DISTRICT OF COLUMBIA COURT OF APPEALS

24-CF-660

DIANDRE CAESAR,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the
District of Columbia – Criminal Division
2022 CF3 4933

BRIEF FOR APPELLANT

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D.C. App. R. 28(a)(2)(A) Statement

Appellant Diandre Caesar and appellee the United States were the parties in the trial court. Adrian E. Madsen, Esq., and Joseph Fay, Esq., represented Mr. Caesar in the Superior Court. Assistant United States Attorneys Caroline Coates Huether, Esq., Jacqueline Yarbro, Esq., Travis Wolf, Esq., and Michael Toogun, Esq., represented the United States in the Superior Court. Adrian E. Madsen, Esq. represents Mr. Caesar before this court. Assistant United States Attorney Chrisellen Kolb, Esq., represents the United States before this court. There are no interveners or amici curiae. No other provisions of D.C. App. R. 28(a)(2)(A) apply.

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ISSUES PRESENTED

1. Whether the evidence was insufficient to permit finding beyond a reasonable doubt that Mr. Caesar "acted in such a manner as would under the circumstances portend an immediate threat of danger to a person of reasonable sensibility," as required for intent-to-frighten assault where neither complainant saw a firearm at any time, where video footage admitted at trial demonstrates that the only witness who testified to having potentially seen a firearm could not have seen what the suspect fired at, and where the complainants heard one set of loud noises.
2. Whether the trial court [erred] by declining to order the United States to produce names of witnesses to a shooting committed by a person connected to an apartment in which a firearm believed to have been used in the shooting at issue in this case was found, preventing Mr. Caesar from marshaling evidence necessary to present a *Winfield* defense.
3. Whether the trial court erred by failing to suppress an out-of-court identification by the complainant that the United States ultimately conceded and the trial court found was unduly suggestive—a mug shot confirmation photo shown to a complete stranger who interacted with the suspect for less than three minutes—and by permitting the complainant to identify Mr. Caesar in court.
4. Whether Mr. Caesar's convictions for possession of a firearm during a crime of violence ("PFCV") merge where, based on shooting with a single firearm without

interruption at a vehicle occupied by both complainants, "they arise out of [his] uninterrupted possession of a single weapon during a single act of violence."[1]

5. Whether resentencing is required where the trial court erroneously believed that "the statutory scheme contemplates that" sentences for ADW "should be consecutive to the possession of a firearm during a crime of violence."[2]

STATEMENT OF THE CASE

On August 24, 2022, after turning himself in when made of an arrest warrant, Mr. Caesar was presented on a two-count complaint based on allegations dating back to June 28, 2022. On March 27, 2024, the case proceeded to trial on a ten-count indictment charging Mr. Caesar with three counts of ADW against complainants Jeffrey Smith, Shelby Greene,[3] and minor child L.R.S., three counts of PFCV, one related to each count of ADW, second-degree cruelty to children against L.R.S., carrying a pistol without a license ("CPWL"), possession of an unregistered firearm ("UF"), and unlawful possession of ammunition ("UA"). On April 8, 2024, the jury returned a split verdict, acquitting Mr. Caesar of six counts—ADW and PFCV against L.R.S., cruelty to children, CPWL, UF, and UA—and finding him guilty of

[1] *Matthews v. United States*, 892 A.2d 1100, 1106 (D.C. 2006).
[2] 7/10/24 Tr. 33. "Tr." refers to transcript by date of proceeding. "R." refers to the record on appeal. "S.R." refers to the sealed, supplemental record on appeal. "DX" and "GX" refer to defense and government exhibits, respectively, admitted at trial.
[3] By the time of trial, Ms. Greene was known as Ms. Bell and was referred to by each name at different times during trial.

ADW (firearm) against Mr. Smith and Ms. Bell and two related counts of PFCV. R. 387-90 (PDF) (Verdict Form). On July 10, 2024, after a brief period of release to allow Mr. Caesar to attend his grandmother's funeral,[4] the trial court sentenced Mr. Caesar to an aggregate eight years' incarceration, sixty months on both counts of PFCV, to run concurrently with one another, and eighteen months for each count of ADW, to run consecutively with one another and the PFCV counts. 7/10/24 Tr.; R. 429 (PDF). This timely appeal followed. R. 430-34 (PDF).

STATEMENT OF FACTS

On August 24, 2022, after turning himself in when made of an arrest warrant,[5] Mr. Caesar was presented on a two-count complaint charging him with one count of ADW (gun)[6] and one count of PFCV[7] on June 28, 2022. R. 43 (PDF). After release from pretrial detention,[8] a grand jury returned a ten-count indictment charging Mr. Caesar with three counts of ADW, three counts of PFCV, second-degree cruelty to children, CPWL, UF, and UA. R. 131-33 (PDF). In short, the United States alleged that Mr. Caesar shot at a car occupied by Jeffrey Smith, Shelby Bell (nee Greene), and L.R.S. on June 28, 2022, in or near the 2200 block of New York Avenue NE.

[4] R. 6/25/24 Tr.; 6/27/24 Tr.
[5] 8/30/22 Tr. 22.
[6] D.C. Code § 22-402.
[7] D.C. Code § 22-4504(b).
[8] 10/18/22 Tr. 12.

Prior to a scheduled October 2023 trial date, Mr. Caesar moved to suppress an out-of-court identification by complainant Jeffrey Smith, a single "confirmation" photo—a mug shot of Mr. Caesar[9]—shown to Mr. Smith, a stranger of a different race than Mr. Caesar who had seen Mr. Caesar, at most, for about two minutes, primarily through a fence,[10] and to preclude any in-court identification by Mr. Smith as tainted by the unduly suggestive procedure R. 169-76 (PDF).[11] Mr. Caesar also moved for a pretrial voir dire regarding any proposed in-court identification of Mr. Caesar by bus driver Anthony Graham, who had not participated in any out-of-court identification procedure. R. 163-67 (PDF).

At an October 20, 2023 hearing, the government confirmed that it would not attempt to elicit any in-court identification from Mr. Graham,[12] and assented to the trial court's directive that it therefore instruct Mr. Graham not to offer any identification unless asked to do so. 10/20/23 Tr. 10-11. The trial court granted Mr. Caesar's motion to continue trial to allow consultation with an identification expert

[9] With Mr. Caesar having just one prior conviction, there for (misdemeanor) distribution of marijuana in 2016, S.R. 4 (PDF) (PSA Report p. 3), this appears to have a been a photograph 2016.

[10] GX 7.

[11] The United States opposed the motion, ultimately conceding that the procedure was unduly suggestive but arguing that it was nonetheless reliable. R. 207-18 (PDF); 3/27/24 Tr. 35.

[12] The United States did not call at trial a bus passenger previously anticipated to be a witness.

and deferred ruling on Mr. Caesar's motion to suppress the out-of-court identification and preclude any in-court identification by Mr. Smith. 10/27/23 Tr. 3.

Motion to Compel Denied

No gun was recovered from Mr. Caesar or the location of the alleged offenses. Discovery provided by the United States indicated that a gun thought to be the same gun that fired bullets recovered from the complainant's car in this case was found in the apartment in the 2100 block of I Street NE during the March 2023 execution of a search warrant related to a February 2023 incident in which a person was shot in the face. R. 280 (PDF) (Mtn Compel p. 2); *see also* R. 178-84 (PDF). 2100 I Street NE is less than 1.5 miles from the location of the events at issue in this case.[13] The man who resided in the apartment in which the search warrant was executed was Zion Ray-Valentine, whose appearance differs from the suspect in the February 2023 shooting. R. 280 (PDF) (Mtn to Compel p. 2). After seeking without success the same informally from the government, Mr. Caesar moved to compel body-worn camera from execution search of the search warrant in which the gun linked by NIBIN[14] to the charged shooting was recovered, names of the complainant and

[13] "Judicial notice may be taken at any time, including on appeal." *Christopher v. Aguigui*, 841 A.2d 310, 311 n.2 (D.C. 2003) (quoting *United States v. Burch*, 169 F.3d 666, 671 (10th Cir. 1999)).

[14] NIBIN is the National Integrated Ballistic Information Network, which "automates ballistics evaluations and provides actionable investigative leads in a timely manner" and "is the only interstate automated ballistic imaging network in

witnesses to the February 2023 shooting, and information regarding whether the suspect in the February 2023 incident had been an informant. R. 279-88 (PDF) (Mtn to Compel). The purpose of the requested information—all known and available to the government—was to investigate a potential *Winfield* defense,[15] given the similarity between the type of drug transaction preceding the alleged offenses in this case and those surrounding the February 2023 shooting which led to the issuance and execution of a search warrant in which a gun linked by NIBIN to the offenses in this case was recovered, the close proximity between the two offenses, and the lack of any evidence that an After hearing argument on the motion,[16] the trial court denied the motion, finding that "this is far too attenuated and sort of a speculative request here,"[17] seeming to apply something akin to the ultimate showing required in order to present a *Winfield* defense[18]:

> Well, having looked at, and I've read through some of the cases that are cited on both sides, it has to be more than some speculative potential third party that could be the subject of a *Winfield* [d]efense. There has to be some nexus between that third party that have, I think the

operation in the United States." *See* https://www.atf.gov/firearms/national-integrated-ballistic-information-network-nibin (last accessed Mar. 17, 2025).

