2011 WL 11070679 (D.C.) (Appellate Brief)
District of Columbia Court of Appeals.

Otis JACKSON, Appellant,
v.
UNITED STATES, Appellee.

No. 07-CF-1216.
April 29, 2011.

Appeal from the Superior Court of the District of Columbia
Criminal Division
F7251-03

Brief for Appellant

Deborah A. Persico, PLLC, Attorney at Law, (Bar No. 415210), 643 South Washington Street, Alexandria VA 22314, (202) 244-7127, Attorney for Appellant, (Appointed by the Court).

***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

CASES

*vi ISSUES PRESENTED

1. Whether the cumulative effect of the trial court's failure to allow two separate juries to hear the trial's bifurcated merits and insanity phases and its implementation of prejudicial procedures negated the purpose of bifurcation of the phases was fatally prejudicial to appellant's defenses of self-defense and insanity.

2. Whether the trial court's erroneous application of Bethea denied appellant's constitutional rights to due process and a fair trial, where the Supreme Court recognizes distinctions between expert observation evidence and diminished capacity evidence and Bethea does not address or disallow observation evidence.

3. Whether the trial court violated appellant's constitutional rights to present a defense, due process and a fair trial when it prevented appellant's expert from expressing his opinion as to whether appellant was criminally responsible.

4. Whether the trial court erred in refusing to allow appellant to present rebuttal evidence in the insanity phase.

5. Whether appellant's convictions for CPWL, UF, UA and PPW must be vacated because they violate his Second Amendment right to keep and bear arms for purpose of self-defense in the home.

*1 STATEMENT OF THE CASE

On August 25, 2004 appellant was charged as follows in an eleven-Count indictment: Count I - Threatening to Injure/Kidnap a Person (Otis Jackson, Sr.), DC Code Section 22-1810; Count II - Assault with a Dangerous Weapon (“ADW”)(Otis Jackson, Sr.), DC Code Section 22-402; Count III - Possession of a Firearm During a Crime of Violence (“PFCV”)(ADW, Otis Jackson, Sr.), DC Code Section 22-4504(b); Count IV- First Degree Murder While Armed (Premeditated)(Carlton Jackson), DC Code Sections 22-2101,4502; Count V-PFCV (First Degree Murder), DC Code Section 22-4504(b); Count VI - Carrying a Pistol Without a License (“CPWL”), DC Code Section 22-4514(b); Count VII Possession of a Prohibited Weapon (“PPW”),DC Code Section 22-4514(b); Count VIII- Possession of Unregistered Firearm (“UF”) (pistol), DC Code Section 7-2502.01; Count IX-UF (shotgun), DC Code Section 7-2502.01; Count X- Unlawful Possession of Ammunition (“UA”), DC Code Section 7-2506.01(3); Count XI-Arson, DC Code Section 22-301. R. 12.

After undergoing a court-ordered psychiatric evaluation, appellant was determined to be competent to stand trial. After hearing arguments on January 22 and January 26, 2007, the Honorable Neil E. Kravitz denied appellant's request for bifurcated trials

before separate juries on the merits and on the defense of insanity. R. 63. Over the government's opposition, however, the court granted appellant's request to present an insanity defense. R. 71.

Appellant moved for reconsideration of bifurcated trials before separate juries. R. 83. The government opposed the motion. R. 84. After hearings on February 12, February 13, April 23 and April 24, 2007, Judge Kravitz ordered bifurcated trials but with a single jury. R. 93. Appellant's ***2** jury trial began on April 25, 2007. On May 14, 2007 the jury found him guilty as charged on all counts of the indictment. R. 100. He proceeded with the insanity phase of the trial. On May 23, 2007, the jury returned its verdict of guilty on all charges.

Appellant appeared before Judge Kravitz for sentencing on October 26, 2007. He was sentenced as follows: First degree murder- 30 years mandatory minimum; threats- 24 months; ADW-36 months; PFCV (ADW)-60 months mandatory minimum; PFCV (murder)-60 months, mandatory minimum; CPWL- 12 months; PPW- 12 months; UF (pistol)- 12 months; UF (shotgun)- 12 months; UA- 12 months; Arson- 24 months. The sentences on the three offenses related to appellant's father (ADW, PFCV, threats) are to run concurrently with each other. The sentences on the remaining counts are to run concurrently with each other but consecutively to Counts 1, 2 and 3. The total sentence, therefore, is 420 months (35 years), followed by five years of supervised release. R. 10. Appellant filed a timely notice of appeal on October 29, 2007. R. 122.

STATEMENT OF FACTS

Appellant was charged with the fatal shooting of his brother, Carlton Jackson, the assault of his father, Otis Jackson, Sr., and arson in the Jackson home on November 20, 2003. During the merits phase of the trial, appellant denied the assault and the arson. He admitted that he shot his brother but testified that he acted in self-defense against a demon that had possessed his brother and was attacking him. The jury found him guilty as charged. Appellant then presented an insanity defense based on the diagnosis that he was suffering from schizotypal personality disorder and experienced a psychotic episode at the time of the charged incident. The jury found that he was criminally responsible.

***3 I Merits Phase**

A. The Government's Case.

At the time of the charged incidents, appellant lived at home with his **elderly** father, Otis Jackson, Sr., his brother, Carlton, and his step-brother, Leonard Greene. Appellant was the primary care giver for his father in the fall of 2003 (4/30/07: 173) (Ottis Jackson, Sr); (4/30/07: 91-93)(Greene). Leonard Greene and Sandra Jackson (Carlton's fiancee) testified that appellant and Carlton were not getting along in the fall of 2003 (4/26/07: 69, 70)(Greene); (4/30/07: 141)(S. Jackson). Appellant and Carlton had a physical altercation in September and had both obtained civil protection orders ("CPO")(4/26/07: 70). Several family members had heard appellant threaten to kill Carlton on several occasions prior to the fatal shooting (4/30/07: 71) (Greene); (4/30/07:144-46) (S. Jackson); (4/30/07: 116-117)(Sheila Watkins). According to S. Jackson, on the day of the shooting appellant also threatened to burn down the house. Id at 146. Neither Greene nor Watkins ever heard Carlton threaten appellant (4/30/07:74)(Greene); (4/30/07:116-117)(Watkins).

Greene and Watkins had seen appellant with a small handgun sometime prior to the shooting (4/30/07: 72); (4/30/07:117) (Watkins). Green never saw appellant with a shotgun or rifle but Watkins had (4/30/07:73)(Greene); (4/30/07:117) (Watkins). Neither had ever seen Carlton with a weapon (4/30/07: 73)(Greene); (4/30/07: 118)(Watkins).

Greene testified that appellant never mentioned in the months prior to November 2003 that Carlton was inhabited by a demon or that he was a demon (4/30/07: 79). Greene had seen appellant with a book called"The New Avatar Power" on one occasion and appellant told Greene twice that he worshiped the devil. Id at 79-80.

***4** Otis Jackson, Sr. was eating breakfast in the dining room the morning of the shooting when Carlton called to him from upstairs and said that appellant had a gun and was going to hurt him (4/30/07: 161). Jackson went upstairs and saw appellant in the hallway in front of the bathroom door. Id at 162. Jackson did not recall at trial what appellant was holding but he testified that appellant threatened to shoot him if he did not go back downstairs. Id. Jackson had told police that appellant "had a gun in one hand" and what "might have been the hammer." Id at 165. Jackson had told the grand jury that "[Appellant] apparently pointed the gun, I suppose." Id at 169-70. Jackson left the house, went to speak with his neighbor, then tried to get back inside his house. The door was locked. Jackson heard two gunshots.

Gail Felicia Thrower, a neighbor of the Jackson family, testified that around 10:00 a.m. on November 20,2003, Otis Jackson, Sr., walked toward her house (5/1/07: 270). He was "[n]ervous, scared, glassy-eyed" and shaking. Id at 270-71. He was dressed in pajamas and tennis shoes with no laces. Id at 271. Thrower asked Jackson what was wrong. Jackson said, "He killed him. He killed him dead" and "he hit him with a hammer." Id at 272. Jackson told Thrower that he was eating cereal and Carlton called for help, that he went upstairs and appellant pointed a gun at him and told him if he did not get out of there, he would shoot him.

Later, Thrower saw appellant come out of his house and walk across the street. Id at 274. He then "just walked up and down the street yelling." Thrower heard him say "yeah, I did it; yeah, I did it; Id do it again." Id at 275. Then he ran back across the street and went back inside the house.

According to appellant's cousin, **Sheila Watkins,** after appellant's arrest he told her that ***5** he had overheard Carlton talking and laughing with his attorney that he was going to win the court case, that he decided he was going to get rid of Carlton, that he went into the bathroom and hit Carlton in the head with a hammer, and that he shot Carlton in the head (4/30/07: 118). Appellant did not say that Carlton attacked him first. Id at 119. According to Watkins, at no point in 2003 did appellant ever seem out of touch with reality or as if he did not understand her.

