participating with deliberations, he said that he's been participating with deliberations, he said that he talks, and he engaged with his fellow jurors, that he's been an active participant.
>
> . . . If he's already decided based upon his review of the evidence, then that may be a source of frustration to fellow jurors and why they're writing — you know, and why they're writing these notes. But he has a right to form his opinion based upon the evidence. He's participated, he's

[12] The court never questioned Juror 13 or in any way verified that it was Juror 13 who authored the note. Nor did the court confirm the subject of the note was Juror 15, as opposed to some other juror. Despite never speaking to Juror 13, the trial court interpreted the note as expressing a frustration with Juror 15's lack of understanding concerning a juror's responsibilities:

> [THE COURT]: It is clear from the jury note signed by Juror Number 13 that even though he's not admitting it and, you know, the -- Juror Number 28 didn't bring it up. It's clear to the Court based on the way that the note from Number 13 is written, that this jury has spent -- they might not have done it together, but one or more of them has spent time discussing -- unless Number 13 is a lawyer -- has spent time discussing this juror not understanding what his responsibilities are.

12/14/23 Tr. 65:4-12.

> review it. If two other jurors say we don't like him . . .
> that's just not a basis to remove him."

12/14/23 Tr. 63:25-64:16. As expressed by defense counsel, Juror 15's removal was motivated by frustrated jurors facing fundamental, and impassable, disagreements concerning their views of the case. After a combined month of testimony and deliberation, it was not unreasonable for the jury to believe that ousting Juror 15 in this manner was the quickest way to end the ordeal.[13]

Unmoved by defense counsel's argument, the trial court dismissed Juror 15.[14] On December 18, 2023, the court called back an alternate juror (Juror 8) and instructed the jury to restart their deliberations. Absent Juror 15, the newly constituted jury quickly reached a unanimous verdict—guilty on all three counts.[15]

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[13] Absent from the court's jury instructions was any guidance about what to do when the jury could not reach agreement. Indeed, the instructions do not acknowledge that disagreement is possible, instead directing that, "each juror must agree . . . . [And] your verdict must be unanimous." Criminal Jury Instructions for the District of Columbia, No. 2.405, (5th ed., Rel. 21, 2023). With no guidance on how to move forward in the absence of unanimity, nothing suggests this jury did not believe themselves doomed to deliberate indefinitely. While many juries eventually reach out to the court for further guidance, the manner and language used to express their predicament varies drastically. Here, where the court gave no instruction on how to deal with disagreement, they had no roadmap to escape the stalemate. Ousting Juror 15 may have appeared as the most expedient way to break their deadlock.

[14] Juror 15 was dismissed on December 14, 2023. 12/14/23 Tr. 72:2-3.

[15] On December 18, 2023, alternate Juror 8 was brought in to replace Juror 15 and the jury restarted deliberations. At 2:41 p.m., the reconstituted jury announced a unanimous guilty verdict. 12/19/23 Tr. 2. The initial jury deliberated for more than a week before Juror 15 was removed. The reconstituted jury reached a unanimous is verdict in a day and a half.

STANDARD OF REVIEW

A trial court's decision to remove a deliberating juror for cause is reviewed for abuse of discretion. *(Thalia) Brown v. United States*, 818 A.2d 179, 184 (D.C. 2003); *Shotikare v. United States*, 779 A.2d 335, 343 (D.C. 2001).

This Court reviews a trial court's decision to admit or exclude evidence for abuse of discretion. *Jones v. United States*, 625 A.2d 281, 284 (D.C. 1993); *see also Smith v. United States*, 111 A.2d 801, 806–07 (D.C. 2001) (applying this standard to admission of consciousness-of-guilt evidence); *see also Johnson v. United States*, 683 A.2d 1087, 1095 (D.C. 1996) (en banc) ("[W]eighing of evidence for relevance and potential prejudice is quintessentially a discretionary function of the trial court, and we owe a great degree of deference to its decision.").

ARGUMENT SUMMARY

Mr. Jordan contends that the trial court abused its discretion in removing Juror 15 during deliberations because the record leaves open a reasonable possibility that the juror's discharge was motivated by his views on the merits of the government's case. Under *Shotikare v. United States*, 779 A.2d 342, 345 (D.C. 2001), when such a possibility exists, the court is prohibited from dismissing the juror.

Jordan further contends that the trial court erred in admitting evidence that he took the decedent's wallet, keys, and phone, despite his prior acquittal of robbery related to those items. This evidence was irrelevant to the charges in the retrial, and its admission was inadmissible as other crimes evidence.

Finally, the trial court abused its discretion by admitting Jordan's offhand remark to police that he had cancer when he did not, just so they could use testimony and medical records to impeach Jordan. The government used this statement—uttered at the time of arrest and wholly unrelated to the charged offenses—to argue in closing that Mr. Jordan was a liar attempting to obstruct the investigation. The statement was irrelevant to any material fact, and its introduction served only to impugn Mr. Jordan's character, not to prove any element of the charged crimes.

ARGUMENT

I. The Trial Court Abused Its Discretion When It Removed Juror 15 During Deliberation.

Jordan contends that the other jurors' complaints about Juror 15 were—or at least very possibly may have been—rooted in substantive disagreements about the

merits of the case, and that dismissing Juror 15 on account of those disagreements violated his Sixth Amendment right to a unanimous and impartial jury. "To remove a juror because he is unpersuaded by the government's case is to deny the defendant his right to a unanimous verdict." *Pitt v. United States*, 220 A.3d 951, 970 n.59 (D.C. 2019) (internal brackets omitted); *see also* U.S. Const. amend VI. Under no circumstances, may a "juror [be removed] because he is unpersuaded by the Government's case . . . ," to do so is "to deny the defendant his right to a unanimous verdict." *United States v. Thomas*, 116 F.3d 606, 621 (2d Cir. 1997). If a juror is allowed to be removed "on that basis, 'then the right to a unanimous verdict would be illusory.'" *Shotikare*, 779 A.2d at 343 (quoting *United States v. (Warren) Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)). "Removal of a holdout juror is the ultimate form of coercion." *Sanders v. Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004).