[15] *See Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (en banc).

[16] 3/18/24 Tr.; 3/19/24 Tr. 1-13.

[17] 3/19/24 Tr. 13 (16-17).

[18] *Id.* at 5 ("It follows from this, as the division recognized, that the trial judge ordinarily may exclude evidence of third-party motivation unattended by proof that the party had the practical opportunity to commit the crime, including at least inferential knowledge of the victim's whereabouts.").

> language is a motive and a practical opportunity, to actually even commit the offense.

3/19/14 Tr. 10.

Leaving aside the lack of any obligation to alert the government to any intent to present a *Winfield* defense,[19] as Mr. Caesar made clear, he was not seeking a ruling regarding whether he could present a third-party perpetrator defense but rather information in the government's possession in order to investigate whether to seek to present such a defense. 3/19/24 Tr. 6-7 ("[T]hat's why it deserves more investigation is because we don't know. And we may be able to say with more investigation why. There's no evidence that this gun was anywhere else in the interim. I think that's really significant… [T]his is not a retrospective analysis. It's a prospective analysis where we're trying to get information before we go to trial.").

Motion to Suppress Identification Denied

On March 27, 2024, the court heard testimony regarding Mr. Caesar's motion to suppress an out-of-court identification by complainant Jeffrey Smith, with the government calling one witness, MPD Detective Yvette Maupin.

On direct examination, Detective Maupin, who at the time of the offense had worked for MPD for approximately twenty-five years,[20] responded to a call on June 28, 2022, a sunny day, regarding the alleged offenses in this case. 3/27/24 Tr. 7-9.

[19] *See generally Moghalu v. United States*, 263 A.3d 462 (D.C. 2021).
[20] 3/27 Tr. 7.

While at the McDonald's near the Salvation Army building on New York Avenue, Detective Maupin spoke with Mr. Smith, who described a suspect as "black male[,] dreads[,] wearing all black." 3/27/24 Tr. 10. While at the scene, Detective Maupin "acquired a possible name for the suspect," which led an offsite detective to send Detective Maupin an undated photograph,[21] of Mr. Caesar taken from Cobalt, a "law enforcement database." 3/27/24 Tr. 10-12. Officers, including Detective Maupin, "obtained video evidence from th[e] incident," which Detective Maupin described as "dash cam from the complainant himself of the incident with Mr. Caesar," which the complainant "reviewed" "several times before [Detective Maupin] got there" and a "couple of times" after Detective Maupin arrived at the scene. 3/27/24 Tr. 12-13. While reviewing the footage, the complainant was "rather hyper, pointing." 3/27/24 Tr. 13.[22] Mr. Smith described to Detective Maupin "an interaction he had with a potential suspect," which "was shown in" GX2. 3/27/24 Tr. 16. Mr. Smith saw the suspect "in front of [a] vehicle" depicted in GX2 and said the suspect "came to the back and started kicking his vehicle." 3/27/24 Tr. 17. The government published without objection as government exhibit 3 surveillance footage from a Salvation Army building next to the McDonald's where the complainant began interacting

[21] The photograph was admitted without objection for purposes of the motion hearing as government exhibit 1. 3/27/24 Tr. 12.

[22] The "dash cam" footage was admitted without objection as government exhibit 2 for purposes of the motion hearing. 3/27/24 Tr. 14-15.

with the suspect, which the trial court had already reviewed. 3/27/24 Tr. 18-20.

Detective Maupin showed to Mr. Smith the photograph of Mr. Caesar sent be offsite detectives, first telling Mr. Smith that "this may be the person or may no be the person that's in the video," and to "be advised that the hair may be different because of the picture may be lighter or darker," at least part of which was captured on body-worn camera footage admitted as government exhibit 4. 3/27/24 Tr. 20-21. When Detective Antoinette Martin, also present, after Detective Maupin's prefatory statements, "turned the phone with the photograph that we got from Colombo of a Diandre Caesar" toward Mr. Smith, Mr. Smith said, "that's him," "looks like him," and "[l]ooks just like him." 3/27/24 Tr. 22-24.

On cross-examination, Detective Maupin agreed that the entirety of the interaction between the suspect and Mr. Smith was less than three minutes, with a portion of that interaction through a fence. 3/27/24 Tr. 23. Detective Maupin testified that she "d[id]n't know" that the suspect and Mr. Smith were facing away from one another during the three-minute interaction, persisting in this answer even when shown video footage appearing to depict that. 3/27/24 Tr. 25-28. Detective Maupin agreed that, after Mr. Smith and the suspect interacted at a fence separating a McDonald's from the parking lot adjacent to a Salvation Army building, there was a period of approximately one minute when the suspect and Mr. Smith did not see

one another. 3/27/24 Tr. 28. Mr. Smith told Detective Maupin that when he was driving onto New York Avenue, his focus was on driving. 3/27/24 Tr. 29.

After agreeing that Mr. Smith described the suspect as black male with dreads, Detective Maupin testified that she believed Mr. Smith described the suspect as "six foot," but agreed that government exhibit 4, body-worn camera footage from an officer at the scene, did not depict Mr. Smith providing any description of height. 3/27/24 Tr. 30-31. Detective Maupin knew that unless a witness knows a suspect in a context other than in the commission of an alleged offense, use of a confirmation photo is inappropriate, and knew that Mr. Smith did not know the suspect outside of the commission of the alleged offense but nonetheless used a confirmation photograph. 3/27/24 Tr. 31-32.

On redirect examination, Detective Maupin testified that she "d[id] a confirmation photo viewing in this case" because "there were witnesses on the scene that told officers the name of [Mr.] Caesar," because "the complainant watched the video several, several times and had the interaction with" the suspect, and "exigent circumstances… [t]rying to get the BOLO out." 3/27/24 Tr. 32-33. Detective Maupin ultimately admitted—on redirect examination—that she "should have done a nine[-]photo array." 3/27/24 Tr. 34.

The government appeared to concede that the identification procedure was impermissibly suggestive—"we don't contest that there was suggestivity in this

procedure[,] [o]bviously it was a confirmation photo"[23]—but argued that the identification was nonetheless reliable. 3/27/24 Tr. 35-38. After noting that the government's concession of impermissible suggestivity shifted the burden to the government of proving that the identification was nonetheless reliable, focusing particularly on the duration of the interaction—less than two minutes, with portions through a fence and portions during which the two were not facing one another—that a person does not gain personal knowledge by watching a video, and the paucity of the description. 3/27/24 Tr. 38-42.

The trial court found that "Mr. Smith was observing the defendant for around two minutes, directly[,] [a]nd was engaged in a heated argument with him under conditions where it seems he had ample opportunity to observed the defendant," and that it was "clear that [Mr. Smith's] attention was directly on Mr. Caesar." 3/27/24 Tr. 44. The trial characterized Mr. Smith's "description of Mr. Caesar [ ]as general, but… accurate[,] black male with dreads wearing all black[,] at least six feet,"[24] and described his identification as "pretty emphatic." 3/27/24 Tr. 45. When denying the

[23] 3/27/24 Tr. 35 (9-11). The trial court concluded the same and found that identification was impermissibly suggestive. 3/27/24 Tr. 38 ("And I think even the detective concedes that as well. She's not taking a position formally, but I think in terms of her testimony, I think it is clearly suggestive.")

[24] 3/27/24 Tr. 45. While generally crediting Detective Maupin, 3/27/24 Tr. 42, the trial court did not address the apparent conflict between Detective Maupin's testimony that Mr. Smith described the suspect's height and the absence of such statements in body-worn camera footage.

motion, the trial court also appeared to rely on its own comparison of Mr. Caesar in court to dash camera footage (GX 2):

> I could observe the video that was Government's Exhibit 2, which is the dash cam on Mr. Smith's car, and it seemed evident to the Court, just seeing that video where Mr. Caesar walks in front of the car, that it is apparent that it's Mr. Caesar. So that supports also, the I think the reliability of the complainant's description.

3/27/24 Tr. 45.

When Mr. Caesar raised that such observations are not relevant to the *Biggers*[25] analysis, the trial court seemingly contradicted itself, stating "I'm not relying on that in terms of finding that" the identification "is reliable." 3/27/24 Tr. 46.

After the United States announced that it did not intend to elicit an in-court identification of Mr. Caesar from Mr. Smith, a decision the government made in part because "in terms of prepping Mr. Smith" it did not "think [Mr. Smith] would be able to ID" Mr. Caesar, Mr. Caesar moved that the trial court order the government to instruct the witness not to offer any in-court identification,[26] which the trial court later denied. 4/1/24 Tr. 66.

Trial

Detective Antoinette Martin

Following jury selection and opening statements, the government first called

[25] *Neil v. Biggers*, 409 U.S. 188 (1972).
[26] 3/27/24 Tr. 46-51.