Marie-Lydie Y. Pierre-Louis, MD, the Chief DC Medical Examiner who conducted the autopsy on Carlton Jackson, confirmed the cause of death as homicide from multiple shotgun and gunshot wounds (4/27/07: 32, 35). Jackson had suffered a total of ten shotgun wounds in the front torso, back of the legs and back of the right hand. Id at 37-53. Most of the were made from a range of three to four feet. Id at 50. The decedent also suffered three gunshot wounds - two to the right ear lobe and one to the left thigh. Id at 53-55. Those shots were fired from a distance of between six inches and three feet. *Id* at 55-56. The examiner opined that it is unlikely that someone who had endured those gunshots to the head could have descended a flight of stairs. Id at 58. The decedent's tee shirt smelled of gasoline. Id at 37. There were several blunt impact injuries, including lacerations on the right side of his head, body and ear lobe, and abrasions of the knee. *Id* at 38-39. The head injury could have been caused by a hammer but Pierre-Louis could not confirm this. *Id* at 39.

Pierre-Louis did not know the sequence of the wounds that occurred. Id at 41, 61. She could not tell the position of the body at the time each shot was fired. Id at 63. As to the leg wounds, she agreed that even if an artery had been severed, that would not mean that the person was not ambulatory. Id at 64. She agreed that the wounds to the abdomen also would not have ***6** caused immediate death and the person would still be ambulatory. Id at 65.

When **MPD Detective Steven Dekelbaum** arrived at the home, he discovered Carlton's body in the doorway and small fires inside the house (4/27/07: 81-82). He extinguished the fires. Id at 82-83. Dekelbaum smelled gasoline in the bedroom and on the whole top floor. Id at 84. He found a shotgun on the bed and loose ammo and shell casings lying around. DNA profiles on appellant's clothing matched the DNA profile from Carlton's sample (4/27/07: 112, 116-117) (Colombo).

MPD Officer Karolyn Kelly had responded to the Jackson home approximately 7 or 8 times in 2003 (4/27/07: 122). She recalled Carlton and appellant arguing. Following appellant's arrest, Kelley transported him to the police station (4/30/07: 20). She did not observe any injuries on appellant or blood on him or his clothing. He did not appear to have any difficulty understanding what was being asked of him or following directions. Id at 21.

On cross-examination, Kelley testified that appellant was handcuffed inside a police vehicle when she arrived and there was nothing remarkable about his demeanor. Id at 23. He was not crying, dizzy or complaining of pain in his head. On re-direct, however, she suddenly claimed that "[h]e was yelling, he was frowning, he was angry." Id at 31.

MPD Officer John Allie, an evidence technician, recovered fingerprints from the shotgun and ammunition seized (4/30/07: 46-47, 50-51). Ruby Brown, MPD fingerprint specialist, concluded that they did not match those of the decedent but that a palm print on the left side of the shotgun and a middle finger print on the right side belonged to appellant (4/30/07: 80-83).

As MPD Sergeant John Rowlands arrived at the Jackson home on November 20, 2003, he ***7** saw appellant running out in the street, then running back into the Jackson home (4/30/07: 93). Rowlands exited his vehicle and knelt near a wall in front of the house with his service pistol out. Id at 94. Appellant came back outside. When appellant saw Rowlands, Rowlands told him to put his hands up. Id at 95. Appellant complied. Rowlands asked him to lift his shirt, which he did. Appellant told Rowlands that he did not have anything in his pockets, then pulled his pockets inside out. A cigarette lighter fell on the sidewalk where he was standing. Rowlands handcuffed appellant. Id at 97. Rowlands smelled gas fumes from the house and saw a cloud coming out of the doorway. According to Rowlands, "it wasn't like a cloud from smoke. It was kind of hard to describe. I've never seen anything like it before. It guess it would be a vaporizing like cloud." Id. According to Rowlands, appellant had no physical injuries and no blood on him. Id at 98. Appellant was very cooperative and did not have difficulty understanding Rowlands.

Sandra McCatty, MD, examined appellant at approximately 3:00 p.m. on November 20, 2003 at Greater Southeast Hospital (5/1/07: 190). Appellant complained of dizziness and back pain and said he had been involved in an altercation and had fallen down a flight of steps. Id at 193-94. Upon examining appellant, McCatty did not see bruising or any physical injuries. She ordered a head CT scan, which was normal. She discharged him with a prescription for motrin. Id at 194-95. On cross-examination, McCatty confirmed that she had circled a number of ailments that appellant had reported, including tingling in his right arm, nausea, blood loss, racing heart, chest pain that he had for one week, fevers and chills, trouble breathing, and diarrhea. Id at 196-98.

MPD Officer Luciano Morales, a firearms examiner, found the shotgun recovered to be in "fireable condition." (5/1/07: 312, 315). The barrel had been sawed off. Id at 316-17. Morales ***8** also test fired the .22 caliber semiautomatic weapon recovered and found it to be operable. Id at 322-23. The parties stipulated that on November 20, 2003, Carlton Jackson's body was transported from 2335 14th Street NE to the DC Medical Examiner's Office (4/26/07: 25).

The parties stipulated that Government Exhibit 120 was a 911 call placed by Carlton Jackson (4/27/07: 79-80). The tape recording was played in open court. [1]

B. The Defense.

Appellant, Otis Jackson, Jr., testified that he was born with a "heightened sense of spirituality" (5/7/07:112). He described it like "having a sixth sense." Id. at 112. At the age of 13, he began reading "The Miracle of the New Avatar Power." Id at 114. He read the book "over and over every day," and the more he read it, the more he "wanted to put into practice that which the book advertised." *Id* at 115. He and his brother tried to "conjure up" new minibikes using the rituals in the book but they were not successful. *Id* at 116. He continued to read the book and learn from it as he got older. *Id* at 117.

Jackson described incantations, rituals and spells he practiced prior to November 20,2003. He also described chants that open the "spiritual vortex to the other side." Id at 118. The book instructs all users to be a "one person secret society" and not to broadcast what they are doing. Id at 119. He showed his brother Leonard the book in 1995 because that was the year his mother died and he was seeking advice about "the dark side." *Id* at 120.

***9** In 1995, appellant received a "vision" from the "entities" which he described as "Avatars," also known as "fallen angels" who had left with Lucifer when he was cast out of heaven. Id at 124. The book "captures a way to tap into their energy, their intervention, their spiritual vortex..." The purpose of the rituals was "gaining physical and mental strength," which appellant testified he was losing because he was taking drugs at the time.

On Halloween of 2002, while he was performing a ritual alone in his bedroom, he opened a spiritual vortex through which an entity entered. He knew this is what happened because all of a sudden the candles he used in the rituals "were blown out" and he felt a chill come through the room. Id at 138. This was not a normal occurrence during his rituals. The following day, during another ritual, the entities confirmed to him that a low level demon had come through the vortex by accident. *Id* at 139.

Low level demons, appellant explained, live in hell and are at the bottom of the hierarchy of entities from the dark side. *Id* at 140. The entities told him that the demon who had come through the vortex was a "bedeviling demon," one who causes torment in human beings. He believed he saw evidence of the demon in his brother, Carlton, every day from November 1, 2002 until November 20, 2003. *Id.* at 142.

Immediately after Halloween 2002, appellant tried to perform rituals to reverse the accident and to send back the demon to the other side. *Id* at 143. His attempts only made the demon more diabolical. *Id* at 143-44. He obtained holy water from a church and tried to sprinkle ***10** it on his brother but it had no effect. *Id* at 145. [2] Appellant testified that the demon made his brother do bad things, like bring women to the house, have sex with women in the living room, and make false phone calls to police that appellant had hit him. Id at 150-153.

By the fall of 2003, appellant was at a "heightened level" of contact with the "entities." Id at 130. He was feeling despair and depression because he had just lost twin boys when his girlfriend had a miscarriage. Also in the fall of 2003, the demon became angrier. Id at 153. The demon influenced Carlton to call 911 to torment appellant and their father. Carlton would not participate in any family activities. On October 31, 2003, appellant performed a ritual for four and a half hours in an attempt to send the demon back where it came from, but he failed. Carlton cussed and hollered and threatened appellant. Id at 154. According to appellant, this behavior was "constant, continuous over a period from September of 2003" until the shooting incident. Id at 154.

Through rituals he performed, the entities told appellant what he needed to do to protect himself. *Id* at 155. By the beginning of November 2003, Carlton's demon "had become enraged." *Id* at 157. "[A]ll hell broke loose in the household, and the threats escalated." Carlton "highjacked" his father's **financial** accounts and withdrew his retirement money. The demon was influencing Carlton because it was not in Carlton's nature to do these things. *Id* at 161. Appellant believed that Carlton argued with the demon at times because he heard Carlton in his room ***11** "ranting and raving" with himself. I*d* at 163.

Appellant denied that he ever threatened Carlton. *Id a*t 165. Although they had verbal confrontations, "[t]he element of inflicting death on him... was unfair in the context that it wasn't my brother, it was the entity that needed to be banished or dissolved." When asked by defense counsel if he intended to kill Carlton on November 20, 2003, appellant responded, "Carlton intended [to kill] me..." *Id* at 166. Carlton was enraged because he had been denied his request for a CPO in September 2003. On November 7, 2003, appellant requested a CPO due to Carlton's escalating violence and hostility toward appellant and his father. *Id* at 175. The hearing was scheduled for November 21, 2003.