A trial court's decision to remove a deliberating juror for cause is reviewed for abuse of discretion. *(Thalia) Brown v. United States*, 818 A.2d 179, 184 (D.C. 2003); *Shotikare v. United States*, 779 A.2d 335, 343 (D.C. 2001). However, for "reasons . . . that are readily apparent", "[t]he authority to excuse a juror during deliberations is to be exercised with caution . . . ." *(Thalia) Brown*, 818 A.2d at 184-85. Excluding a juror at this "particularly sensitive stage of the trial," *United States v. Stratton*, 779 F.2d 820, 832 (2d Cir. 1985), presents distinct risks both to the defendant's right to jury unanimity in criminal cases and to the secrecy of jury deliberations—"the cornerstone of the modern Anglo-American jury system." *Thomas*, 116 F.3d at 618.

Questioning a deliberating juror must be approached with caution to avoid compromising the secrecy of jury deliberations.[16] When concerns about a juror do not clearly stem from an external or extrinsic source, the trial court faces a difficult dilemma. On one hand, failing to investigate adequately risks the removal of a juror who is simply unpersuaded by the government's case—thereby violating the defendant's right to a unanimous verdict. On the other hand, probing too deeply into deliberations to assess potential misconduct necessarily creates an "especially pronounced" tension between the court's duty to remove jurors for cause and its obligation to preserve the sanctity of the deliberative process. *Thomas*, 116 F.3d at 618.

To balance the need for juror secrecy and the defendant's Sixth Amendment right to unanimity, this court in *Shotikare*, 779 A.2d at 345, adopted a strict prophylactic limitation on the removal of a deliberating juror: "[I]f the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror."[17]

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[16] "Ordinarily, of course, there should be no inquiry into the juror's views on the merits of the case. Jury deliberations are presumptively secret. The trial judge (and counsel) must respect that presumptive secrecy when it becomes necessary to inquire into a report of juror misconduct during deliberations." *Shotikare*, 779 A.2d 344-45 (internal citations omitted); *see also Pitt v. United States*, 220 A.3d 951, 969 (D.C. 2019) (court must avoid inquire into the juror's view on the merits of the case).

[17] Even if it is the juror themselves seeking their own removal, the court must ensure their impetus to leave is not traceable to their views of the evidence. Thus, if Juror 15 sought removal because of perceived pressure to change their position on the merits,

Given the limitations of inquiring into a jury's ongoing deliberations, *Shotikare* recognizes that the record generated when dealing with such sensitive and secret issues may be "less than exhaustive,"[18] *Shotikare*, 779 A.2d at 345, leaving the trial court with no option but to risk keeping a juror who is refusing to follow the law. *See, e.g., Thomas*, 116 F.3d at 621 (observing that while a juror who intends to nullify the law is subject to dismissal, a claim of nullification presented during deliberations may—without an exhaustive but impermissible inquiry—infringe upon the defendant's right to a unanimous verdict if the suspect juror is excused, because without a clear record it may be the juror is simply unpersuaded). To avoid the risk of removing a juror who is merely unpersuaded by the government's case, the law limits the court's discretion in the face of ambiguity, favoring the protection of the defendant's constitutional right to unanimity free from coercion. Thus, while the court's decision to remove a deliberating juror is discretionary, that discretion is strictly limited. Only where the record leaves no reasonable doubt that the impetus for a juror's ouster is unrelated to their views of the evidence can they be removed. "[G]iven the necessary limitations on a court's investigatory authority in cases

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they could not be removed. *See Pitt*, 220 A.3d at 970 (D.C. 2019) ("When the trial court has reason to believe that a deliberating juror is requesting release because of undue pressure to change her views, the court must be sure that the juror is asking to be released for a proper reason.").

[18] Whether and to what extent a juror should be questioned regarding the need for removal is within the trial judge's discretion. *See United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994); *see also (Thalia) Brown*, 818 A.2d at 187 (D.C. 2003).

involving a juror's alleged refusal [or inability] to follow the law, a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence." *Thomas*, 116 F.3d at 622.

Juror 15's professed initial misunderstanding of unanimity and his present intent to "hold[] onto [his idea]," was left unexplored. What little record there is, does not eliminate the possibility Juror 15 was stuck because it viewed some insufficiency in the government's case. Moreover, given that the first complaint of Juror 15's participation was raised after a full week of deliberations, the trial court could not make an end run around the issue and declare him unavailable. On this record, the court was obligated to deal with the possibility that Juror 15 expressed the inability to deliberate further because they believed the government's case insufficient, and could not agree to the same verdict as fellow jurors.

A. The trial court abused its discretion because it failed to recognize it had discretion.

"[T]he core of 'discretion' as a jurisprudential concept, is the absence of a hard and fast rule that fixes the results produced under varying sets of facts." *Johnson*, 398 A.2d at 361. In *Johnson*, this Court described the basis of the prohibition of a formulaic answer to a problem that requires analysis: "Failure to exercise choice in a situation calling for choice is an abuse of discretion—whether the cause is ignorance of the right to exercise choice or mere intransigence—because it assumes the existence of a rule that admits of but one answer to the question presented. Similarly, when the trial court recognizes its right to exercise discretion

but declines to do so, preferring instead to adhere to a uniform policy, it also errs." *Id.* at 363 (citations omitted).