MPD Detective Antoinette Martin. 3/27/24 Tr. 184. Detective Martin, a Fifth District MPD detective at the time of the alleged offenses, went with MPD Detective Maupin to a McDonald's "near the intersection of Bladensburg Road and New York Avenue" on June 28, 2022, "at about 1:00 pm" in response to a report of a shooting. 3/27/24 Tr. 184-88. After describing with the aid of maps the general area to which she responded on June 28,[27] Detective Martin testified over Mr. Caesar's objection that she "learned the name of a possible suspect" from Christopher Wallace, a Salvation Army supervisor. 3/27/24 Tr. 194-96. Detective Martin relayed the name learned from Mr. Wallace to a "colleague[ ]" in "the detective's office," Detective Velez,[28] "and asked [Detective Velez] to run the provided name through a law enforcement database," who then "emailed [Detective Martin] a photograph of the person that [they] believed to be the individual's name that [officers] were provided with." 3/27/24 Tr. 196-97. Over objection, Detective Martin testified that GX3 was the photograph she received from Detective Velez, which she showed to complainant Jeffrey Smith. 3/27/24 Tr. 207-12. Detective Martin obtained video from cameras located on the outside of the Salvation Army building located next to the McDonald's, which the trial court admitted over Mr. Caesar's authentication objection. 3/28/24 Tr. 14-28.

[27] 3/27/24 Tr. 188-94.

[28] While referred to during the portion of the transcript as Detective Valez, all discovery provided referred to a Detective Velez.

On cross-examination, Detective Martin testified that Mr. Wallace was not present "when any facts complained of… occurred" and provided Mr. Caesar's name as "an employee of the Salvation Army." 3/28/24 Tr. 28-30. Detective Martin did not inquire of the McDonald's regarding video footage or verify that any footage from McDonald's had been viewed and ultimately agreed that she drafted a buccal warrant for Mr. Caesar's DNA. 3/28/24 Tr. 30-35.

On redirect examination, Detective Martin testified that during a witness conference Mr. Wallace identified Mr. Caesar as a person depicted in a photograph "taken from dash camera footage recovered from the scene." 3/28/24 Tr. 35-39.

Shelby Bell

The government next called complainant Shelby Bell. 3/28/24 Tr. 40.[29] Ms. Bell testified that, as of June 2022, she was "together" with Mr. Smith, with whom she had one child, a son, "L.S,"[30] but that her relationship with Mr. Smith was by the time of trial "not so good," including because of a "domestic violence incident" in which Mr. Smith was convicted of reckless endangerment against Ms. Bell, for which he remained on probation. 3/28/24 Tr. 40-44. On June 28, 2022, Mr. Smith, who used marijuana "multiple times a day," and Ms. Bell, who used it nightly,

[29] As noted, *supra*, Ms. Bell was previously known as Ms. Greene and at times referred to at trial as the same.

[30] The same child was referred to as "L.R.S." in the indictment. R. 132 (PDF) (Indictment p. 2). Mr. Caesar was acquitted of all charges relating to the child.

traveled from Annapolis, where they then lived, to the District, in order for Mr. Smith to purchase more marijuana, bringing L.R.S., then two years old, with them, something Ms. Bell had done "three [or] four times before." 3/28/24 Tr. 44-48. Each time, the group would meet the "delivery driver… at the McDonald's" after arranging to do so through a "store online," and did not have any "problems or issues when doing so." 3/28/24 Tr. 46-47. After Mr. Smith exchanged marijuana for cash with a person driving "a BMW," the seller "took off" without issue, which Ms. Bell described with the aid of maps and images of the area. 3/28/24 Tr. 49-53.

After encountering a "milk cart or crate… in the middle of the street"—a drive-thru lane of the McDonald's, events captured in GX7, a man whom Ms. Bell had not seen before tossed the milk crate Mr. Smith had just thrown from the McDonald's side of the fence to the Salvation Army side of the fence back over the fence, hitting the "passenger side of the window," with Ms. Bell using profane language both before and after this occurred. 3/28/24 Tr. 53-59.

After describing in some detail the interaction that followed at the fence between Mr. Smith and the man, including "bickering," her own use of "homosexual slur[s]," Mr. Smith and the man on the other side of the fence "calling each other the N-word," and Ms. Bell encouraging Mr. Smith, then in the car, to grab his knife "in case [he had] to stab a motherfucker," Mr. Smith returned to the car and began driving toward the McDonald's exit where another car stopped in the center of New

York Avenue, preventing Mr. Smith from turning left. 3/28/24 Tr. 60-70. As most relevant to this appeal, after further argument near the intersection of the McDonald's drive-thru and New York Avenue, including what Ms. Bell alleged was the suspect kicking her car and attempting to open the car door, Ms. Bell testified that after Mr. Smith began driving away from the McDonald's on New York Avenue—"there was no traffic and we just t[ook] off"—she heard sounds, which she described as "the bullets hitting [their] car." 3/28/24 Tr. 79.[31] Ms. Bell made clear that she "did not realize the actual bullet holes… were in the back of the car" until returning to the McDonald's some time later, by which time police had arrived, despite neither Ms. Bell nor Mr. Smith having called 911. 3/28/24 Tr. 85-86. Whether the noises Ms. Bell claimed to have heard were gunshots, bullets hitting the car, or something else, Ms. Bell testified that the noises made her feel "terrified," "scared," and "in shock." 3/28/24 Tr. 114. Ms. Smith did not offer and was not asked to make any in-court identification of Mr. Caesar as the suspect.

On cross-examination, as most relevant here, Ms. Bell: 1) acknowledged that when she was yelling at the suspect while on New York Avenue, she repeatedly told

[31] Ms. Bell also testified that she "hear[d] gunfire" coming "from behind" the car, "like, six shots," without seeming to distinguish between the noise of what she testified was "bullets hitting [their] car" and "gunfire." 3/28/24 Tr. 79-80 ("Q. You said, I heard six shots— A. Yes. Q.—and then you said something else? A. Six shot, and then I think there was a full—four bullets that hit the car. A. And I'll get back to that is a second. Did you feel or hear where the bullets were hitting the car? Yes, in the back, in the trunk area.").

the suspect "there's nothing in the bag" the suspect held,[32] 2) when confronted with still images from GX7 (dash camera footage), that, contrary to her testimony on direct and cross-examination, the suspect had on gloves and wore the same bag from the time he first began interacting with Mr. Smith at the fence,[33] and 3) that she never saw a firearm on June 28, 2022, during the events in question. 3/28/24 Tr. 165.[34]

Anthony Graham

The government next called Anthony Graham, a commuter bus driver for Coach USA, who drove at least one route that included New York Avenue NE at around 1 pm, including on June 28, 2022. 3/28/24 Tr. 169-73. With the aid of maps and images, Mr. Graham generally described the area in question, including the McDonald's, Salvation Army, and New York Avenue. 3/28/24 Tr. 173-78. While driving on New York Avenue NE, Mr. Graham noticed "some commotion or a lack of commotion… basically[ ] right at the gate of the Salvation Army." 3/28/24 Tr. 178. "[T]here was some sort of an argument or just something loud," including "a[n] individual on the passenger side of" a car near the same gate." 3/28/24 Tr. 179. Mr. Graham "always ha[d]… a utility window" somewhere on the bus open. 3/28/24 Tr. 179. Mr. Graham described the nature of the "commotion" as "individuals… arguing

[32] 3/28/24 Tr. 157.
[33] 3/28/24 Tr. 157-62.
[34] Ms. Bell briefly testified on redirect examination regarding issues not relevant to this appeal. 3/28/24 Tr. 165-68.

back and forth about something there." Although Mr. Graham testified that "the individual appeared to pull out… what [he] thought was maybe… a handgun[ ] and started firing at the car,"[35] GX7 makes it extremely unlikely that Mr. Graham, who did not testify that he looked backwards or in a mirror to see this,[36] could have seen what the suspect was purportedly firing at. GX7 4:08-4:11.[37]

After being unable to remember whether he looked away from the "commotion" before allegedly seeing shots fired, Mr. Graham agreed that he did so after having his recollection refreshed with his grand jury testimony. 3/28/24 Tr. 181-84. Mr. Graham struggled with other details of what he witnessed:

> Q. But then what happened, after you turned your attention away from the commotion?
> A. Well, yeah, I—I—I saw the car take off, and then they—and then the gentleman started running alongside the Salvation Army in a—in a gate that was faced open. And—and—and after that, that's pretty much what I saw.
> Q. So, sir, just to back up a bit—
> A. Okay.
> Q.—it's true sir, you testified that what first drew your attention was the loud argument, a commotion; is that

[35] 3/28/24 Tr. 180.
[36] Mr. Graham identified the bus he drove as the bus visible in GX7 at approximately timestamp 4:06. 3/28/24 Tr. 199-200.
[37] Perhaps unsurprisingly, where he testified close to two years after the events in questions, saw any relevant events for a matter of seconds, and did not speak to law enforcement until months after the alleged offenses, 3/28/24 Tr. 209, Mr. Graham appeared to testify inconsistently with GX7, including the location of the interaction between the "individual on the passenger side of a car" and the occupants of the car, where Mr. Graham would have been a significant distance away at that time, and whether more than one person was present on the sidewalk at the time of the alleged events. 3/28/24 Tr. 209.

right?
A. Yes. Uh-huh.
Q. And it's true, as you just testified, that you turned away, momentarily from that argument; is that true?
A. Yes. Yes.
Q. Now, did there come a time when you turned back to the loud argument?
A. Well, I—I guess, that's—you know, that's when, I don't know, I'm kind of getting confused, you know, because of the—because of the time. It—it was—it wasn't—it wasn't a whole lot of time that—that kind of elapsed, from the time I saw, you know, basically, heard the, heard the commotion. I looked over. Now, [p]op, pop or the—the sound of what appears to be a—a—a firearm.
Q. And let me stop you there, sir.
A. I'm sorry.
Q. So you just mentioned, [p]op, pop, and you stated what appeared to be the sound—
A. Yeah.
Q.—of a firearm, when did you hear that sound in the time frame of this—
A. Well, that was just—
Q.—of this incident?
A.—just—just after that commotion got my attention there.
Q. All right. And once you heard that sound, what'd you do?
A. Oh, well, basically, you know, I was—I was pretty much still looking, and—and then the—the car took off. And then the individual or the—the individual started running alongside the—the—Salvation Army.