On November 20, 2003, appellant heard Carlton's voice in the bathroom. Id at 176. Appellant went downstairs to help his father with his medication, and he purposely avoided Carlton. Id at 178. When Carlton left the bathroom and went to his bedroom, appellant went upstairs to the bathroom. Id at 181. Appellant heard Carlton come out of his bedroom. Appellant "felt a chill." As Carlton walked past the bathroom, he looked at appellant and they made eye contact. That is when appellant saw the demon. Carlton's "eyes were black, his face had an expression that could best be described as without any love. There was nothing there." Carlton continued on without saying anything and walked into his father's bedroom.

As appellant left the bathroom, Carlton confronted him about the hearing. *Id* at 182. Carlton was enraged. *Id* at 183. He wanted appellant to cancel the hearing. Appellant said no, and Carlton started cussing, shouting and spitting. *Id* at 186. Appellant was afraid.

Carlton went to his room and came back out with a silver pistol. Id at 187. That was the ***12** first time appellant had seen a physical manifestation of the demon in Carlton (5/8/07: 208.) Appellant felt overwhelming fear. Id at 210. He heard Carlton speak in the demon's voice-"shrieky," "escalating loud anger," and "high pitch." Id at 212. Carlton pointed the gun at appellant and threatened to kill him. Id at 215. He told appellant, "I'm going to have your soul."

Appellant grabbed Carlton's gun and they struggled. Id at 220. Appellant hollered to his father to help him, that Carlton had a gun. Id at 221. His father started up the steps and appellant told him that Carlton was trying to kill them and to go to the neighbor's and call the police. Appellant denied at trial that he threatened his father. Id at 225.

A fight ensued between appellant and Carlton in the bathroom. Appellant hit his head and the gun fell on the floor. Id at 227-28. Carlton retrieved the gun and appellant grabbed a hammer and struck Carlton on the side of his head. Id at 231. They continued to fight and the bedroom door (bedroom #2) "bust open." Id at 234. Carlton fell on top of appellant and the gun fell from Carlton's hand. They continued to wrestle and fight. Id at 235. Carlton then grabbed a shotgun and a box of shells. Id at 237. Appellant kicked the box of shells out of his hand and the shells flew all over the place.

Carlton left his room and went into appellant's room. Id at 237-38. As appellant lay on the floor in Carlton's bedroom, he heard the demon in that high pitched, shrieky voice speaking to someone. Id at 239. Appellant heard the same voice on the recorded 911 phone call admitted into evidence. Id at 240. Appellant tried to make a call from another phone but there was no dial tone. Id at 243.

As appellant tried to pull himself up from the floor by grabbing the door knob, he heard ***13** a shot and the shot went right through the door. Id at 245. Appellant was not hit but he fell back. Id at 247. He grabbed the pistol that had fallen to the floor during the struggle and as he turned toward the door, Carlton kicked in the door. Id at 252. He had the shotgun in his hand. Appellant pointed the pistol at him and squeezed the trigger.

Carlton ran down the steps. Id at 254. He went to the front door and appellant heard something like the lock turning. Appellant was still on the floor in the bedroom, his heart pounding like he was having a heart attack. Id at 255. He prayed to his entities. He heard footsteps running from the front of the house to the back of the house. Id at 256. Carlton came back upstairs and, as appellant lay on the floor, Carlton pointed the shotgun at him. Id at 257.

Appellant continued to pray to his entities and at some point he knew they came to him because he felt "[e]mpowered, saved, protected." Id at 258. Carlton told appellant he was not going to get away and he hit appellant with the butt of the gun on the left side of his head. Appellant reached up and grabbed the shotgun and hit Carlton in the stomach with it. Id at 285, 288. Carlton picked up the pistol from the floor and pointed it at appellant, trying to shoot him. Id at 272, 290. Appellant shot Carlton with the shotgun because Carlton was trying to kill him with the pistol. Id at 273. Every time Carlton fired at him, appellant would fire back and hit him. Id at 290. Appellant was never hit by any shot Carlton fired. Id at 291.

During the fight, both men fell down the steps and ended up downstairs by the front door. Id at 275-76; 292-93. Carlton still had the pistol and pointed it at appellant. Appellant grabbed it. Two shots went off right by his head. The front door was locked. As appellant turned, he saw smoke. "It wasn't even black smoke, it was like white..." Id at 294. He grabbed the shotgun from ***14** the floor and ran back upstairs with the shotgun and the pistol. He threw the guns on the bed.

After appellant shot Carlton, he saw a "gray mist" that "rose right out" of Carlton. Id at 311. As appellant ran through the mist to get out the front door, he knew that it was the remnants of the entity that had entered his brother. Id at 312. There was also smoke coming from the dining room toward the living room. Appellant ran out of the house to his next door neighbor's house.

The door closed as he approached it and he called to the person to call an ambulance. Id at 313. He told the person he thought his house was on fire. He got no response, so he ran to another neighbor's and knocked but no one answered.

Appellant denied that he yelled "I did it." Id at 314. He denied that he told Sheila Watkins that he hit Carlton because Carlton was laughing about the court case. Id at 317. As he came off his neighbor's porch, a police officer told him to freeze, pointing her gun at him. Id at 314. After his arrest, he asked police to take him to the hospital because he was in pain from falling down the steps and from being hit in the head. Id at 316.

II Insanity Phase

A. Appellant's Case.

Appellant explained again his lifelong fascination with the teachings of the "Miracle of the New Avatar Power (5/15/07: 92-94). He found himself being overcome by the entities, who were fallen angels from the other side. *Id* at 94-95. He entered into a pact with the entities in exchange for his soul. *Id* at 108. He reiterated his belief that he was going to be killed by the entities that had taken his brother as a host. *Id* at 121. He reiterated the incidents of threats and **abusive** behavior by Carlton toward him and his father in the fall of 2003. *Id* at 122-124.

***15** On cross-examination, the prosecutor inquired why appellant had delayed speaking to the psychiatric personnel at St. Elizabeth's about demons and hearing voices. Appellant explained that he had not mentioned it initially because there was no need to mention it. Id at 134. Nor did he mention these issues between October 2004 to January 2005, because it never came up in the competency evaluation. Appellant further explained that he had only preliminary interviews with Dr. Lange and they did not have a chance to speak about the specifics of his case. Id at 137, 140. Appellant testified that in January 2006 he did tell Dr. Michael Sweda about his brother and hearing voices. Id at 138, 141. He did not mention this issue to Dr. Sweda in February 2006 because he had already mentioned it in January. Id at 139. He spoke with Dr. Lange about his brother's demon in March 2006. In April 2006, when they were "into the criminal responsibility evaluation in full force," appellant told the doctors that he had been hearing voices for years. Id at 143.

Wayne Blackmon, M.D., a psychiatrist retained by the defense, concluded that appellant suffers from Schizotypal Personality Disorder ("SPD") and "underlying diffuse brain disorder." (5/15/07:194-95). Dr. Blackmon explained that Schizotypal Personality Disorder is a life long condition where the pattern of thinking and beliefs a person has are such that 'they can't quite fit what the majority of people would agree is normal, instead they have a tendency to have very, very unique perceptions of the world..." *Id* at 196. The longer you listen to such a person, it becomes harder to make sense of what he is saying. In addition, there was a "disconnect in [appellant's] thinking from one thought to the other" which goes beyond the [SPD]." *Id* at 197.

Dr. Blackmon conducted a neurologic test in which he asked appellant to draw a cube, a ***16** task that "actually sucks up a lot of power from the brain" and "the most sensitive screen test we have to see if there might be an underlying neurological problem." Appellant became visibly upset when he drew a bad cube and could not copy it. Id at 199. This test confirmed that appellant also suffers from a diffuse brain abnormality called Constructional Apraxia.

According to Dr. Blackmon, an individual who has SPD is "somewhat stably strange over the course of their lifetime, however, they have the capacity, it is well recognized, under stress for their condition to worsen and they can become, in fact, highly likely to misinterpret things around them." *Id* at 203. They may have "actual breaks with reality" and it is "totally consistent for such a person to misperceive that an individual is not who he says he is... [E]specially given a background heavily laced with books invoking magic - it would be very easy for a person so afflicted [with SPD] under stress in a fight to begin to perceive that people around him might be not who they say they are; might be magical entities; might take action to protect themselves from perceived threats [from] such magical entities." *Id* at 203-204. When coupled with a "diffusely defective brain that is not functioning right, the ability to reason, to filter, to restrain would also be that much more impaired so that it would be totally consistent for such an afflicted person in common parlance to lose it and not know what he was actually doing." *Id* at 204.

Individuals with SPD "may experience transient psychotic episodes lasting minutes to hours..." *Id* at 209. Blackmon described a psychotic episode as a breakdown in a person's thinking process to the point where they lose touch with reality.