Here, the trial court did not recognize its discretion, but instead assumed it had "no choice but to remove Juror 15."[19] The trial court, without making specific findings, without engaging in any legal analysis, and without referencing specific authority or an applicable standard, determined that it was required to remove Juror 15.[20] The court's ruling then was an abuse of discretion because it simply applied an unspecified rule without analysis. "Purporting to be bound to rule as a matter of law will not satisfy the moving party's claim on the court's discretion." *Johnson*, 398 A.2d at 364. That error is, in all cases, fatal: "An outright failure or refusal to exercise that judgment is wholly defeating." *Id.* "Purporting to be bound to rule as a

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[19] The court ruled: "So him not being able to continue to deliberate makes him unavailable under the rules. And I've got no choice but to remove him from this jury." 12/14 Tr. at 66:3-7.

[20] The court did refer to "the rules," without specification. 12/14 Tr. 66:3-7. The court may have been referring to the Superior Court Rules of Criminal Procedure. It may be that the trial court understood Super. Ct. Crim. R. 24(c)(1) to mandate the removal of Juror 15. However, the language of Super. Ct. Crim. R. 24 (c)(1) is not mandatory. Super. Ct. Crim. R. 24(c)(1) states: "The court *may* impanel up to six alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties." (emphasis added). "The narrow purpose of the Rule is to enable courts to avoid mistrials by replacing incapacitated or disqualified jurors with alternates; it neither grants nor recognizes any broader removal authority, and courts have no inherent power to replace jurors for reasons other than the Rule specifies." *Hinton v. United States*, 979 A.2d 663, 679 (D.C. 2009). The limited authority to replace of juror conferred by the Rule is further constrained by the principles announced in *Shotikare*, but nothing about the rule "fixes the results produced under varying sets of facts." *Johnson*, 398 A.2d at 361.

matter of law will not satisfy the moving party's claim on the court's discretion." *Id.* at 364 (quoting *Grow v. Wolcott*, 194 A.2d 403, 404 (Vt. 1963)).

B. The trial court abused its discretion because it did not consider or apply the correct legal standard: the strict standard of *Shotikare*.

"Judicial discretion must," of course, "be founded upon correct legal principles, and a trial court abuses its discretion when it rests its conclusions on incorrect legal standards." *In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991) (citations omitted). As this Court has explained, "We must not invite the exercise of judicial impressionism. Discretion there may be, but methodized by analogy, disciplined by system. Discretion without a criteria for its exercise is authorization of arbitrariness." *Johnson*, 398 A.2d at 365 (internal quotations omitted). This court, then, "should inquire whether the trial court's reasoning is substantial and supports the trial court's action." *Id*. at 365. This is so because "[t]o exercise its judgment in a rational and informed manner the trial court should be apprised of all relevant factors pertaining to the pending decision." *Id*. This Court on review will find an abuse where "the trial court exercised its discretion . . . for an improper or legally insufficient reason, if its ruling lacked a firm factual foundation, or if the trial court otherwise failed to exercise its judgment in a rational and informed manner." *Hinton v. United States*, 979 A.2d 663, 683-84 (D.C. 2009) (en banc) (internal quotations omitted). "We will inquire whether the trial court failed to consider a relevant factor [or] relied upon an improper factor, and whether the reasons given reasonably support the conclusion." *Id*. Here, the court did not appreciate the necessity of *Shotikare's* prophylactic approach and, as a result, failed to complete a required factual inquiry for the correct

legal standard. *See Johnson*, 398 A.2d at 366 (D.C. 1979) (court abuses its discretion when it fails to undertake a required factual inquiry).

1. The trial court failed to consider the motivating reason for Juror 15's unavailability.'

After receiving the two notes complaining of Juror 15, the court correctly understood that it had some obligation to inquire into the situation. However, the court's limited inquiry only served to muddy the waters. Certainly, once Juror 15 explained that he was an active and willing participant in deliberations and expressed his sentiment—that "I get my own little idea that I hold onto and I think I'm going to hold onto it," 12/14/23 Tr. at 43:8-14—the trial court faced the real possibility that it was Juror 15's view of the sufficiency of the government's case, and not misconduct, causing discord. Faced with such a possibility, the court did not seem to recognize or acknowledge the importance of determining the motivating factor behind Juror 15's removal.

That in the trial court's view, Juror 15 was unable to deliberate further, was not an alternative basis permitting Juror 15's removal. In skipping over why Juror 15 was unable to deliberate further, the court was putting the cart before the horse. Even if Juror 15 was legitimately unable to deliberate further, a proposition that was not at all clear,[21] the court still needed to determine why.[22] In skipping the issue of what

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[21] *See supra* note 10 (court did not clarify ambiguity in Juror 15's response).

[22] If, for example, Juror 15 felt unable to deliberate further because of continued disagreements stemming from his views of the sufficiency of the government's evidence, Juror 15 could not simply be dismissed. Given the ambiguities motivating Juror 15's removal, it was incumbent on the court to first determine why the jury was stuck before it could determine what action it could take.

was driving Juror 15's removal, the trial court demonstrated some misapprehension of the law. This court is now left to wonder if the trial court was aware of *Shotikare's* strict evidentiary standard or misunderstood when it needed to be applied. Regardless of which, the court abused its discretion by simply dismissing Juror 15 without undertaking this required factual inquiry.

Rather than abruptly dismiss the juror, the court should have first attempted giving clarifying instructions.[23] At minimum, if the court was intent on dismissing Juror Fifteen, there needed to be further inquiry.[24] It was the court's obligation to ensure the record left no doubt that the "idea" Juror Fifteen was intent on holding onto amounted to misconduct, rather than "simply [being] unpersuaded by the Government's evidence." *Thomas*, 116 F.3d at 621. If the court could not safely thread the needle between the competing interests of secrecy and clarity, *Shotikar* is clear: Juror Fifteen could not be dismissed. Ultimately, the failure to clarify Juror Fifteen's state of mind or examine any of the other ten jurors was itself an abuse.