3/28/24 Tr. 184-86.

After initially unequivocally testifying that he could not describe the person he saw "running alongside the… Salvation Army," over objection and in response to leading questions, Mr. Graham agreed that the person was an "African-American male" with

a "slim build." 3/28/24 Tr. 186-87.

When asked to clarify why "pops"—of which Mr. Graham testified he heard no more than two[38]—were gunshots, Mr. Graham testified that was because of the "posturing" of the person and "maybe a firearm pointing." 3/28/24 Tr. 190. When further elaborating about the sequence of events, Mr. Graham testified that the "African-American male" "was standing there, and… he was pointing at the car, I saw that much, and then… the car took off." 3/28/24 Tr. 196.

On cross-examination, Mr. Graham testified that he did not call 911 on June 28, 2022, and did not speak to police about the alleged events until "months" later, doing so by chance. 3/28/24 Tr. 209. Mr. Graham could not remember whether the suspect held the gun in his right or left hand or whether he held it with one or two hands. 3/28/24 Tr. 211-12.

Jeffrey Smith

The government next called complainant Jeffrey Smith. As relevant to the issues raised in this appeal,[39] over Mr. Caesar's objection, Mr. Smith identified Mr. Caesar as the person with whom he interacted on June 28, 2022.

> Q. Who made that statement that we heard?
> A. That was the defendant.
> MR. TOOGUN: And for the record, I would note

[38] 3/28/24 Tr. 189.

[39] With some inconsistencies, Mr. Smith, also impeached with prior convictions, offered testimony regarding similar subjects to those discussed by Ms. Bell. 4/1/24 Tr.

> Mr. Smith stated that was the defendant, he nodded his head towards what would be my left, I suppose.
> THE WITNESS: Correct. Your left and my right.

4/1/24 Tr. 42.

Mr. Smith also testified that he "knew" the man at the fence did not have any weapons on him because Mr. Smith had "done hand-to-hand combat for almost, at that time, over 15 years." 4/1/24 Tr. 48.

Notwithstanding the United States' previous acknowledgment that the suspect had the bag later seen in GX7 when the suspect was on the sidewalk near New York Avenue[40] and Mr. Caesar's request for a *Napue* instruction regarding the same during Ms. Bell's testimony,[41] the United States again elicited from Mr. Smith that he "had [not] noticed that cross-body bag at any time" prior to interacting with the suspect near the intersection of the McDonald's drive-thru exit and New York Avenue NE. 4/1/24 Tr. 56. Mr. Smith also testified that—at a time when he had driven past the suspect and the suspect was thus behind him, as depicted in GX7—that he "heard the firearm go off… and could also hear them hitting the back of [his] car." 4/1/24 Tr. 61. When asked how this made him feel, Mr. Smith answered that his "only concern was to get a far enough distance away that [he] could check on [his] son." 4/1/24 Tr. 61. Over Mr. Caesar's renewed objection, Mr. Smith was

[40] 3/28/24 Tr. 102 ("And the government does not contest that [Ms. Bell] may be mistaken…").
[41] 3/28/24 Tr. 101-04.

permitted to identify that he identified the person depicted in the single confirmation photo as the suspect. 4/1/24 Tr. 64-67.[42]

On cross-examination, Mr. Smith was generally impeached regarding his intent upon getting out of his car after a milk crate hit it, what he hoped would happen upon doing so,[43] details of his interaction with the suspect, and his motive to curry favor where he was on probation and had cases on the stet docket in Maryland. 4/1/24 Tr. 72-76. Mr. Smith did not see a firearm on June 28, 2022. 4/1/24 Tr. 143.

Officer Dayna Johnson

The government next called MPD Officer Dayna Johnson, who canvassed near the Salvation Army for witnesses, finding none, and found "at least two"[44] "casings located on the sidewalk outside of the Salvation Army." 4/1/24 Tr. 148-60. Over Mr. Caesar's repeated hearsay and Confrontation objections, Officer Johnson testified that she learned the name "Diandre Caesar" from a "witness" and that "one of the witnesses" identified Mr. Caesar as a person depicted in a photograph taken from a "database" that she did not herself search. 4/1/24 Tr. 165-66, 170-86.

Michael Peete

The government next called Michael Peete, a former Salvation Army

[42] Contrary to Ms. Bell's testimony that neither she nor Mr. Smith had called 911, Mr. Smith testified that both he and Ms. Bell did so. 4/1/24 Tr. 67.
[43] 4/1/24 Tr. 114-20.
[44] 4/1/24 Tr. 167.

employee who "maintain[ed] most of the facilities, the vehicles, [and] the homes," and who had worked with Mr. Caesar for about seven months as of June 2022, seeing him every day during that time. 4/1/24 Tr. 190-94. On June 28, 2022, Mr. Peete picked Mr. Caesar up from a Metro station, went "to 2626 Pennsylvania Avenue to sign some papers," and dropped Mr. Caesar off at a job site at 2100 New York Avenue NE. 4/1/24 Tr. 196-98.

After going to a warehouse in Maryland "to cut some grass," Mr. Peete returned to New York Avenue where he saw Mr. Caesar "trying to get out [of] the gate." 4/1/24 Tr. 199-200. Mr. Caesar was "arguing with a small white car" after Mr. Peete "pulled into the lot." 4/1/24 Tr. 208. While in the lot, Mr. Peete called his sister because he was "a little upset" and because he "called her for everything. 4/2/24 Tr. 14-15. Mr. Peete did not hear any "loud pops" or gunshots[45] and identified a car seen leaving the Salvation Army parking lot as Mr. Caesar's. 4/2/24 Tr. 21. Mr. Peete called Christopher Wallace, a Salvation Army supervisor, to come to the location, when police "wanted to see the video." 4/2/24 Tr. 29-30.

On cross-examination, Mr. Peete testified that, as part of job duties, he purchased blue gloves which were used for "various things" like "picking up trash" and reiterated that when at the Salvation Army near the time of the alleged incident, he did not hear any gunshots, "car backfiring, none of that," but that there was a

[45] 4/2/24 Tr. 16.

fireworks stand set up "right across the street" on New York Avenue. 4/2/24 Tr. 31-32, 36-37. Mr. Peete did not hand Mr. Caesar a gun or see a gun "the whole day." 4/2/24 Tr. 38. Mr. Peete knew Mr. Caesar to carry a "cross-body bag" in which he kept "[t]rash," like an "old beat-up wallet" and "paper." 4/2/24 Tr. 41.

Christopher Wallace

The government next called Christopher Wallace, a Salvation Army facilities manager who was asked by Mr. Peete to go to 2100 New York Avenue NE between 1:00 and 2:00 pm on June 28, 2022. 4/2/24 Tr. 43-47. After Mr. Wallace arrived, police asked him about "Diandre's last name," which he did not then know or know why police were asking. 4/2/24 Tr. 48. Thereafter, AUSA Michael Toogun asked numerous questions, many leading—to which Mr. Caesar objected—and which the trial court found to call for a hearsay response. 4/2/24 Tr. 48-54.

> And you keep asking him questions about how he learned things. You know, all those things call for a hearsay response.
> …
> For now, in terms of this objection, you need to move on to questions that are not calling for what he has learned from other folks, including the police.

4/2/24 Tr. 54-55.

Mr. Wallace described "Diandre" as "[t]all, skinny, dark skin, [with] dreads," and testified that police showed him a photograph of "Diandre" on June 28, 2022. 4/2/24 Tr. 56-61. Mr. Wallace identified Mr. Caesar in court, who, aside from "pick[ing]

up some weight," did not look different than in June 2022. 4/2/24 Tr. 64-65.

On cross-examination, Mr. Wallace confirmed that he did not witness any crime on June 28, 2022, and that his identification of Mr. Caesar in a photograph was as an employee of the Salvation Army.