On cross-examination, Blackmon agreed that there was no evidence that appellant was psychotic on the day of the interview, April 3, 2007, three and a half years after the shooting. ***17** Id at 218-220. He disagreed with the prosecutor's incorrect conclusion that because there was nothing random about the shots fired at Carlton Jackson that appellant was not psychotic. Id at 234. Blackmon testified that appellant was "psychotically goal-directed." Id at 235. Blackmon testified that in his opinion, appellant was not malingering.

On re-direct, Blackmon testified that when he questioned appellant about his failure to mention the demons to the staff at St. Elizabeth's, appellant "invoked the secrecy of the book." Id at 252. Blackmon also explained that appellant's behavior in denying that he had any type of disorder and his ability to work well with the doctors at St. Elizabeth was "totally consistent with the diagnosis of [SPD]." Id at 253. Blackmon again testified that the cube test is "the single most powerful test there is to pick up this disorder." Id at 254. Blackmon reaffirmed his opinion that appellant was not malingering. Id at 260.

B. The Government's Case

Michael Sweda, M.D., a clinical and forensic psychologist at St. Elizabeth's Hospital, testified that he specifically asked appellant early on in his stay at St. Elizabeth's whether appellant heard voices and appellant said he did not (5/16/07: 309). It was not until March 2006 that appellant told him about his interest in spells and magic. *Id* at 318. According to Sweda, appellant did not say that it had anything to do with Carlton Jackson. *Id* at 319. On April 27, 2006, appellant mentioned that his brother was possessed by a demon. Id at 320-21. For the "better part of May," appellant reported hearing voices. *Id* at 321. When released in June 2006, appellant told Sweda that he had been hearing voices for 30 years. *Id* at 321-22.

When Sweda questioned him about why he had not mentioned hearing voices earlier, ***18** appellant said that Sweda did not ask him or that he did not understand the question or that he was presenting a bifurcated trial. Id at 322. Sweda did not believe him. According to Sweda, when he confronted appellant about why he had not mentioned that Carlton was possessed by a demon early on, appellant said that he was presenting information to Sweda in two stages, a merits phase and the mental health phase. Id at 324.

Dr. Sweda agreed with Dr. Blackmon, however, that appellant suffers from SPD. Id at 324-325. Dr. Sweda also agreed with Blackmon that a person with appellant's personality disorder could, under stress, suffer a psychotic episode and break into a lapse with reality. Sweda discounted the possibility that appellant was under stress. However, appellant did not mention to Sweda his struggles with Carlton. Id at 326-27.

Sweda did not conduct any tests similar to the one conducted by Dr. Blackmon because, according to Sweda, appellant showed no evidence of any cognitive impairment. Id at 337. Sweda dismissed Blackmon's conclusions based on the cube test that appellant had a cognitive deficiency. Id at 338. Sweda opined that appellant's disorder had no impact on his behavior on November 20, 2003. *Id* at 339.

Christopher Lange, M.D., a psychiatrist, examined appellant on seven occasions in January, February and May 2006 for a total of twelve hours (5/16/07: 348). Appellant first spoke of demons involved in Carlton's death and of hearing voices in May 2006. *Id* at 356-357. Lange saw no signs of psychosis during the six months he worked with appellant. *Id* at 365. Lange agreed with the diagnosis of SPD. *Id* at 366. He described appellant's symptoms as an "over elaborated style of thinking and speaking... very laced with metaphors... very large amounts ***19** of the minutiae... to the point of being distracting for the interviewer to determine a lot of story." *Id* at 366-67. He also described appellant as having "perceptions of magic," being paranoid "in some variety but not necessarily to a delusional factor." *Id* at 367. Lange agreed that persons with appellant's disorder sometimes have psychotic episodes when they are under stress, but appellant did not display any symptoms at the time of his arrest. *Id* at 368. According to Lange, appellant's SPD had no impact on his ability to control his behavior on November 20, 2003.

Lange agreed on cross-examination that by telling appellant at the inception of the first interview in January 2006 that he was producing a report for the defense, the US Attorney's office and the court, he was, in effect, making it clear to appellant that he was not a sympathetic ear. Id at 371. Although he claimed that appellant did not mention demonic possession until May 2006, he admitted that he had ordered and read a copy of the New Avatar in March 2006. Id at 406-407. Lange also confirmed that appellant was prescribed 300 mgs of the antipsychotic, Seroquel, at St. Elizabeth's, and 200 mgs at the jail, neither of which dosage was prescribed for sleep. Id at 411-412; 415. Lange agreed that the jail medical records chart showed that Seroquel was prescribed for major depressive disorder, recurrent, severe with psychotic features. Id at 415.

Raymond Patterson, M.D., a psychiatrist retained by the government, diagnosed appellant with substance related problems, malingering, and SPD with narcissistic features (5/16/07:470-71). According to Patterson, however, a personality disorder is not a mental illness, rather it is a "life-style." Id at 472-73. Patterson testified that it is rare for there to be a psychotic experience based on a personality disorder. Id at 474. He opined that appellant was not experiencing any kind of psychosis on November 20, 2003. Furthermore, according to Patterson, the dosage of Seroquel ***20** that was prescribed to appellant is "most frequently used for sleep." I*d* at 478.

Throughout his testimony, Patterson gratuitously touted himself as the quintessential expert of psychiatric diagnoses of inmates. He disparaged the doctors at the DC Jail and their diagnoses, as well as their treatment of appellant for "encapsulated delusions," which Patterson condescendingly attributed merely to their "simply treating what the patient tells you they're experiencing." *Id* at 478-79. His most scathing testimony was directed at Dr. Blackmon. [3] Referring to Blackmon's cube test, according to Patterson if a candidate for board certification presented a drawing of one figure by a patient that justified a diagnosis, he would "fail him on the spot." *Id* at 480-81. Patterson deemed Blackmon's examination of appellant "an inadequate and inappropriate way to approach providing a diagnosis..." *Id* at 481. According to Patterson, "a CT Scan conducted on November 20, 2003" would have been the best indicator of whether appellant had structural brain damage, *id*, and [appellant's] CT scan is clean" (5/17/07 part 2:36). Appellant, he opined, did not demonstrate by his behavior that he had brain damage (5/16/07: 482). Finally, Patterson opined that appellant's "personality disorder in and of itself is not in any way positive of the events on" November 20, 2003. Id at 485.

On cross-examination, Patterson conceded that jail medical records did not indicate that Seroquel was prescribed for sleep and that the manufacturer's information does not recommend it for sleep. Id at 526, 535. He admitted that he conducted no tests whatsoever in determining his ***21** diagnoses and opinions (5/17/07 part 2: 11-12).

ARGUMENTS

I THE CUMULATIVE EFFECT OF THE TRIAL COURT'S FAILURE TO BIFURCATE APPELLANT'S TRIAL BEFORE TWO SEPARATE JURIES AND ITS IMPLEMENTATION OF PREJUDICIAL PROCEDURES NEGATED THE PURPOSE OF BIFURCATION AND WAS FATALLY PREJUDICIAL TO APPELLANT'S DEFENSES.

A. Standard of Review

Where the trial court determines, as a matter of law, that a defendant could not have a fair trial if the issues of guilt and insanity were presented to the jury simultaneously, this Court reviews the record "to determine, if after granting bifurcation, the court **abused** its discretion in the procedure it prescribed." *Jackson v United States,* 404 A2d 911 (DC 1979)(reversed). Where there is no objection to the procedures employed by the trial court, the appellate court determines under the plain error standard whether they created unfair prejudice either individually or in their aggregate effect." Id at 1507. "The standard for reversal where more than one error is asserted on appeal is whether the cumulative impact of the errors substantially impacted the jury's verdict." *Foreman v United States,* 792 A2d 1043, 1058-59 (DC 2002).

B. Background

Appellant moved for a bifurcated trial with two separate juries so that he could present defenses of self-defense and insanity without being prejudiced by having the same jury hear both phases of the trial (1/22/07:4). Counsel explained her theories of self-defense: (1) The decedent expected to be put out of his home the next day based on appellant's request for a CPO, he assaulted appellant when appellant refused to drop the request, appellant defended himself (1/22/07:8), and the 911 call was contrived as evidenced by the sound of the decedent's voice ***22** indicating that the phone was never away from his mouth (1/26/07:9); and (2)if jurors believed that appellant's delusions and beliefs compelled him to act but that his fears were objectively unreasonable, those findings would prove imperfect self defense (4/23/07: 19); **App A, B, C.**

The court recognized the potential for prejudice in a unitary trial before a single jury where a defendant pleads self-defense then pleads insanity, "for fear of... appearing like a liar... to the jury. *Id* at 27. The judge opined that "where there is a... substantial self-defense claim, that... could pose a problem in front of a single jury for a defendant." Id at 28. According to the court, however, there would not be "any unfairness to the defense from a bifurcated trial in front of the same jury," because the proposed defense on the merits was not inconsistent with the defense in the insanity phase. Trial counsel pressed again for two juries, stating that she did not believe that a single jury could separate appellant's testimony in the insanity phase, which would be followed by experts, from his testimony as to his state of mind in the merits phase, which would not be followed by experts. *Id* at 33. Essentially, trial counsel questioned whether the jury could separate an imperfect self-defense analysis from a criminal responsibility analysis. The trial court disagreed and ordered a bifurcated trial before a single jury (4/24/07: 3); **App C, D.**

C. The Trial Court's Denial of Separate Juries And Implementation of Improper Bifurcation Procedures Should Result in Reversal.