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[23] A clarifying instruction might have fixed the issue for the jurors, or at minimum focused their thinking such that further inquiry would be less treacherous and more likely to get at the heart of the issue. This court has routinely approved of additional clarifying instructions under like circumstances. *See, e.g.*, *(Thalia) Brown v. United States*, 818 A.2d at 181-82 (approving of the trial court's actions when after two notes, the court reminded the jury of the proper grounds to be used in reaching a decision; and then after a third note, giving additional detailed instructions on the juror's obligations).

[24] The court must conduct an adequate inquiry before dismissing a deliberating juror. *See, e.g.*, *Braxton v. United States*, 852 A.2d 941, 948 (D.C. 2004) (suggesting the trial court erred when it did not question additional jurors but affirming with "reluctance" as the error was invited).

2. The court's failure to consider a mistrial was an abuse of discretion

Apparently believing they could dismiss the deliberating juror on some unspecified alternative basis, the trial court also failed to consider whether a mistrial was required. This court has explained:

> it might be incumbent on the trial judge to grant a motion for a mistrial where, for example, the judge's inquiry into the conduct of the juror who is excused has revealed the juror's views on the merits or the juror's status as a holdout. For then the decision to remove the juror, however appropriate, would entail influencing the outcome of deliberations in a known direction. Moreover, in such a case the potential for coercion in returning the jury to deliberate would be heightened. The consequent appearance (if not the reality) of a manipulated or coerced jury verdict might make declaration of a mistrial the only acceptable course.

Shotikare, 779 A.2d at 347.

When a deliberating juror is accused of not properly discharging his or her responsibilities, the judge must decide not only whether to excuse that juror but also whether to declare a mistrial. *See Shotikare*, 779 A.2d at 347; *see also Braxton v. United States*, 852 A.2d 941, 949 n.10 (D.C. 2004) (mistrial likely warranted where it was readily apparent the removed juror was the holdout).

In this case, declaration of a mistrial was warranted. It was apparent that Juror No. 15 was likely the sole dissenting juror, in favor of a not guilty verdict.[25] The jury was frustrated and seemed to be picking on Juror 15; defense counsel observed as much. 12/14/23 Tr. 44:22-23 ("[T]hey're getting pissed off."). With Juror 15 gone a

[25] *See supra* note 8. Given that Juror 15's removal resulted in a prompt guilty verdict, there really is no doubt

guilty verdict promptly followed. *Cf. Israel v. United States*, 109 A.3d 594 (D.C. 2014) (the three days of deliberation which followed a juror's replacement suggested the juror had not been singled for their view of the evidence). Clearly, Juror 15 was the holdout.

Removing Juror 15 then entailed impermissibly influencing the outcome of deliberations in a known direction, towards guilt. *See Shotikare*, 779 A.2d at 347. Even if the decision to remove Juror 15 was proper, the appearance of the court's thumb on the scale made a mistrial "the only acceptable course." *Id*.

C. Even if the court recognized the correct legal standard, the record does not support the trial court's decision to remove Juror 15 because there was a reasonable possibility his removal was motivated by his view of the evidence.

Assuming the court was aware of the strict evidentiary standard and undertook to apply it, the court's decision to remove Juror 15 was an erroneous abuse of its discretion because the record foreclosed the action it took.

A trial court's discretionary determination must "be based upon and drawn from a firm factual foundation." *Johnson*, 398 A.2d at 364 (D.C. 1979). The trial court's discretion, when exercised, must not be erroneous. *Johnson*, 398 A.2d at 365. Its exercise of discretion is not a free hand to choose any option, but rather "the body of facts in the record may foreclose some or most of the options either as a matter of law or because the facts themselves are so extreme." *Id*. at 365. "The principles guiding the trial court's discretion will restrict the number of alternatives available. They may do so, for example, by stating what actions the trial court may take or

enumerating the factors that the trial court may or should consider in its deliberation." *Id*. at 365. A discretionary decision is erroneous when it falls outside the "range of permissible alternatives" in light of the record. *Id*.

Proper application of the law foreclosed dismissing Juror 15 on this record. There was simply too little information to eliminate the possibility that Juror 15's ouster stemmed from his view of the evidence. Rather, the timing and nature of the issues suggested Juror 15 had a nonconforming view of the evidence, causing strife.

1. The timing of the notes suggests removal was inappropriate.

This court has held the timing of complaints about a deliberating juror to be an important factor when assessing the possible reasons for their removal. *See Israel v. United States*, 109 A.3d 594, 614 (D.C. 2014) ("We deem it important" that the issue with the juror "came to light early after the case had gone to the jury" and note that "following the replacement . . . deliberations continued for three days before the jury reached its verdict, suggesting that there remained much room for discussion at the time" of the removal.). Complaints received at the start of deliberations suggest a fellow juror's legitimate concern for misconduct. *See*, *Isreal*, 109 A.3d at 613 (complaint about juror's refusal to remain in the jury room or in any way participate received within a few hours of starting deliberations, left no reasonable possibility the juror's removal was due to their views on the evidence); *see also (Thalia) Brown*, 818 A.2d at 187 (complaint received less than two hours after starting deliberations stating juror announced they wanted to use the case to protest Congress's treatment of the District of Columbia left no reasonable possibility the juror was removed

based on their view of the merits); *Shotikare*, 779 A.2d at 340 (three notes complaining of verbal and physical abuse on the first day of deliberation).