Officer Gregory Collins

The government next called MPD Officer Gregory Collins, a K-9 officer, who, along with another officer, found two shell casings "in the grass." 4/2/24 Tr. 68-83. Officer Collins confirmed that his canvass was limited to the "parking lot of the Salvation Army," and the "grassy area," not "in front of the McDonald's," "on the other side of the McDonald's" or "across the street." 4/2/24 Tr. 84-85.

Officer Jennifer Jamieson

The government next called MPD Officer Jennifer Jamieson, who happened to be in the parking lot of the McDonald's at issue in this case during her lunch break. 4/2/24 Tr. 104-07. While "further back, between the menu board and where you go and actually pay for your food," Officer Jamieson "heard an argument happening…[,]didn't think anything of it" and saw "someone, an individual, on the side of the Salvation Army," whom Officer Jamieson described as "a tallish, slender, black male" with "like a neoprene" hat "he would have long hair in." 4/2/24 Tr. 108-14. After about thirty seconds, the person "on the other side of the fence walked away," leading Officer Jamieson to "continue[ ] on with trying to get [her]

cheeseburger." 4/2/24 Tr. 116. "A short time later," or "[n]o more than two minutes," Officer Jamieson "heard a series of about like four to five gunshots coming from the New York Avenue side." 4/2/24 Tr. 116. "[T]he same individual that was at the fence" then "r[a]n through the parking lot of the Salvation Army," and Officer Jamieson then saw "a dark-colored, older model, Suburban-style SUV c[o]me around from the back of the Salvation Army." 4/2/24 Tr. 119. Officer Jamieson did not see a gun or who, if anyone, was being fired upon,[46] took some pictures of the SUV, called 911, attempted to block off an area of the sidewalk where she saw shell casings until police arrived, and later spoke to detectives. 4/2/24 Tr. 123-52.

Detective Yvette Maupin[47]

The government next called Detective Maupin, who testified that Mr. Caesar's name was Diandre Brand Caesar and that a photograph of Mr. Caesar was used for an identification procedure with Mr. Smith. 4/2/24 Tr. 189-98.

Although Mr. Wallace had identified Mr. Caesar on June 28, 2022, as an employee of the Salvation Army, not the suspect, AUSA Toogun—again on redirect

[46] 4/2/24 Tr. 118.

[47] The government called and recalled MPD Officer Christian Valdez, who worked in MPD's "Firearm Registration Branch." 4/2/24 Tr. 157-85; 4/3/24 Tr. 18-26. Mr. Caesar was acquitted of all charges to which Officer Valdez's testimony related. After previously having repeatedly asked questions calling for hearsay responses, AUSA Toogun, repeatedly misstated the name Officer Valdez searched in MPD's firearms registration and licensing databases, particularly on redirect examination. 4/2/24 Tr. 159, 161-64, 174-76, 183-88; 4/3/24 Tr. 18-19.

examination—mischaracterized the evidence, stating that Mr. Wallace had identified Mr. Caesar as the suspect.

> Q. So Defense Counsel asked you about the procedure that you investigate this case, the showing of this single photograph. Why did you show a single photograph in this case, Officer?
> A. *On the scene, Mr. Smith had already had his video that depicted to show the person of interest, which was Mr. Diandre -- Mr. Diandre Caesar*. He had reviewed it several times. I reviewed it. *And also, one of the witnesses identified him as being his supervisor*. With the exigency of the circumstances that were there, and the timing, I made a judgment to do a single-photo photo array.
> Q. And I'm going to clarify something you stated there during your answer to that question. You mentioned a supervisor or one of the individual's supervisor, what were you referring to there, just to be clear, with respect to who was identifying whom?
> A. The officer got the information from the supervisor, Mr. Peete, and that he was Mr. Diandre Caesar. So he was already identified on the—
> MR. FAY: I'm going to object at this point to the --
> THE COURT: Overruled.
> …
> What did you mean by the exigency of the circumstances?
> A. Well, the timing with the complainant, the victim seeing the video several times, reviewing it. *The workers identifying Mr. Diandre Caesar*, and with the timing of trying to get a BOLO out immediately of the individual that was identified.

4/2/24 Tr. 204-05 (emphasis added).

Almost immediately after Mr. Caesar raised this objection at length,[48] AUSA

[48] 4/2/24 Tr. 205-09.

Toogun again falsely stated that a Salvation Army employee had identified Mr. Caesar on June 28, 2022, as a person depicted in dash camera footage:

> Q. I was showing you Exhibit number 7 before. That was the dash cam video we were looking at. *When you were watching that video -- and I can pull it back up here -- did you see another individual next to Mr. -- next to Mr. Caesar*?
> A. Yes, sir. Q. And what, if any, investigative steps did you do to find that person?
> MR. FAY: Objection.
> THE COURT: Overruled.

4/2/24 Tr. 213 (emphasis added).

Mr. Caesar then moved for a mistrial, which the trial court denied.

> And I will tell you that the place where Mr. Caesar was identified in the dash cam video was not by the witness in her answer to any question. The issue was that the prosecutor asked the detective to identify the person standing -- if effort were made to identify the person standing next to Mr. Caesar.
>
> I am going instruct the jury in final instructions, as always, that the questions of the lawyers are not evidence. It's the answers that are evidence. And at no time did the detective testify as to Mr. Caesar being the person identified in the dash cam video. And so, for that reason, the request for mistrial is denied.

4/3/24 Tr. 15.[49]

[49] The trial court denied Mr. Caesar's MJOA (and later renewed MJOA) and conducted a *Boyd* inquiry, and Mr. Caesar called a character witness before resting. 4/3/24 Tr. 28-58.

Following closing arguments,[50] final instructions,[51] and several jury notes over multiple days, the jury returned a split verdict, convicting Mr. Caesar of four counts—ADW against each Mr. Smith and Ms. Bell[52] and associated counts of PFCV—and acquitting him of the remaining six counts—ADW (and PFCV) against L.R.S., second-degree cruelty to children. R. 387-90 (PDF).

On July 10, 2024, the trial court sentenced Mr. Caesar to an aggregate ninety-six months' incarceration, eighteen months for each count of ADW, counts one and three, to run consecutive to one another and other counts, and sixty months incarceration on counts two and four (PFCV), to run concurrently with one another but consecutive to counts one and three.[53] Regarding the latter, the trial court believed that either a statute or the Voluntary Sentencing Guidelines called for PFCV sentences to be run consecutively to sentences for the underlying crimes of violence:

> And I think the statutory scheme contemplates that that should be consecutive to the possession of a firearm during a crime of violence. So the sentences on each count will run consecutively.

7/10/24 Tr. 33.

This timely appeal followed. R. 430-32.

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[50] 4/3/24 Tr. 58-123.
[51] 4/3/24 Tr. 137-69.
[52] The United States expressly disavowed any reliance on an attempted battery theory, making clear that it was proceeding only under an intent-to-frighten theory of ADW, so the jury was only instructed on the latter. 4/2/24 Tr. 93.
[53] R. 429 (PDF).

SUMMARY OF THE ARGUMENT

Mr. Caesar's convictions—two counts of ADW and two associated counts of PFCV—must all be vacated because the evidence was insufficient to permit finding beyond a reasonable doubt that he "acted in such a manner as would under the circumstances portend an immediate threat of danger,"[54] necessary to prove intent-to-frighten ADW, the predicate for his PFCV convictions, where neither complainant saw a gun at any time and where objective evidence indicates that bus driver Anthony Graham, assuming, *arguendo*, that he saw someone firing a gun, did not see what the person was firing at. Assuming, *arguendo*, that Mr. Caesar's convictions are not vacated, they must nonetheless be reversed for two independent reasons: 1) because the trial court erred when denying his motion to compel information regarding a man linked to an apartment in which a gun linked by NIBIN to the charged offense was located, preventing Mr. Caesar from marshaling evidence to present a *Winfield* defense, and 2) because the trial court erred by denying his motion to suppress an impermissibly suggestive out-of-court identification procedure and by failing to preclude an in-court identification even the government did not believe prior to trial that Mr. Smith could reliably offer. Finally, even if Mr. Caesar's convictions are not reversed, one of two PFCV convictions must be vacated

[54] *Parks v. United States*, 627 A.2d 1, 7 (D.C. 1993) (quoting *Robinson v. United States*, 506 A.2d 572, 575 (D.C. 1986)).

because they merge under *Nixon*,[55] and resentencing is required because the court sentenced Mr. Caesar based on an erroneous belief that either the D.C. Code or the D.C. Voluntary Sentencing Guidelines indicated that sentences for ADW and PFCV "should" run consecutively to one another.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. CAESAR "ACTED IN SUCH A MANNER AS WOULD UNDER THE CIRCUMSTANCES PORTEND AN IMMEDIATE THREAT OF DANGER TO A PERSON OF REASONABLE SENSIBILITY," AS REQUIRED FOR INTENT-TO-FRIGHTEN ASSAULT.

a. Standard of Review.