"The concept of bifurcated trials arose from the realization that "substantial prejudice may result from the simultaneous trial on the pleas of insanity and not guilty."' *Jackson,* 404 A2d at 925, quoting *Holmes v United States,* 363 F2d 281, 282 (DC Cir 1966). As the Jackson court explained, "[t]he aim of a bifurcated trial is to mitigate the possibility of such prejudice by separating as much as possible the issue of mental responsibility from the factual elements of the accused's ***23** conduct." *Jackson,* 404 A2d at 925, citing *United States v Taylor,* 510 F2d 1283 (DC Cir 1975). It is the defendant's burden to demonstrate the need for a bifurcated trial by making a "substantial proffer both on the merits and the issue of responsibility." *Lucas v United States,* 497 A2d 1070, 1073 (DC 1985), citing *Klienbart v United States,* 426 A2d 343,354 (DC 1981). "In cases of doubt, the question should be resolved in favor of bifurcation where the evidence on criminal responsibility does not significantly overlap the evidence on the merits and where the same jury can fairly determine both issues." *Lucas,* 497 A2d at1074, quoting *United States v Contee,* 410 F2d 249, 250 (DC Cir 1967).

"The court not only has a broad discretion in considering bifurcation, but also in prescribing its procedure, the form of the charge and submission of the questions to the jury, the admissibility of evidence in each stage, and even the impaneling of a second jury to hear the second stage if this appears necessary to eliminate prejudice." *Holmes,* 363 F2d at 283. However, "the procedure adopted...must effectuate the purpose of bifurcation by guarding against two types of prejudice inherent in a unitary trial involving insanity: (1) prejudice to a defendant's insanity defense arising from the evidence on the merits, and (2) prejudice to a defendant's defense on the merits arising from the insanity defense." *Jackson,* 409 A2d at 925; also see, Lucas, 497 A2d at 1072-1073.

Although "a defendant is not entitled to two juries as a matter of right," *Harris v United States,* 377 A2d 34, 39 (DC 1977), "the desirability in a bifurcated trial [is for] a second jury to hear an insanity defense if this appears necessary to eliminate prejudice." *Taylor,* 510 F2d at 1289. In *Taylor,* the defendant asserted self-defense in the merits phase of his bifurcated trial before a single ***24** jury. Agreeing with trial counsel's proffer to the trial court, the appellate court understood that "[d]uring the development of the insanity defense, if the trial of that phase of the case were not by a separate jury, jurors would be aware that appellant was

contending that his killing of [the decedent] was due to a rational belief it was necessary because [the decedent] threatened him with serious bodily harm, a contention inconsistent with this claim of irrationality in support of his insanity defense." *Id. Taylor* discounted the trial court's belief that the problem could be resolved by instructing the jury that the defendant had the right to present an insanity defense. In reversing the insanity verdict, the *Taylor* court reasoned that "[o]ne aim of a bifurcated trial is to disassociate as far as possible from the issue of mental responsibility those factual elements of the accused's conduct which are irrelevant to that issue. For a jury which sits during both phases of a bifurcated trial, this is a difficult task in most cases." *Id.*

In *United States v Bennett,* 460 F2d 872 (DC Cir 1972), the court noted that even when the merits and insanity phases are bifurcated, the government's presentation of the "shocking details" of a heinous crime during the merits phase "is indeed likely to prejudice an insanity defense." *Id.* In that scenario, the court emphasized that "bifurcation alone cannot prevent [prejudice] unless the two parts of the trial are presented to different juries." *Id* at 881. "It would surely be unreasonable to expect a jury to ignore the lurid details of the crime when turning to the insanity defense even if the defense on the merits had already been resolved." *Id.*

Here, appellant made a sufficient showing that a bifurcated trial before the same jury would prejudice his defenses. Indeed, as explained below, the record shows actual prejudice. In addition, procedures implemented by the trial court - including jury instructions, voir dire ***25** questions, admission in the insanity phase of merits-phase evidence, exhibits and verdict form, and the prosecutor's closing argument in the insanity phase - caused substantial prejudice.

1. Appellant Made a Sufficient Proffer Warranting Two Juries and the Record Shows Actual Prejudice In Denying That Request.

In the present case, as in *Jackson, supra,* "the trial court's decision to bifurcate determined, as a matter of law, that appellant could not have a fair trial if the issues of guilt and insanity were presented to the jury simultaneously." *Jackson,* 404 A2d at 925. Having made the decision to bifurcate, however, the trial court failed to grasp how separate trials before a single jury would substantially prejudice appellant's defenses. Counsel explained that appellant's self-defense claim was inconsistent with his insanity claim and would present state of mind issues which counsel believed a single jury would have difficulty separating from criminal responsibility. Trial counsel's proffer supporting two juries was nearly identical to that presented to the trial court in Taylor, supra, which resulted in reversal of the insanity verdict. Taylor requires reversal here.

In any event, the record provides glaring proof that appellant was prejudiced by a single jury. During the insanity phase, the merits-phase jury finding that appellant was not credible became the lynchpin of the government's strategy to discredit Dr. Blackmon. The trial court clearly understood and articulated the prosecutor's objective - "to establish that Dr. Blackm[o]n's opinion is based upon factual assertions that [have] essentially been rejected beyond a reasonable doubt by the [jury] and, therefore, that Dr. Blackm[o]n's opinion is not worth very much." (5/15/07: 149-150). The prosecutor agreed: "You said it better than I could have, Judge, that's right." Id at 150. Not only did appellant "appear like a liar" in the insanity phase, as forecasted by the trial judge, but the jury's discrediting of appellant in the merits phase necessarily tainted ***26** its view of Blackmon before he even testified. Appellant did not stand a chance going into the insanity phase. Such prejudice pouring over from the merits phase would not have been possible had there been separate juries.

2. Advising the Jury During Voir Dire That There Might Be A Separate Insanity Phase Prejudiced Appellant's Merits Defense.

After the trial court decided to bifurcate the trials, the prosecutor pressed for the court to voir dire the jury panel about both phases of the trial (4/23/07: 36-37).[4] The court did not see this as problematic because, in the court's view, "the defenses... are not inconsistent." Id. at 39. In subsequent discussions regarding whether to inform the jury panel in advance that there might be two phases to the trial, defense counsel requested, "[I]if we can avoid it that we avoid it" (4/24/07:18). Counsel proffered

that the jury could be advised that there will be two facets to the trial without being specific. *Id* at 19. The court disagreed. *Id.* at 21. It told the jury panels:

The trial of this case is going to be divided into two phases. At the first phase the merits of the government's charges against the defendant will be decided. And the jury will be asked in that first phase to find the defendant either guilty or not guilty of each of the 11 charges pending against the defendant in the case. In the event that the jury finds the defendant guilty of one or more offenses at the first phase of this trial, then there will be a second phase at which the defendant may raise the defense of not guilty by reason of insanity. And that,...phase will be tried in front of the same jury following the first phase.

***27** (4/24/07; 4/25/07).[5] They were also told that if there was a second phase, they would hear from psychiatrists and other professionals about "what was going on in the defendant's mind at the time of the incidents alleged in this case." Id. During preliminary instructions, the trial court again advised the jury that there may be a merits phase and an insanity phase (4/26/07:4-5); App F.

As this Court found in Jackson, supra, the above procedures fatally prejudice a defendant. In Jackson, the trial court ordered bifurcation before the same jury. As here, the Jackson trial court advised jurors in advance of the merits phase that the defendant might raise an insanity defense, then it questioned jurors regarding that potential defense. Such procedures, Jackson found,

exposed appellant to the dual dangers which bifurcation seeks to obviate: prejudice to both appellant's defense on the merits and his insanity defense arising from the inability of a jury to disassociate the appellant's factual guilt from his mental responsibility. The substantial prejudice to the appellant...is apparent from the "Catch-22" position into which defense counsel was placed: he could probe the jurors about their attitudes toward insanity prior to trial on the merits and incur virtually certain severe prejudice to his client's defense on the merits by indicating to the jurors that an additional, inconsistent defense was yet to come; or he could forego voir dire on this issue entirely and be unable to assure that impanelled jurors were not biased with respect to the insanity defense...The court further eroded the protections which bifurcation should have afforded to the appellant when it questioned the potential jurors about their opinions on the defense of insanity, prior to the guilt phase of the trial. By injecting the issue of insanity at this stage, the court fatally prejudiced the appellant's defense on the merits because the jury, aware of a possible insanity defense, "will tend... believe that (appellant) did the act," Holmes [363 F2d at 282] and could rely on this belief to ***28** piece together the evidentiary puzzle presented by the government.

Jackson, 404 A2d at 925-26.

Here, the trial court followed the same erroneous path of the trial court in Jackson, "fatally prejudic[ing]" appellant's defense on the merits. Jackson requires reversal here.