Alternatively, complaints received after considerable time in deliberation evince disagreement arising from or in relation to the merits of a case. *United States v. Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999) (where a complaint was sent after a week of deliberations, it was reasonably possible that frustrations and disagreement over the merits of the case motivated others to seek the juror's removal). As the Ninth Circuit has noted, even where "other jurors may not have thought their difficulties with [a juror] stemmed from [the merits of the case] such difficulties can certainly manifest themselves in concerns about a juror's reasonableness or general capacity as a juror." *Id.* Understandably, as tensions or disagreements mount during extended deliberations, jurors may attribute flaws to another juror rather than admit reasonable minds could differ.

Here, no complaints were received about Juror 15 until a week of deliberations had passed. Given the timing, there is good reason to believe the jury had reached an impasse and was experiencing a degree of disagreement. Given the extended length of deliberations, there was a reasonably possibility that the impasse was traceable to the merits of the case. While the record does not clearly reveal why the requirement that all the jurors reach the same agreement was only now causing consternation, the obvious, reasonable, and ultimately unrefuted possibility was that—after five days of deliberation—it was clear to the jury that a stalemate had been reached and that

unless some jurors sacrificed their individual judgement for the sake of conformity, there could not be a unanimous verdict.

2. The nature of the issue suggests removal was inappropriate.

Courts have drawn a distinction between allegations of juror misconduct resulting in identifiable acts and alleged misconduct that goes more to the quality and coherence of a juror's views. *See Symington*, 195 F.3d at 1087 n.6 (distinguishing between allegations that go to "quality and coherence" of juror's views and allegations that focus on some identifiable event of misconduct); *see also United States v. Kemp*, 500 F.3d 257, 303 n.25 (3d Cir. 2007) (observing that strict no-reasonable-possibility rule does not apply in "many instances" of alleged juror bias where district court can "focus on the existence of a particular act that gives rise to the bias"). The Second Circuit observed in *Thomas* that, without exhaustive inquiry, a juror who is simply unpersuaded by the evidence may easily be confused with a juror alleged to be disregarding or unable to follow the law. *Thomas*, 116 F.3d at 621. (Where unable to inquire because the need for the secrecy, "the court will have little evidence with which to make the often difficult distinction between the juror who favors acquittal because he is purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence.").

Thus, this court will approve the removal of a juror where evidence of identifiable action makes the reason for removal abundantly clear. *See, e.g.*, *Shotikare*, 779 A.2d at 345 (juror threatened harm and committed acts of

intimidation directed at fellow jurors); *Israel*, 109 A.3d at 612-13 (juror continued to walk out of deliberations, and when present would put her head down and close her eyes, telling the jury she "had already made up [her] mind and [would] not be open to . . . discuss it further"); *(Thalia) Brown*, 818 A.2d 179, 187 (D.C. 2003) (juror announced they intended to use the case to protest policy regardless of the evidence); *Pitt*, 220 A.3d at 971 (juror who looked sick, and reported being sick was properly excused).

Unlike the threats of physical harm in *Shotikare*, the trial court here could not safely distinguish between actual juror misconduct and nonconforming views on the merits. Once Juror 15 expressed his sentiment—that "I get my own little idea that I hold onto and I think I'm going to hold onto it," *id*. at 43:8-14—the court faced the real possibility that it was the juror's views of the sufficiency of the government's case, and not misconduct, causing discord.

Given that the court's instructions did not explain what to do in the event of disagreement—indeed, the instructions did not even admit that disagreement was possible—the jurors' notes might well have been this jury's initial attempt at expressing the concept of deadlock. Lacking clear definition or instruction, the jury may have perceived that their problem lay with Juror 15's capacity, not their ability to reach consensus. *Cf. Symington*, 195 F.3d at 1088 ("While the other jurors may not have thought their difficulties with [this juror] stemmed from [his] position on the merits, such difficulties can certainly manifest themselves in concerns about a

juror's reasonableness or general capacity as a juror."). Regardless of the label applied to this less-than-unanimous jury, further inquiry was needed.

Defense counsel suggested questioning Juror 15 using language similar to the anti-deadlock language of the *Gallagher* instruction to clarify Juror 15's ambiguous responses. The court dismissed the suggestion, stating it did not want to treat the notes as evidence of a deadlock. 12/14/23 Tr. 44. While the court might well want to avoid giving an anti-deadlock charge, it was not entirely clear—that after a week of deliberations—the court should not take some step to ensure that was not the case. *Cf. United States v. Black*, 843 F.2d 1456, 1463 (D.C. Cir. 1988) ("[a] trial judge may take reasonable steps to ensure that a jury is in fact deadlocked when informed that this is a possibility").

While Juror 13's note suggested Juror 15 lacked the capacity to make judgments, that did not come through in Juror 15's answers when questioned. Nor did the court make a finding Juror 15 lacked the capacity to make judgments as a juror. If, for example, Juror 15 had announced they were unable to make judgments due to some previously undisclosed religious grounds, the court might have had clear indication that Juror 15 could not render any verdict.[26] However, that was not the

[26] *See, e.g.*, *United States v. Geffrard*, 87 F.3d 448, 450-52 (11th Cir.), cert. denied, 117 S. Ct. 442, 117 S. Ct. 443 (1996). In *Geffrard*, a juror submitted a letter to the court during the course of deliberations in which she stated that she adhered to the Christian teachings of Emanuel Swedenborg. Under Swedenborg's theology, the juror explained, she could not "'live with a verdict of guilty for any of the accused on any of the charges, as [she] believed deep within [her] heart and soul and mind that [the defendants] were unjustly led into this so called transaction by a more intelligent and powerful figure.'" *Id*. 87 F.3d at 451. The juror was convinced, assertedly as a

case. Rather, the nature of the complaint against Juror 15 was ambiguous and, without further inquiry, left a reasonable possibility that Juror 15 simply had a differing view.