This court reviews de novo the sufficiency of the evidence. *See, e.g.*, *Jones v. United States*, 293 A.3d 395, 399 (D.C. 2023) (citing *Nero v. United States*, 73 A.3d 153, 157 (D.C. 2013)). "Viewing the evidence, as [it] must, in the light most favorable to sustaining the factfinder's verdict, [this court] will overturn a conviction on insufficient proof grounds only if there was no evidence' adduced at trial 'upon which a reasonable mind could find guilt beyond a reasonable doubt.'" *Augustin v. United States*, 240 A.3d 816, 823 (D.C. 2020). "Yet if" this court's "review of the sufficiency of the evidence is deferential, it is not 'toothless,'" and this court "ha[s] an obligation to take seriously the requirement that the evidence in a criminal

[55] *Nixon v. United States*, 730 A.2d 145, 153 (D.C. 1999).

prosecution must be strong enough that a [factfinder] behaving rationally really could find it persuasive beyond a reasonable doubt." *Id.* at 824.

b. Mr. Caesar's Convictions Must Be Vacated Because the Evidence Was Insufficient to Prove Beyond a Reasonable Doub That Mr. Caesar "Acted in Such a Manner as Would Under the Circumstances Ported an Immediate Threat of Danger to a Person or Reasonable Sensibility."

Evidence sufficient to support a conviction for intent-to-frighten ADW requires proof,[56] as relevant here, that "the assailant acted in such a manner as would under the circumstances portend an immediate threat of danger to a person of reasonable sensibility." *Parks*, 627 A.2d at 7 (quoting *Robinson*, 506 A.2d at 575). While "application of the standard of 'apparent present ability' does not elevate the victim's subjective perception to an element of the crime of assault,"[57] and "[t]he test is not whether the victim experienced actual fear or had a subjective perception of fear,"[58] the circumstances as they appear to the complainant(s), or at least a (single) person witnessing the actions of the accused, are the focus of the inquiry. *See, e.g.*, *Kelly*, 281 A.3d at 615-16 (reviewing circumstances as they appeared to the complainant).[59]

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[56] As noted, *supra*, the United States disavowed any reliance on an attempted battery theory, proceeding only under an intent-to-frighten theory of ADW. 4/2/24 Tr. 93.
[57] *Anthony v. United States*, 361 A.2d 202, 206 (D.C. 1976).
[58] *Kelly v. United States*, 281 A.3d 610, 615 (D.C. 2022).
[59] While *Kelly* involved a robbery conviction, this court relied on the same "portend an immediate threat" test.

In *Parks*, the driver of a car (Parks), was convicted of ADW based on having "reach[ing] down under the front seat of the car and rais[ing] a gun to his knee[,] while [an officer] stood outside the door of the car unaware of this action." 627 A.2d at 6. Another officer "testified that while he was leaning into the car, he observed [Parks] grab the steering wheel with his left hand and place his left foot on the brake," and "in one continuous motion with his right hand: start the car, put it in gear, reach straight down his leg to the floor, retrieve a pistol from under the seat, lean to his right, and bring the gun back up in his hand," all without "t[aking] his eyes off of [the officer] who remained standing outside the driver's door." *Id.* at 3. Without examining in depth the events being witnessed by a person other than the object of the ADW,[60] focusing instead on the lack of requirement that the complainant subjectively experience fear, this court affirmed: "[a]ppellant's acts were of such a manner as would portend a threat to a reasonable person." *Id.* at 7.

In *Jones*, this court expanded on dicta in *Perez Hernandez* that—under a theory of assault not at issue in this case, nonsexual offensive touching—"[i]n an unusual case, th[e] third element[61] may have to be modified to say 'offended or

[60] "The rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994) (internal citation omitted).

[61] "[T]hat the touching offended the other person."

would have offended.'"[62] When finding the evidence sufficient to support the third element of this offense based on testimony that, employed at a daycare, Jones "pick[ed] up and kiss the [eight-month-old] child on the lips," this court relied both on the reaction to the kissing by a seven-year-old child who witnessed it—wiping the infant's mouth, describing the kiss as "nasty," and reporting it—and testimony from the infant's mother, who did not witness the kiss, that "she did not give consent for [Jones] to touch [the child] other than for a caregiving reason," and the absence of any evidence of a caregiving reasons. 293 A.3d at 400-01.

In both *Parks* and *Jones*, while not the victim of the offense, *a* witness observed the relevant events, and this court found that each witness's observations of relevant events satisfied the relevant element—in *Parks*, that "the [driver] acted in such a manner as would under the circumstances portend an immediate threat of danger to a person of reasonable sensibility," and in *Jones* that the touching would have offended the person. In the instant case, by contrast, no witness observed relevant events sufficient to permit finding beyond a reasonable doubt that Mr. Caesar "acted in such a manner as would under the circumstances portend an immediate threat of danger to a person of reasonable sensibility," with the complainants not observing a firearm and hearing noises described as gunshots while

[62] 286 A.3d 990, 1004 n.21 (D.C. 2022) (en banc).

driving on New York Avenue and Mr. Graham, as shown in video evidence, not seeing what, if anything, the suspect was firing at.

i. The Complainants Did Not See a Firearm.

The circumstances as they appeared to the complainants (or would have appeared to a reasonable person in the complainants' shoes) did not include seeing the suspect with a firearm at any time.[63] Instead, the complainants saw a man wearing a bag—consistently throughout the interaction[64]—who argued with Mr. Smith, and, viewed in a light most favorable to the United States, hit and kicked the car while on New York Avenue, while Ms. Bell, Mr. Smith, and the man continued to exchange words. The complainants likewise did not claim to have seen any object in the suspect's hand, a muzzle flash, or any other indication of a gun.[65]

ii. The Complainants Heard One Set of Loud Noises.

Approximately four seconds after the complainants began driving west on

[63] 3/28/24 Tr. 165 (Bell); 4/1/24 Tr. 143 (Smith).

[64] While the complainants initially denied that the suspect wore gloves at the outset, they later acknowledge this was false. Moreover, where the suspect is plainly shown wearing gloves at all times in GX7, and the test is objective, the complainants' earlier denial is not relevant.

[65] Ms. Bell testified that at the time of the interaction with the suspect, before any purported gunshots were heard, that the suspect "might have a gun… [b]ecause of the… little handbag that he has," 3/28/24 Tr. 71 but: 1) speculation that a person "might" have something is insufficient to provide proof beyond a reasonable doubt, and 2) Ms. Bell's perception was colored by her indisputably erroneous belief that the suspect did not have the bag until on the sidewalk of New York Avenue NE.

New York Avenue,[66] approximately five loud noises are heard, all within two seconds of one another. While the complainant's subjective perception is not an element of the offense, Ms. Bell described the noises as "gunshots,"[67] without explaining why, if at all, she believed at that time the noises were gunshots, testifying that she "did not realize the actual bullet holes… were in the back of the car" until returning to the McDonald's later, by which time police had arrived. 3/28/24 Tr. 85-86.[68] Mr. Smith testified that he heard what he thought were gunshots because "if anybody's heard a gun… it's pretty distinct" and claimed to have heard "the firearm go off, and… also… them hitting the back of my car." 4/1/24 Tr. 61. Mr. Smith was not asked which noises in GX7 he believed were gunshots and which the sound of "them" hitting the car and, perhaps more importantly, whether he had ever heard gunshots before.[69] Like Ms. Bell, Mr. Smith—with neither having called 911, let alone having any call admitted as evidence at rial—also appeared heavily influenced

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[66] GX7 4:05-4:09 (13:00:30-13:00:34).

[67] 3/28/24 Tr. 113.

[68] The much later realization about the nature of an act cannot salvage insufficient evidence where the inquiry requires consideration of whether the "assailant acted in such a manner *as would under the circumstances* portend an immediate threat of danger." *See, e.g.*, *Fleming v. United States*, 224 A.3d 213, 229-30 (D.C. 2020) (en banc) (quoting *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987) ("We have said that, '[i]f either the actus reus—the unlawful conduct—or the mens rea—the criminal intent—is missing at the time of the alleged offense, there can be no conviction. Reducing it to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state.'")).

[69] It is not at all clear that a reasonable person in the circumstances, the measure at issue for ADW, would have believed the noises to be gunshots.

by what he later saw, purported bullet holes in the back of the car. 4/1/24 Tr. 62 ("There was physical bullet holes in my car. I physically seen three at the time that I pulled over, and then I noticed the fourth as I went back to the scene.").

iii. Bus Driver Anthony Graham Could Not Have Seen What If Anything the Suspect Fired at.

Viewing the evidence in a light most favorable to the government, a reasonable juror might conclude that Mr. Graham, driving a bus eastbound on New York Avenue at roughly the time of the alleged offenses, who did not speak with police until months after the events in question, who acknowledged being "confused" about what he saw and where he saw it, who testified that he looked away "momentarily" after hearing "commotion," and who testified that he saw a man pull out "what [he] thought was maybe… a handgun[ ] and start[ ] firing at the car,"[70] saw a person firing a gun. However, where Mr. Graham—who did not testify that he looked in a mirror or turned around while driving—testified that when he heard "pop, pop" or "the sound of what appear[ed] to be a… firearm" before a car "took off,"[71] and where GX7, in evidence, does not depict any noises until roughly four seconds after the complainants' car began driving west on New York Avenue, at a time when either passing or past Mr. Graham's bus,[72] no reasonable juror could

[70] 3/28/24 Tr. 180.
[71] 3/28/24 Tr. 184-85.
[72] GX7 4:10

find beyond a reasonable doubt that Mr. Graham saw the suspect firing at a car.