3. Jury Instructions and Admission of Merits Phase Evidence In the Insanity Phase Defeated the Purpose of Bifurcation.

In direct conflict with the purpose of bifurcation, the judge instructed jurors at the beginning and end of the insanity phase that they "should consider all of the evidence represented at both phases of the trial in evaluating the defendant's defense of insanity"(5/22/07: (5/22/07: 20); **App I;** (5/15/07:73); **App G.** To make matters worse, it sent the following to the jury room for the jury's consideration during deliberations: "a copy of the instructions from the first...phase of the trial," and "[a]ll of the exhibits that have been admitted in evidence, both in the first phase of the trial and in the second phase of the trial... along with the instructions and the verdict form..." (5/22/07: 82); **App I;** See, R. 101, 104. The judge instructed jurors, "[L]ook at your notes from both phases if you wish." *Id* at 83. The trial court's procedures obliterated the protections of bifurcation and exacerbated the prejudice of a single jury. Although trial counsel did not object to these procedures, the trial court's errors were plain and they affected the substantial rights of appellant and the fairness and integrity of the proceedings. *Olano, supra.*

First, nowhere in the *DC Criminal Jury Instructions* does it permit the jury to consider "all of the evidence presented at both phases of the trial." Rather, in considering the insanity defense, the pertinent instructions, Nos. 5.07 and 5.08, [6] permit jurors to "consider any evidence about the development, adaptation and functioning of the defendant's mental and emotional processes and behavior controls," No. 5.07, and to "consider the evidence of the defendant's mental condition before and after the time of the offense charged, as well as the evidence of the defendant's mental condition before and after the time of the offense." No. 5.08. [7]

***29** Moreover, it is well-settled that the reason for not permitting jurors to "consider all the evidence presented at both phases of the trial" is because the "aim of a bifurcated trial is to disassociate as far as possible from the issue of mental responsibility those factual elements of the accused's conduct which are irrelevant to that issue." *Taylor,supra.*

The insanity phase of a trial "is devoted solely to a consideration of whether the defendant has proved the statutory defense of mental illness by a preponderance of the evidence." State v Brink, 500 NW2d 799 (Minn 1993). During the insanity phase

> the inquiry shifts to a different dimension. The question becomes whether the defendant, even though he has manifested the specific intent to do the thing that he did, was laboring under such a defect of reason that he lacked the capacity to form the intent that was otherwise manifested. [citations omitted] On this issue of capacity, expert psychiatric testimony has probative value. *The inquiry is no longer on the direction the defendant's mind took but on how the defendant's mind worked.*

***30** *State v Bouwman,* 328 NW2d 703, 705 (Minn 1982)(emphasis added).

Here, instead of taking steps to assure that the issues before the jury were clearly delineated, the trial court allowed the jury to again focus on the merits phase, that is "the direction the defendant's mind took," *Bowman,* 328 NW2d at 705, while it was supposed to be considering only "how the defendant's mind worked." In doing so, it impermissibly allowed reconsideration of all of the graphic details of the crime- including the horrific 911 call [8] -as well as mounds of other evidence which had no bearing on insanity, all of which it "would surely be unreasonable to expect a jury to ignore." See, Bennett, 460 F2d at 881. Also, as Taylor recognized, allowing the jury to view its previous verdict form from the merits phase, "may have created a subtle though unintended danger of influencing the jury, or some of its members, to resolve their doubts by adhering to the previous verdict," Taylor,510 F2d at 1289, when it is clear that the determination of criminal responsibility should be made in terms of responsibility or non-responsibility." Id at 1289-90. Appellant submits that allowing the jury to review the chilling 911 call, the merits phase verdict, instructions and exhibits confused the two distinct issues of a bifurcated trial. The result was bifurcation in name only and a denial of the protections intended, thus affecting appellant's substantial rights and the fairness and integrity of the proceedings.

4. Prosecution's Closing Argument.

***31** The prosecutor's closing argument in the insanity phase further demonstrates that the failure to allow separate juries substantially prejudiced appellant's insanity defense. Following the trial court's jury instruction allowing jurors to consider "all the evidence" in both phases, the prosecutor improperly told jurors that they could rely solely on the merits phase testimony in determining whether appellant was criminally responsible:

> So, ladies and gentlemen, you've heard a lot of psychological and psychiatric testimony, you've heard a lot of expert testimony, but you know what, you don't even really have to get there because the evidence from the first phase of the trial is so overwhelming that the defendant could conform his behavior to the requirements of the law and could recognize the wrongfulness of his conduct.

(5/22/07: 50); App I. In addition, the prosecutor's closing impermissibly allowed jurors to consider appellant's conduct at the time of his arrest as proof that he was criminally responsible at the time of the charged crime. The prosecutor argued:
[T]he evidence during the first phase of the trial showed you that there was no question [appellant could conform his conduct to the requirements of the law]. How do you know that? Well, when he walks out of the residence, when he walks out of the burning house, Carlton is just a few feet away from him and he encounters Sergeant [Rowlands]. This is just minutes after the crime. He follows Sergeant [Rowland's] instructions to a T. Sergeant [Rowlands] tells him to pull up his shirt to see whether the defendant has any weapons. Sergeant [Rowlands] tells him to put his hands up. The defendant does both of those things. And then Sergeant [Rowlands] goes on to arrest the defendant without incident. Could he behave according to the law? Of course, he could.

What else do you know? Officer Carolyn Kelly told you that when she transported the defendant from the crime scene to the police station, he followed all of her instructions and that trip was without incident. He was cooperative. Of course he could follow the law.

***32** (5/22/07: 47-48); App I. Trial counsel did not object to the prosecutor's comments. The error in permitting them, however, was plain. First, the Taylor court long ago took pains to explain the importance of separating the issues of guilty and criminal responsibility. Here, the prosecutor merged the trials and dismissed the significance of the insanity phase evidence. Second, Taylor instructed long before appellant's trial that during the insanity phase "[t]he question is not properly put in terms of whether [the defendant] would have capacity to conform in some untypical restraining situation- as with an attendant or policeman at his elbow. The issue is whether he was able to conform in the unstructured condition of life in an open society, and whether the result of his abnormal mental condition was a lack of substantial internal controls." Taylor, 510 F2d at 1290. In Taylor, too, trial counsel did not object to the prosecutor's improper comments, yet the court recognized that the jury "could well have been prejudicially misled by the prosecutor's statement." *Id.* [9] As with the trial court's improper procedures, the prosecutor's comments here defeated the purpose of bifurcation and thereby affected appellant's substantial rights and the fairness and integrity of the proceedings.

D. Conclusion

Appellant provided sufficient support justifying bifurcation with separate juries. The trial court's failure to require separate juries and its implementation of erroneous procedures ***33** obliterated the purpose of bifurcation and fatally prejudiced appellant's defenses. The errors cumulatively, if not individually, require reversal. *Foreman, supra.*

II THE TRIAL COURT'S ERRONEOUS APPLICATION OF BETHEA DENIED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

A. Standard of Review.

The trial court's erroneous application of *Bethea v United States*, 365 A2d 64 (DC 1976), implicates constitutional rights to due process and a fair trial, and, therefore, the applicable standard of review is whether the error was harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18, 24 (1967)

B. Background.

Appellant moved to introduce expert testimony in the merits phase on "observation evidence of client's way of thinking and behavioral characteristics," in order to negate mens rea R. 83. [10] Counsel initially advised the court that she expected an expert would testify about a "pattern of provoking instances" by the decedent for several weeks leading up to the fatal shooting, specifically the decedent "interfering or... precluding [appellant] from being able to be and provide" care to his ill father," all of which resulted in a "buildup of rage," which would support a mitigating defense (2/12/07: 6-9). Subsequently, counsel

explained that the expert would testify about appellant's beliefs and "how he reacts when challenged and so on" (4/23/07: 19). Counsel expressly recognized that an expert "cannot give a diagnosis to the jury that ***34** [appellant] is schizophrenic..." Id at 21. Rather, counsel asserted, "I think he can describe for the jury my client's beliefs, how they affect him, his reactions when challenged." Id. Counsel proffered that the expert could testify as to his observations "without telling the jury that [appellant] has a form of schizophrenia." Id at 21-22. In explaining why appellant was requesting separate trials on the merits and on the insanity defense, counsel emphasized the distinction between observation evidence and the insanity defense: "...[0]n the not guilty by reason of insanity aspect, the expert would testify more fully... [regarding] mental disease and defect." The trial court denied appellant's request for expert observation evidence. Id at 32. App C.

C. The Trial Court Erroneously Applied Bethea.

The trial court erroneously interpreted Bethea as preventing appellant from introducing in the merits phase expert testimony to provide "observation evidence," that is evidence of appellant's "tendency to think in a certain way and his behavioral characteristics," to negate mens rea. Bethea neither addresses nor disallows observation evidence. It speaks only to the inadmissibility of "diminished capacity" evidence short of an insanity defense [11] , that is, expert testimony going to the effect of a mental disease or defect on a defendant's capacity to form the necessary intent. Bethea at 85. As the Supreme Court recognized in ***35** *Clark v Arizona*, 548 US 735 (2006), however, "professional mental disease or capacity evidence going to ability to form a certain state of mind during a period that includes the time of the offense charged" is distinct from "observation evidence indicating state of mind at the time of a criminal offense." Clark, 548 US at 765, n34. According to Clark, observation evidence "can be presented by either lay or expert witnesses." *Id* at 865. The trial court's interpretation of Bethea to preclude the introduction of observation evidence by an expert violated appellant's constitutional rights to due process and a fair trial.