Even if the court found a permissible alternative impetus, the reasonable possibility of an impermissible one was not foreclosed: Juror 15 needed to remain. Here, what was clear was that this jury was stuck—less clear was why.

D. Juror Fifteen was not removed for just cause

While the trial court chose to focus on Juror 15's perceived unwillingness to *continue* deliberations, in context Juror 15's less than forceful response—"I am going to say no[,] . . . [because] "I am going to hold onto [my idea]"—was no refusal. *Compare* 12/14/23 Tr. 43:8-14 (available *supra* at 22) *with United States v. Baker*, 262 F.3d 124, 131 (2d Cir. 2001) (court reasonably concluded juror was refusing to deliberate when they informed the judge they had made up their mind in advance of beginning deliberations and stopped all interaction within thirty minutes). Juror 15's response is reasonably interpreted as an expressed belief that further deliberation would not produce agreement.[27] Juror 15 never refused to follow the court's instruction, listen to his fellow jurors, or consider all the evidence. Indeed, he

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result of her religious beliefs, that the defendants were the victims of governmental entrapment, notwithstanding the fact that the court had earlier instructed the jury that entrapment was not at issue in the case. *Id*. The juror in *Geffrard* thus was prepared purposefully to "nullify" the law as set forth in the court's instructions to the jury. The Court of Appeals upheld the dismissal, reasoning that the juror's letter "[made] it a certainty that this particular juror could not reach a verdict following the judge's instructions as applied to the facts." 87 F.3d at 452.

[27] *See supra* note 8.

professed to have been doing just that and did not say he would stop. 12/14/23 Tr. 39-40 (available *supra* at 21). When questioned pointedly, Juror 15 explained he was doing all that was required.[28] That he considered further deliberation likely futile was not a refusal or reason to remove him. Nor is it clear what level of participation the trial court could reasonably expect if deliberations had become stale and repetitive. Given the ambiguity of the record, the court's decision to simply dismiss Juror 15 for just cause was unsupported, and at best, premature. *Cf. Hinton v. United States*, 979 A.2d 663, 684 (D.C. 2009) (record of "unusual and immaterial questions" inadequate to justify judge's implicit finding that Juror was unable to perform duties).

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While the trial court's expressed view that Juror 15 was refusing to participate was a possible interpretation of events, the record did not eliminate the reasonable possibility that he was simply a holdout unwilling to sacrifice his individual

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[28] While jurors have a duty to deliberate, *at least upon first entering the jury room*, that duty does obligate them to endless deference to repeated arguments voiced ad nauseum by their fellow jurors. The duty to deliberate means that "when you enter the jury room it is your duty to consult with one another to consider each other's view and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgement." *Lowenfield v. Phelps*, 484 U.S. 231, 235, 241 (1988) (approving of the trial court's charge to the jury). The duty to deliberate does not entail the "'burden or obligation' actually to 'convince one another that one outcome is preferable to another.'" *See United States v. Baker*, 262 F.3d 124, 130 (2d Cir. 2001) (quoting *Smalls v. Batista*, 191 F.3d 272, 280 (2d. Cir. 1999). A juror's duty to deliberate is merely to avoid entering "the jury room with a blind determination that the verdict shall represent his opinion of the case *at that moment*[.]" *See Allen v. United States*, 164 U.S. 492 (1886) (emphasis added).

judgment. Thus, the trial court abused its discretion when it removed Juror 15 over the defense's objection.

II. The Trial Court Erred in Admitting Evidence That Mr. Jordan Took the Decedent's Wallet, Keys, and Phone, Despite His Prior Acquittal and the Evidence's Prejudicial Nature

At appellant's first trial, the jury acquitted him of robbery of the decedent's wallet, car keys, and cellphone. The defense filed a motion in limine to exclude mention of those items in the re-trial, arguing that Jordan's possession of the decedent's property (or the property being recovered from his flight path) was more prejudicial than probative.[29] The trial court ruled that the decedent's cellphone was relevant because Jordan's testimony at the last trial was that he took the phone to call 911, but the evidence was that he did not, in fact, make that call. The court noted that the government wants to refer to the wallet and keys to show that, rather than rendering aid as Jordan claimed he was doing in the first trial, he was simply removing the decedent's belongings. The trial court ruled as follows regarding the wallet and keys:

> The Court is going to allow the government to mention -- to proffer up evidence about the keys and the wallet because the government is not proffering that evidence as propensity evidence; instead, the government is offering that evidence to support its argument that it's consciousness of guilt with respect to what Mr. Jordan did or did not do after he left the apartment that evening. It -- that squarely fits in the analysis of being *Johnson* evidence

[29] The defense filed its motion on July 8, 2023. R. at 1442 (Defendant's Motion in Limine). The government filed a motion in opposition on July 26, 2023. R. at 1454 (Government's Opposition).

> because without that being a part of the government's storyboard, their storyboard does not make any sense.

11/15/23 Tr. 8. The defense objected to the introduction of the physical evidence, arguing that the wallet and keys are "completely unrelated" to consciousness of guilt, and that whatever limited probative value there might be is outweighed by the prejudicial impact of the evidence. *Id.* at 14. Despite the court's curative instruction, the defense maintained its objection to the admission, specifically of the wallet and keys as unrelated to consciousness of guilt and far more prejudicial than probative. *Id.* at 9-11, 14.

At a motions hearing on July 3, 2023, where the government argued that the decedent's cellphone, keys, and wallet were evidence of appellant's "consciousness of guilt," and also important to explain to the jury his movements and location after the offense, 7/3/23 Tr. 12, the court specifically advised government counsel:

> . . . you walk a fine line here between relevancy and the jury misunderstanding something. While I agree with you that the cell phone scenario makes sense, it's the testimony of Mr. Jordan rifling through Ivan's pockets. You . . . the logical inference from that is that you are rifling through pockets because you're going to steal something or take something from those pockets. This jury doesn't need to hear that. That's beside the point. That's got no probative value here.