Allowing the combination of the observations of Mr. Graham and the complainants to satisfy the requirement of showing that "the assailant acted in such a manner as would under the circumstances portend an immediate threat of danger to a person of reasonable sensibility," an approach this court does not appear to have applied, would stretch criminal liability far beyond any reasonable bounds and allow for dozens of ADW convictions on the facts of this case, for any driver in the area on New York Avenue, regardless of whether he or she heard the purported gunshots. Because the evidence was insufficient to support Mr. Caesar's convictions for ADW, his associated PFCV convictions must also be vacated.

II. THE TRIAL COURT ERRED BY DECLINING TO ORDER THE UNITED STATES TO PRODUCE NAMES OF WITNESSES TO A SHOOTING COMMITTED BY A PERSON CONNECTED TO AN APARTMENT IN WHICH A FIREARM LINKED BY NIBIN TO THE SHOOTING AT ISSUE IN THIS CASE WAS FOUND, PREVENTING MR. CAESAR FROM MARSHALING EVIDENCE NECESSARY TO PRESENT A *WINFIELD* DEFENSE.

a. Standard of Review.

"This court review[s] a trial court's decision on whether to conduct an *in camera* inspection of alleged *Brady* material for an "abuse of discretion"[73] but the determination of whether "whether there has been a *Brady* violation." *Zanders v.*

[73] *Beatty v. United States*, 956 A.2d 52 (D.C. 2008) (quoting *Smith v. United States*, 665 A.2d 962, 969 (D.C. 1995)).

United States, 999 A.2d 149 (D.C. 2010). "[I]t is necessarily such an abuse for the trial court to employ 'incorrect legal standards.'" *In re C.A.*, 186 A.3d 118, 121 (D.C. 2018) (quoting *Mayhand v. United States*, 127 A.3d 1198, 1205 (D.C. 2015)).

b. The Trial Court Erred by Failing to Order Disclosure of the Requested *Brady* Information and Materials.

"Under *Brady v. Maryland*, 373 U.S. 83 (1963), the government has a constitutionally mandated obligation to disclose to the defense, prior to trial, information in the government's actual or constructive possession that is favorable and material." *Vaughn v. United States*, 93 A.3d 1237, 1244 (D.C. 2014). Favorable information is 'of a kind that would suggest to any prosecutor that the defense would want to know about it' because it helps the defense." *Id.* (citing *Miller v. United States*, 14 A.3d 1094, 1110 (D.C. 2011)). "[T]he critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel, who has a different perspective and interest from that of the police or prosecutor." *Miller*, 14 A.3d at 1110 (quoting *Zanders*, 999 A.2d at 164).

As discussed, *supra*, after a February 2023 shooting, which related to purchasing or wishing to purchase a small quantity of marijuana and which occurred, about 1.5 miles from the charged offenses in this case, police executed a search warrant, recovering a gun linked by NIBIN to the shooting in this case. GPS data from the Pretrial Services Agency demonstrated that Mr. Caesar could not have committed the February 2023 shooting. R. 281 (PDF) (Mtn Compel p. 3). A second

man, a suspect in the February 2023 shooting was linked to the same apartment. R. 286 (PDF) (Mtn Compel p. 8). The suspect in the February 2023 shooting, so far as the record reveals, was never arrested, and the occupant, Zion Ray-Valentine implausibly claimed to have found the gun in a trash can. R. 280-81 (PDF) (Mtn Compel p. 3). In order to investigate whether the February 2023 shooting suspect would allow for presentation of a *Winfield* defense in this case, Mr. Caesar moved to compel production of the name February 2023 shooting suspect, whether the suspect had been an informant, and body-worn camera footage from execution of the search warrant, all materials and information "'of a kind that would suggest to any prosecutor that the defense would want to know about it." The trial court denied the motion, conflating the ultimate standard—relevance—governing whether the defense may present a *Winfield* defense with the standard governing pretrial disclosure of *Brady* material.[74]

> There has to be some nexus between that third party that have, I think the language is a motive and a practical opportunity, to actually even commit the offense.

3/19/24 Tr. 10.

Whether reviewed de novo or for abuse of discretion, this was error, as the requested

[74] *See, e.g.*, *Vaughn*, 93 A.3d at 1262 n.29 ("The materiality assessment this court conducts on appellate review is necessarily different from the materiality assessment the government can make pretrial when assessing its *Brady* obligations, and we reiterate that prior to trial, the government must disclose information that is "arguably" material.") (collecting cases).

materials were at least "arguably material," and the trial court necessarily abused its discretion by applying the test for admissibility under *Winfield*, not then at issue. Unlike the facts of *Zanders*, in which this court found "no reasonable probability that counsel could have successfully countered the strong evidence of [Zanders'] guilt presented at trial[,]… [e]ven though it [could not] completely discount the possibility that with early and full disclosure, defense counsel might have been better equipped to develop a *Winfield* defense" based on "the trial court's findings in [a] post-trial hearing and defense counsel's own actions once the information was disclosed," the government never disclosed the requested information and materials to Mr. Caesar in the first instance. Unlike the facts of *Young v. United States*, 63 A.3d 1033, 1057 (D.C. 2013), in which the defense request—conducting a DNA search of a database containing "roughly fourteen thousand times the number" of samples as another database, the search of which took half an hour—would have been extraordinarily burdensome, the requested materials in this case—the name of a suspect, whether the suspect had been an informant, and body-worn camera footage—all were possessed by the government. The government did not nor could it reasonably have asserted that production would have been burdensome.

An error of constitutional magnitude in the trial court requires reversal of a criminal conviction on appeal unless the government establishes that the error was harmless beyond a reasonable doubt." *Burns v. United States*, 235 A.3d 758, 791

(D.C. 2020) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Said another way, Mr. Caesar's "convictions therefore must be reversed unless they were 'surely unattributable'" to trial court's erroneous denial of the motion,[75] a burden the United States will not be able to carry, particularly in what was far from an overwhelming case for the government, with no gun presented at trial, no forensic evidence linking Mr. Caesar to the alleged offenses, and the jury acquitting Mr. Caesar of more than half of the charged offenses after deliberating for close to three day.

III. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS AN OUT-OF-COURT IDENTIFICATION BY THE COMPLAINANT THAT THE UNITED STATES ULTIMATELY CONCEDED AND THE TRIAL COURT FOUND WAS IMPERMISSIBLY SUGGESTIVE—A MUG SHOT CONFIRMATION PHOTO SHOWN TO A COMPLETE STRANGER WHO INTERACTED WITH THE SUSPECT FOR LESS THAN THREE MINUTES—AND BY PERMITTING THE COMPLAINANT TO IDENTIFY MR. CAESAR IN COURT.

a. Standard of Review.

"[S]uggestivity [of an identification] and reliability are mixed questions of law and fact," with this court "review[ing] mixed questions of law and fact under [its] usual deferential standard of review for factual findings… and [applying de novo review to the ultimate legal conclusions based on those facts." *Young v. United States*, 305 A.3d 402, 435 (D.C. 2023) (quoting *Hilton v. United States*, 250 A.3d 1061, 1068 (D.C. 2021)).

[75] *Id.*

b. The Trial Court Erred by Relying on Its Own Comparison of Mr. Caesar and a Man Depicted in Video Footage Not Used in the Identification Procedure.

"Asking a witness," as occurred in this case, "whether they can identify a standalone suspect—rather than picking him out from a lineup or photo array—is among the most suggestive and objectionable forms of pretrial identification because of the strong implication that the individual has been singled out as the suspect by law enforcement." *Morales v. United States*, 248 A.3d 161, 172-73 (D.C. 2021). If, as here, an identification procedure is impermissibly suggestive—"courts must proceed to the second step of determining whether 'the totality of circumstances' nonetheless demonstrate the in-court identification to be 'reliable,' and thus permissible, despite that suggestivity." *Id.* at 172 (quoting *Biggers*, 409 U.S. at 199)). "[R]eliability review 'may not include the consideration of evidence of the defendant's guilt external to the identification.'" *Id.* (quoting *Long v. United States*, 156 A.3d 698, 708 (D.C. 2017)). The reliability analysis "requires weighing the independent (and non-suggestive) basis for the identification against 'the corrupting effect of the suggestiv[ity]' itself"[76] and "is similar to the independent source question posed in [*United States v. Wade*, 388 U.S. 218 (1967)]." *Id.* (citing *Patterson v. United States*, 384 A.2d 663, 666 n.2 (D.C. 1978)). Factors relevant to the analysis include "[1] the opportunity of the witness to view the criminal at the

[76] *Id.* (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation." *Id.* (quoting *Biggers*, 409 U.S. at 199-200).

Where the trial court relied on its own comparison of Mr. Caesar to a video depicted in dash camera footage depicting the suspect[77]—"evidence of [his] guilt external to the identification"—it necessarily erred in denying his motion to suppress the out-of-court identification of Mr. Caesar by Mr. Smith. While the trial court later sought to walk this statement back,[78] it is difficult if not impossible to square the latter with its statement just moments earlier.

c. The Government Failed to Carry Its Burden of Proving That the Results of the Impermissibly Suggestive Identification Procedure Were Nonetheless Reliable.