7/3/23 Tr. 13.

Under *Drew v. United States*, evidence of a defendant's other crimes is generally inadmissible to show criminal propensity or bad character. *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964). However, such evidence may be admitted for a substantial, legitimate purpose, such as proving motive, intent, absence of mistake,

common scheme or plan, or identity. *Id*. Before admitting this type of evidence, the government must show by clear and convincing evidence that the other crime occurred and that the defendant committed it. *Johnson* , 683 A.2d at 1087.

The *Drew* rule does not apply to every instance where evidence could implicate another crime. Specifically, it does not govern when the evidence (1) constitutes direct and substantial proof of the charged offense, (2) is closely intertwined with the charged crime, or (3) is necessary to provide context for the jury to understand the charged conduct. *Johnson*, 683 A.2d at 1098.

Separately, even when evidence is relevant, trial courts must apply the balancing test under Rule 403, admitting the evidence only if its probative value is not substantially outweighed by the danger of unfair prejudice. *Johnson*, 683 A.2d at 1099; *Bacchus v. United States*, 970 A.2d 269, 273 (D.C. 2009).

In the instant case, the government argued that belongings of the decedent recovered from appellant or in his "flight path" were relevant to his connection to the murder and his leaving the scene of the crime; additionally, the government argued that appellant's possession of the wallet, keys, and phone were somehow an indication of consciousness of guilt. The defense objected strongly, noting that Jordan was acquitted of robbery after his first trial, and that the evidence was more prejudicial than probative.

Decedent's keys were recovered from appellant; the cellphone was recovered from the area of 500 L Street, S.E., where appellant had been observed walking; and the decedent's wallet was mailed to his father from an anonymous source with a

return address of Van Ness Elementary School – the area where appellant was arrested. Evidence and testimony regarding the recovery of decedent's wallet, cell phone, and keys was far more prejudicial than probative and entirely unnecessary for the government to establish a connection between appellant and the decedent, or to trace appellant's route after the offense where (1) the government sponsored 3 eyewitnesses to the murder or circumstances leading up to the murder; (2) DNA evidence linked appellant to the decedent; and (3) the government admitted surveillance video taken almost immediately after the offense which showed Jordan wandering around the area with two children who the government proved were in the apartment at the time of the offense.

The wallet was unnecessary to establish appellant's trajectory after the offense as that trajectory was captured on video surveillance and testified to by Office Spajic. Additionally, because the wallet was anonymously mailed, there was no evidence regarding its interim location until it was mailed to the decedent's father. The keys, as argued above, do not provide any necessary and additional evidence linking appellant to the decedent.

While this Court has explained that "The government is not confined to presenting the bare minimum of evidence sufficient to support its charges." *In re Richardson*, 273 A.3d 342, 351 (D.C. 2022), it is also true that evidence should not be admitted where the prejudicial impact of the evidence "substantially" outweighs its probative value, as appellant contends is the case here.

The defense motion in limine recognized "the minimal evidence the cellphone evidence might have," R. at 1445, in that appellant told police he left the decedent's apartment to call 911, and no record of such a call from that phone was found. However, the defense argued that such minimal evidentiary value was "substantially outweighed by unfair prejudice for its potential to suggest robbery (argued or not) and should be excluded on that ground." *Id*.

The government argued that in the previous trial, Jordan had explained he had Lynch's phone to call 911, and thus, the fact that the phone was not used to call 911 shows that Jordan lied, and his lie supports a "consciousness of guilt" inference. 7/3/2023 Tr. 12. However, at the second trial, the government did not introduce any statement by Jordan that he had the decedent's phone to call 911. In closing, the government simply argued that no 911 call was made from the decedent's phone and thus suggested to the jury that Jordan had had the phone at some point and opted not to call 911. 12/5/23 Tr. 143. The introduction of the phone was not for the purpose of impeaching any statement by Jordan; thus, the government couldn't use Jordan's non-existent lie as a basis to argue that the phone was relevant to consciousness of guilt.[30]

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[30] Even if Jordan had the phone, it would not demonstrate consciousness of guilty. It is not unusual for witnesses to not want to be involved with the police or with the judicial process; cases are replete with the testimony of such witnesses. *See, e.g.*, *Waters v. United States*, 302 A.3d 522, 527 (D.C. 2023) (Witness "initially told police she could not see the shooter's face because, she testified, she was afraid to get involved."); *Foreman v. United States*, 114 A.3d 631, 637 (D.C. 2015)("Initially, [the witness] said he did not want to be a snitch and did not want it known that he had spoken with the police."); *Taylor v. United States.*, 866 A.2d 817, 819 (D.C.

By the same token, although the trial court in the motions hearing made reference to appellant's testimony at the first trial that he was not robbing the decedent, but rather rendering aid, no statement to that effect was introduced at the instant trial and, thus, there was no reason to impeach that statement with evidence of decedent's keys, wallet, and cellphone.