"The first, and what is often described as the most important factor in determining an identification's reliability, is… opportunity to observe the suspect at the scene." *Morales*, 248 A.3d at 177 (internal citations omitted). Here, Mr. Smith interacted with the suspect for at most two minutes, including periods of time when the two did not face one another, and indisputably incorrectly described aspects of

[77] 3/27/24 Tr. 45 ("I could observe the… dash cam on Mr. Smith's car, and it seemed evident to the Court, just seeing that video where Mr. Caesar walks in front of the car, that it is apparent that it's Mr. Caesar. So that supports also, the I think the reliability of the complainant's description.").
[78] 3/27 Tr. 46 ("I'm not relying on that in finding that it is reliable.").

the suspect's appearance, alleging that the suspect did not wear gloves or a bag during their encounter at the fence. Although Mr. Smith purportedly expressed confidence, this court "would still give little or no weight to this factor where the certainty was expressed only after the suggestive mugshot display, and would seem to be a byproduct of it." *Id.* at 179. Weaker still than the facts of the officer's "description of the suspect he chased" in *Morales*—"[1] a Hispanic male, [2] a beanie on his head, [3] tattoos on his face and neck, and [4] a jacket tied around his waist," Mr. Smith described the suspect, at most, as a black male wearing all black with dreads and "six foot."[79] As in *Morales*, where Mr. Caesar was not arrested until months later and there was no evidence of the clothes he wore, the description of the clothing was irrelevant.

d. The Trial Court Erred by Failing to Order the United States to Instruct Complainant Jeffrey Smith, Whom the United States Acknowledged It Did Not Believe Could Reliably Identify Mr. Caesar, Not to Offer Any In-Court Identification of Mr. Caesar and by Failing to Strike Mr. Smith's Volunteered Identification.

Because the trial court erred by failing to suppress the out-of-court identification and by failing to preclude Mr. Smith from offering an in-court identification even the government did not think he could reliably offer,[80] "[t]he

[79] The government did not introduce evidence of Mr. Caesar's height during the motions hearing. 3/27/24 Tr.

[80] "[T]he [g]overnment's perception of, in terms of prepping Mr. Smith is that we don't think he would be able to ID him." 3/27/24 Tr. 48.

government bears the burden of demonstrating that the improper admission of [Mr. Smith's] in-court identification was harmless beyond a reasonable doubt,"[81] a burden it will not be able to carry where neither Ms. Bell nor Mr. Graham identified Mr. Caesar as the suspect, where no forensic evidence linked Mr. Caesar to the alleged offenses, and where no gun was presented as evidence in the case.

IV. MR. CAESAR'S PFCV CONVICTIONS MERGE WHERE, BASED ON SHOOTING WITH A SINGLE FIREARM WITHOUT INTERRUPTION AT A VEHICLE OCCUPIED BY BOTH COMPLAINANTS, "THEY ARISE OUT OF [HIS] UNINTERRUPTED POSSESSION OF A SINGLE WEAPON DURING A SINGLE ACT OF VIOLENCE."

a. Standard of Review.

This court "review[s] merger issues de novo." *In re Z.B.*, 131 A.3d 351, 354 (D.C. 2016) (citing *Robinson v. United States*, 50 A.3d 508, 532 (D.C. 2012)).

b. Mr. Caesar's PFCV Convictions Merge.

"The Double Jeopardy Clause of the Fifth Amendment 'protects against multiple punishments for the same offense.'" *Id.* (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). Although "[t]he general rule when… convictions for… predicate crimes do not merge is that the associated PFCV convictions do not merge,"[82] this court has "fashioned a 'limited exception' to this general rule"—

[81] *Morales*, 248 A.3d at 182.
[82] *Matthews*, 892 A.2d at 1106 (citing *Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000)).

"h[o]ld[ing] in *Nixon*… that multiple PFCV convictions will merge, even if the predicate felony offenses do not merge, if they arise out of a defendant's uninterrupted possession of a single weapon during a single act of violence." *Id.* (quoting *Stevenson*, 760 A.2d at 1036). The test for determining "whether two PFCV convictions are based on a single act of violence or distinct acts" is the "so-called 'fresh impulse' or 'fork-in-the-road' test: 'If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment.'" *Id.* (quoting *Stevenson*, 760 A.2d at 1037).

In *West v. United States*, 866 A.2d 74, 84 (D.C. 2005), this court found that two PFCV convictions related to offenses against different complainants—"Wade was taken to D.C. General Hospital and treated for two gunshot wounds to her left leg. King was killed, an autopsy revealing he was shot four times in the chest"—merged because "multiple counts of PFCV merge when only one gun was used and the incidents were not separated by time and location." (citing *Nixon*, 730 A.2d at 153). Indeed, as this court observed in *Campos–Alvarez v. United States*, 16 A.3d 954, 963 (D.C. 2011), *Nixon* itself involved "the paradigmatic case for appropriate merger of PFCV convictions… sho[oting] at a single target—an automobile with several occupants, resulting in convictions for three different types of assault and three corresponding PFCV convictions (which merged)."

Assuming, *arguendo*, that Mr. Caesar's convictions are not vacated or reversed, where his PFCV convictions were based on "sh[ooting] at a single target—an automobile with several occupants, resulting in convictions for [two] different [counts] of assault and [two] corresponding PFCV convictions" one of his convictions for PFCV—count two or four—must therefore be vacated.

V. RESENTENCING IS REQUIRED WHERE THE TRIAL COURT ERRONEOUSLY BELIEVED THAT "THE STATUTORY SCHEME CONTEMPLATES THAT" SENTENCES FOR ADW "SHOULD BE CONSECUTIVE" TO THOSE FOR PFCV.

a. Standard of Review.

The standard by which [this court] review[s] sentencing procedures varies based on the measure of discretion given to the court under the circumstances. *Bradley v. District of Columbia*, 107 A.3d 586, 595 (D.C. 2015). This court appears to review de novo whether a sentence was imposed in an illegal manner, consistent with well-settled principles of reviewing issues of law de novo. *See, e.g.*, *Collins v. United States*, 631 A.2d 48, 49-51 (D.C. 1993) (reviewing meaning of D.C. Code § 23-103a(b) (1989) regarding consideration of victim impact statements).

b. Neither the D.C. Code Nor the Voluntary Sentencing Guidelines Indicate That Sentences for ADW or Other Crimes of Violence "Should" Run Consecutively to Sentences for Associated PFCV Counts.

"[A] sentence imposed in an illegal manner," contrasted with an illegal sentence, "is one that reflects defects in the process or proceedings prior to the

imposition of the sentence." *Ruffin v. United States*, 25 A.3d 1 (D.C. 2011). While, "ordinarily, 'this court does not review sentences for substantive reasonableness,'"[83] "[t]his does not mean, of course, that the sentencing process… is immune from appellate scrutiny." *Id.* (quoting *In re L.J.*, 546 A.2d 429, 434–35 (D.C. 1988)). Thus, "appellate review of the sentencing process is in order where, for example, it is contended that the sentencing judge relied on improper or inaccurate information, that the defendant was not represented by counsel at sentencing, that the prosecutor violated his agreement not to allocute at sentencing[,] that a stiffer sentence was imposed because a defendant asserted his innocence at trial," or "where it is alleged that the judge totally failed to exercise his discretion in imposing sentence." *Id.* Likewise where the sentencing court commits an error of law. *See, e.g.*, *Cook v. United States*, 932 A.2d 506, 509 (D.C. 2007) (Schwelb, J., concurring).

Neither the ADW[84] nor PFCV[85] statute nor any provision of the Voluntary

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[83] *Bradley v. District of Columbia*, 107 A.3d 586, 595 (D.C. 2015) (quoting *Saunders v. United States*, 975 A.2d 165, 167 (D.C. 2009)).

[84] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[85] D.C. Code § 22-4504(b) ("Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.").

Sentencing Guidelines[86] indicate, as the trial court stated when sentencing Mr. Caesar that sentences for ADW "should" run consecutive to PFCV counts associated with the same.[87] This error of law requires resentencing for the trial court to properly exercise it discretion when sentencing Mr. Caesar.

Respectfully submitted,

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[86] District of Columbia Voluntary Sentencing Guidelines Manual § 6.1 (Sept. 2023) ("Only one crime of violence per victim per event must be sentenced consecutively to other counts.").

[87] 7/10/24 Tr. 32-33 ("The sentencing guidelines contemplate that because there are two separate victims at issue here, that those would run consecutively to one another. … But given the way the guidelines contemplate that I should run those sentences, I'm going to run those two sentences on Counts 1 and 3 consecutively to one another. And I think the statutory scheme contemplates that that should be consecutive to the possession of a firearm during a crime of violence. So the sentences on each count will run consecutively.").

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was electronically served upon the United States Attorney's Office for the District of Columbia, this 18th day of March, 2025.

/s/ Adrian Madsen
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