Evidence that the appellant went through the decedent's pockets and took his belongings was irrelevant to "consciousness of guilt." Like the wallet and keys, the phone was simply an unnecessary and prejudicial effort to tie Jordan to the offense. The government argued in closing that appellant's "shedding evidence" was further proof of his guilt, 12/5/23 Tr. 141-142, and certainly this Court has found that attempts to hide or destroy evidence can evince consciousness of guilt. However, the issue in the instant case is that Jordan allegedly took the items from Lynch after the stabbing. The evidence served only to show that he may have robbed Lynch after the fact. Evidence of robbery after the fact was other crimes, and did not indicate a consciousness of guilt. Allowing the government to introduce evidence of a

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2005)("[The witness] gave a false name "because [she] did not want to get involved and be labeled as a snitch and [she] was scared. . . . for [her] life"). Indeed, Johnson's testimony explained his own reluctance to speak with the police at homicide because he did not want to be involved in the "backlash," that is, the judicial process, and that testifying makes him concerned for his safety. 11/28/23 Tr. 131-132. Thus, even if Jordan had the means to call 911, it does not follow that his failure to do so was somehow consciousness of guilt. Rather, it is just as possible that he had witnessed a crime—as the defense argued in closing—and did not want to be a "snitch."

previously acquitted offense in this case substantially prejudiced appellant, particularly where he had a strong *Winfield* argument.

In *King v. United States*, 75 A.3d 113, 118-19 (D.C. 2013), this Court instructed the trial court that it:

> must determine, "before evidence is admissible to establish consciousness of guilt," whether "the chain of inferences connecting the defendant's post-crime conduct to the crime itself would allow the jury to find that the conduct was inconsistent with that of an innocent person."

(quoting *Williams v. United States*, 52 A.3d 25, 39 (D.C. 2012) (emphasis added). While the trial court gave an instruction to the jury not to consider the possibility that appellant robbed the decedent, based upon his possession of and proximity to decedent's belongings, it strains credulity that jurors would not consider the possibility of robbery as a motive for the stabbing—a motive neither established nor argued by the government. Certainly, where the defense was that someone other than the appellant committed the crime, suggesting a motive unique to the appellant was unnecessarily detrimental to the defense case, and far more prejudicial than probative.

Recalling the last trial, the trial court admonished the government during the motions hearing that testimony by Johnson regarding Jordan "rummaging through pockets" would be prejudicial. 7/3/2023 Tr. 14. Although an accommodation was eventually reached, and the jury was instructed at the beginning of Johnson's testimony that they were about to hear about Jordan going through the decedent's pockets (but should consider that information only for his "state of mind, his intent and whether or not that evidence is consciousness of guilt as to what he is charged

with"), appellant submits that the trial court's original impulse to keep out the prejudicial evidence was correct.

Contrary to the trial court's determination that the evidence "squarely fits in the analysis of being *Johnson* evidence because without that being a part of the government's storyboard, their storyboard does not make any sense," the evidence was entirely unnecessary to complete the story of the offense and, instead, added another crime and a motive for the jury to consider, despite jury instructions advising them not to.

This Court wrote in *(De'Andre) Williams v. United States*, 77 A.3d 425, 432 n.8 (D.C. 2013):

> Though it did not squarely address the admissibility of acquitted conduct, in *Roper v. United States,* 564 A.2d 726 (D.C.1989), this court found it "disturbing, and fundamentally unfair, that one could be acquitted of a crime by the trier-of-fact, yet have it held that that evidence of that same charge would have been admissible against him in another trial."

Id. at 732. Jordan's being in possession of the decedent's keys, the cellphone found in the area where he was seen walking, and the wallet mailed to the decedent's father do not reflect consciousness of guilt, as the government argued below. That the decedent's cellphone was not used to call 911 did not serve to impeach Jordan, where his previous trial testimony that he used it to call 911 was not in evidence in the instant trial, nor is he heard to make any statement to police in the instant trial regarding his possession or use of the decedent's phone. The trial court erred in allowing evidence of the decedent's belongings on or in the "flight path" of appellant, where such evidence was far more prejudicial than probative, and its

admission was fundamentally unfair, given Jordan had been acquitted of robbery in his first trial.

III. The Trial Court Abused Its Discretion In Allowing Evidence Of Appellant's Statement That He Had Cancer And Testimony And Medical Records To Impeach That Statement.

At the time of his arrest, Mr. Jordan made an offhand comment to police that he had cancer. Subsequent medical records confirmed that he did not. Over defense counsel's objection, the trial court permitted the government to introduce this statement and impeach it with medical records and testimony from a physician. 11/29/23 Tr. 212. In closing argument, the government emphasized this remark as one of several "lies" Mr. Jordan allegedly told to hinder the investigation. 12/5/23 Tr. 145.

This evidence, however, was irrelevant under the rule. To be admissible, evidence must be both material to an issue in the case and probative of a fact that is of consequence. *(Lamont) Jones v. United States*, 739 A.2d 348, 350-51 (D.C. 1999). The cancer statement fails both prongs. First, it bore no logical relation to any material fact—such as identity, intent, or consciousness of guilt—connected to the charged offenses. Second, it was not probative of whether Mr. Jordan committed second-degree murder, simple assault, or carried a dangerous weapon. Its only apparent purpose was to paint Mr. Jordan as a gratuitous liar, thereby attacking his general character rather than offering meaningful evidence related to the charged crimes.

Moreover, even if the government sought to use the statement as part of a broader theory that Mr. Jordan was deceptive following the incident, this particular remark was cumulative and marginal at best, especially in light of other admissible post-arrest statements. Its prejudicial effect—inviting the jury to infer that Mr. Jordan had a dishonest character generally—substantially outweighed its probative value, further warranting exclusion. *See Punch v. United States*, 377 A.2d 1353, 1358 (D.C. 1977) ("evidence of dubious relevance should not be admitted when it serves principally to impugn the defendant's character").

In sum, the cancer remark was wholly irrelevant to any fact of consequence in this case, and its admission served no legitimate evidentiary purpose beyond improper character assassination.

CONCLUSION

This court should reverse and vacate Mr. Jordan's convictions.

June 24, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2025, I caused the foregoing to be served via the Court's electronic filing and service system, upon all counsel of record.

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