1. The Supreme Court Recognizes Distinctions Between Observation Evidence, Diminished Capacity and the Insanity Defense.

In Clark, the defendant was charged with first-degree murder of a police officer. He did not contest that he shot the officer but presented evidence that he suffered from paranoid schizophrenia and therefore, he did not have the specific intent to shoot the officer. At a bench trial, Clark claimed mental illness in support of an insanity defense and to rebut the required mens rea (i.e., that his mental illness caused him to believe that the officer was an "alien" who was trying to kill him). The trial court ruled that Clark could not rely on evidence bearing on insanity to challenge mens rea. It subsequently found Clark guilty, rejecting his insanity defense. Before the US Supreme Court, Clark argued that Arizona's insanity law violated due process. [12]

Pertinent to the issues in the present case is *Clark's* discussion of the "categories of evidence with a potential bearing on mens rea": "observation evidence," "mental disease ***36** evidence," and "capacity evidence." *Clark* at 864-866. Clark described "observation evidence" as

> testimony from those who observed what [a defendant] did and heard what he said; this category would also include testimony that an expert witness might give about [a defendant's] tendency to think in a certain way and his behavior characteristics. This evidence may support a professional diagnosis of mental disease and in any event is the kind of evidence that can be relevant to show what in fact was on [a defendant's] mind when he fired the gun.

Id at 864. Such evidence, *Clark* explained, would include a defendant's "behavior at home and with friends," and, as to Clark's own case, "his expressions of belief around the time of the killing that 'aliens' were inhabiting the bodies of local people (including government agents)..." *Id.* Clark further held that "observation evidence can be presented by either lay or expert witnesses." *Id* at 865.

The second category, according to Clark, is "mental-disease evidence' in the form of opinion testimony that [a defendant] suffered from a mental disease with features described by the witness." *Id.* Usually such evidence "comes from professional psychologists or psychiatrists who testify as expert witnesses and base their opinions in part on examination of a defendant..." Id. The third category is "capacity evidence' about a defendant's capacity for cognition and moral judgment (and ultimately also his capacity to form mens rea)." *Id.* Clark defined "capacity" as "the ability to form a certain state of mind or motive, understand or evaluate one's actions, or control them." *Id* at 860, n7. "This, too," Clark recognized, "is opinion evidence" which "concentrate[s] on those specific details of the mental condition that make the difference between sanity and insanity under [state law] definition." *Id.*

Clark's identification of distinct categories was based on "explicit or implicit distinctions" ***37** contained in State v Mott, 931 P2d 1046 (AZ 1997). In Mott, the trial court denied the defendant an opportunity to present evidence of battered woman syndrome that the defendant argued was relevant to her inability to form the intent and knowledge required for the charges of child **abuse**. The Mott court referred to the "uuse of expert psychiatric evidence to negate mens rea" as a "diminished capacity" defense. *Mott,* 931 P2d at 1050. A diminished capacity defense, Mott explained, "is distinguishable from an affirmative defense that excuses, mitigates or lessens a defendant's moral culpability due to his psychological impairment." *Id.* Arizona courts, Mott noted, had "rejected the theory of diminished responsibility which allows evidence of mental disease or defect, not constituting insanity..., to be admitted for the purpose of negating criminal intent." *Id,* citing *State v Laffoon,* 610 P2d 1045, 1047 (Ariz 1980).

In rejecting Mott's claim, however, the court made clear that it was not mandating a blanket rejection of expert testimony for the purpose of disputing mens rea. Rather, Mott distinguished State v Christensen, 628 P2d 580 (Ariz 1981), which had held that the trial court erred in excluding a psychology expert's proffered testimony that the defendant reacted impulsively to stress, testimony intended to challenge the element of premeditation. Mott, at 1054. Mott reasoned that the evidence offered by the defendant in Christensen

> was not evidence of his diminished mental capacity. Rather, the defendant merely offered evidence about his behavioral tendencies. He attempted to show that he possessed a character trait of acting reflexively in response to stress (citation omitted). The proffered testimony was not that he was incapable, by reason of a mental defect, of premeditating or deliberating but that, because he had a tendency to act impulsively, he did not premeditate the homicide. Because he was not offering evidence of his diminished capacity, but only of a character trait relating to his lack of premeditation, the defendant was not precluded from presenting the expert testimony.

***38** *Id.* To the contrary, the defendant in Mott had offered expert psychiatric testimony "to demonstrate that [her] mental incapacity negated specific intent." Id at 1055. Such evidence was inadmissible except as to the insanity defense.

Clark understood that Mott "imposed no restriction on considering... observation evidence" as it related to mens rea, but rather, it restricted only mental-disease evidence and capacity evidence. *Clark,* 548 US at 866. "[O]nly opinion testimony going to mental defect or disease, and its effect on the cognitive and moral capacities on which sanity depends under the Arizona rule, is restricted." Id. Recognizing those distinctions, the Clark court emphasized that "[n]othing that we hold here is authority for restricting a factfinder's consideration of observation evidence indicating state of mind at the time of a criminal offense (conventional mens rea evidence) as distinct from professional mental-disease or capacity evidence going to ability to form a certain state of mind during a period that includes the time of the offense charged." *Id* at 869, n34.

2. Bethea's Mandate Regarding "Diminished Capacity" Evidence Does Not Address or Disallow "Observation Evidence."

Similar to Mott, Bethea arose from the defendant's assertion that evidence that a mental disease or defect which affected his capacity to form the required mens rea could be considered on the issues of premeditation, deliberation and malice, even if

such evidence fell short of an insanity defense. Bethea at 83. Bethea based his claim on the doctrine of "diminished capacity" a defense permitted by *United States v Brawner,* 471 F2d 969 (DC Cir 1972). [13] Bethea, charged with ***39** murdering his wife, presented testimony of lay and expert witnesses to support his assertions that his mental condition amounted to insanity, or in any event, that his mental condition precluded a finding that he had the required mens rea. Lay witnesses testified that he appeared irrational at the time of the shooting; a psychiatrist testified that Bethea had been under "severe emotional distress" suffered from "hysterical neurosis of a dissociative type." *Id* at 68-69.

Bethea requested a jury instruction based on the "diminished capacity" doctrine adopted by *Brawner*. *Bethea,* 365 A2d at 70, n9, citing Brawner, 471 F2d at 998-1002. The trial court denied the instruction and Bethea was convicted of first-degree murder. The appellate court affirmed the conviction and rejected Brawner, being "convinced that the principles of diminished capacity should not be incorporated into our rules of criminal adjudication" short of an insanity defense. *Bethea,* 365 A2d at 85.

Bethed's explanation and analysis of "diminished capacity" evidence clearly shows, as Clark expressly recognized more recently, that "diminished capacity" evidence is distinct from "observation evidence." "Diminished capacity," as the term plainly suggests, refers to a defendant's "capacity to form a particular specific intent," Bethea at 86, citing Brawner at 999 (emphasis added), that is, that due to a mental disease or defect the defendant lacked the ability to form intent. Observation evidence, on the other hand, does not involve "capacity to form ***40** intent." It is simply evidence of a defendant's characteristic or behavioral traits which "show what in fact was on [a defendant's] mind" at the time of the charged crime. Bethea, focusing solely on diminished capacity vs. insanity, did not address or disallow the type of evidence now referred to as "observation evidence." The trial court erred in excluding observation evidence.

3. The Trial Court's Error Was Not Harmless Beyond a Reasonable Doubt.

As a result of the trial court's ruling, appellant became the sole witness who testified as to his spiritual beliefs, how those beliefs affected him and how he reacted to being challenged by his brother regarding the care of their father. The jury obviously did not credit appellant's testimony and rejected his claim of imperfect self-defense. The "harmless beyond a reasonable doubt" test of Chapman "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v Louisiana, 508 US 275 (1993)(emphasis added).

Here, this Court cannot say that the guilty verdict was surely unattributable to the trial court's failure to allow appellant to introduce expert observation evidence. First, the proffered evidence was necessary to dispute a critical element of the charge against him and to support his defense of self-defense. *See, Christensen,* 628 P2d at 584. Second, an expert's testimony as to appellant's beliefs and behavioral tendencies would have aided the jury in assessing the defendant's credibility as a witness. *See, Mott,* n7, citing *State v Gonzales,* 681 P2d 1368 (AZ 1984). [14] ***41** This was especially important here given the nature of appellant's defense. It is not hard to imagine why a jury of lay persons were skeptical of appellant's testimony that he believed a demon possessed the decedent and that the demon intended to kill him. A medical expert who had examined appellant, however, would have aided the jury in assessing whether appellant did believe in demons and reacted with built-up rage to his brother's long-standing antagonism over the care of their father. Based on the above, appellant is entitled to a new trial.

III THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, DUE PROCESS AND A FAIR TRIAL WHEN IT PREVENTED APPELLANT FROM ELICITING HIS EXPERT'S OPINION AS TO CRIMINAL RESPONSIBILITY.

A. Standard of Review.

Appellant's counsel did not object to the exclusion of the expert opinion of appellant's psychiatrist. Therefore, this issue is reviewed for plain error. Olano, supra. As noted in *United States v Brown,* 352 F3d 654 (2d Cir 2003), "there is usually little

question" that where an error of constitutional magnitude has been found, such an error would affect "a defendant's substantial rights, the violation of which would result in manifest injustice." Id at 664 (quoting United States v Kepler, 2 F3d 21,24 (2d Cir 1993). "For the same reason," Brown explained, any such error would seriously affect[] the fairness, integrity or public reputation of judicial proceedings." Brown, 352 F3d 654, 664, citing Olano , 507 US at 732.

B. Background.

Prior to trial, citing Federal Rule of Evidence 704(b), [15] defense counsel moved to preclude ***42** the government from eliciting expert testimony on the ultimate issue of criminal responsibility. The government, citing federal cases only, did not challenge the request. R. 66. Counsel did not object to the court's assessment that an "expert can testify to the...likely effects of a certain mental illness, which may themselves give rise to an inference that the defendant either did or did not understand the wrongfulness of his conduct or either was or was not able to conform to the requirements of the law (2/12/07: 25-26); R. 69.

At trial, counsel unsuccessfully attempted several times to elicit an opinion from Dr. Blackmon on whether appellant was criminally responsible. Four times the government objected to the phrasing of her questions, three of which objections the court sustained; the final time counsel withdrew the question. [16] Counsel did not make any further attempts to elicit an opinion from Dr. Blackmon either on direct or re-direct examination.

***43 C. The Trial Court Erroneously Interpreted DC Law in Denying Appellant the Opportunity to Elicit An Opinion From His Expert on the Ultimate Issue.**

This Court had held long before appellant's trial that "[e]xperts are permitted in the District of Columbia to render opinions upon the 'ultimate facts' to be resolved by the jury. Wilkes v United States, 631 A2d 880,883 n.7 (DC 1993). "The real test is not [whether] the expert opinion testimony would go to the very issue to be decided by the trier of fact, but whether the special knowledge or experience of the expert would aid the court or jury in determining the questions in issue." Id, quoting Casbarian v District of Columbia, 134 A2d 488, 491 (DC 1957). In Wilkes, an insanity case, the Court noted that it was proper for the defense to elicit from its psychiatrist his opinion that the defendant suffered from a "dissociative disorder" which involves a "disturbance in the usual integrated functioning of the psychological processes of memory, identity, and consciousness," and that as a result of his mental disease, on the date of the offense the defendant "was in a different state of awareness such that he was not able to either control his behavior or realize all the implication of what he was doing, including the illegality." Wilkes, 631 A2d at 882-883. Given that it was well-settled at the time of appellant's trial that such opinion testimony was indeed admissible, the trial court in the present case plainly erred in prohibiting Dr. Blackmon' opinion as to whether appellant's mental disease affected his ability to control his behavior or appreciate the wrongfulness of his conduct on November 20, 2003.

The trial court's error affected appellant's substantial rights and the fairness and integrity of the proceedings. Appellant was entitled to the right to present an insanity defense. That defense encompassed his expert's testimony and opinions on his mental disease and how that disease affected his ability to conform to the requirements of the law and appreciate the ***44** wrongfulness of his conduct. *Bethea, supra.* Moreover, the government's repeated objections to defense counsel's attempts to conform to the (erroneous) restrictions on opinion testimony apparently rattled defense counsel to the point where she eventually withdrew the question and did not make further attempts, no doubt fearing that her inability to frame the question in a manner acceptable to the court was not playing out well before the jury. The government, however, then elicited from all three of its psychiatric experts their opinions that defendant's mental disorders did not impact his behavior on November 20, 2003 (5/16/07: 339) (Dr. Sweda); (5/16/07:368)(Dr. Lange); (5/17/07:485)(Dr. Patterson). The result was that appellant was left with no conclusive opinion whatsoever from his expert as to the effect of his mental disorder on his conduct on the date of the incident or his ability to recognize the wrongfulness of his acts.

The purpose of the insanity trial is to provide the defendant an opportunity to prove that his mental condition was such that he should not be held criminally responsible for his conduct. Bethea, supra. Evidence of a mental disease or defect is only a portion

of that defense. The expert opinion was an essential element of his insanity defense. By erroneously disallowing appellant's expert to state his full opinion, the trial court essentially denied appellant his constitutional rights to present his defense and to due process and a fair trial. Therefore, the court's error affected appellant's substantial rights and the fairness and integrity of the proceedings. Brown, supra. In any event, even if the trial court's errors were not constitutional in nature, disallowing appellant's expert to fully state his opinion on the ultimate issue was plain error requiring reversal. Thomas v United States, 914 A2d 1 (DC 2006)(where erroneous evidence was sole proof of critical element, defendant's substantial rights were affected).

***45 IV THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW APPELLANT TO PRESENT REBUTTAL EVIDENCE IN THE INSANITY PHASE.**

A. Standard of Review.

This court reviews the trial court's decision to deny rebuttal for **abuse** of discretion. United *States v Shelton*, 983 A2d 979, 985-986 (DC 2009).

B. The Trial Court Erred in Denying Rebuttal.

Following Dr. Patterson's testimony in the insanity phase, appellant's counsel requested to recall Dr. Blackmon on rebuttal. First, counsel proffered that Dr. Blackmon could refute Dr. Patterson's claim that the dosage of Seroquel administered to appellant at the jail indicated it was used merely as a sleeping aid in a detention setting and not for treatment of SPD (5/18/07: 16-17). [17] The trial court opined that "this whole focus on the Seroquel seems to me over blown... ", but the court acknowledged that the jury could infer from Dr. Patterson's testimony that based on his interview of a DC Jail doctor that the prescribed dosage was for sleep, not psychoses. *Id* at 17.

Second, trial counsel proffered that Dr. Blackmon would dispute the government medical experts' assessments that appellant was malingering by addressing Constructional Apraxia and "explaining how important it is to consider and test for physical abnormalities that best explain ***46** what you're getting when you interview the patient." *Id* at 20. Third, counsel proffered that Dr. Blackmon could challenge Dr. Patterson's "trong language" in dismissing the cube test that Dr. Blackmon administered. *Id* at 21. The trial court stated that Dr. Blackmon addressed those issues during his initial testimony, but also that defense counsel "knew full well based on the Government's expert disclosures" and "could tell by cross-examination of Dr. Blackmon" that the government disputed the cube drawing, and that she could have addressed those issues on redirect. *Id* at 22-23. Trial counsel further explained, however, that Dr. Patterson had maligned not only Blackmon's assessments but his competence when he "strongly indicated" that "it is borderline malpractice to rely on a simple drawing alone for this diagnosis of Constructional Apraxia." *Id* at 23. The trial court believed that Dr. Blackmon would simply be repeating his initial testimony and that it was not proper rebuttal. App H.

The record also indicates, however, that the expense of Blackmon'S testimony was of great concern to the court during this trial. During the prosecutor's cross-examination, the judge called the parties to the bench and inquired how much longer the prosecuto's examination would be (5/15/07: 248). The prosecutor said he had about 5 or 10 minutes. Appellant's counsel said she anticipated redirect. The court complained: "We'll go about 10 minutes, is that going to be enough time? I'm not happy about it since the court is paying his fee how many thousands of dollars we have to pay for him to come back for a half an hour tomorrow morning." Id. The court asked the prosecutor if he would be willing to "shut it down" but the prosecutor indicated that he had a few more questions he really needed to ask. Id at 249. Again trial counsel indicated that she needed redirect on four or five topics. The prosecutor suggested resuming cross-examination ***47** and the court replied, "Well, try to be quick." Id at 250. Trial counsel began redirect, but before 5 p.m. the trial court told her in front of the jury: "[W]e need to wrap this up after this question." Id at 264. After that question, trial counsel asked permission to ask one more question. The court pressed, "One last question." Id at 265.

It is well-settled that rebuttal evidence may be presented "to refute, contradict, impeach or disprove the evidence that the adversary has already elicited." *Shelton v United States*, 983 A2d 979, 985 (DC 2009), citing *Beynum v United States*, 480 A2d 698, 704 (DC1984). This includes rebuttal testimony "supporting the credibility of impeached witnesses, or responding to new points raised by the opponent." *Hoem v Zia*, 606 NE2d 818,830 (111 1994). While the trial court has discretion in allowing rebuttal evidence, *Rowland v United States*, 840 A2d 664,680 (DC 2004), trial courts should conclude a trial "when each side has had the opportunity to present his view of all issues fairly raised." *United States v Sadler*, 488 F2d 434 (5th Cir 1974). Special care must be taken by the trial court in insanity cases. Though a trial court may seek to expedite the trial, "where the plea is insanity, the goal of expediting the trial must not be allowed to interfere with the defendant's right to develop fully and completely the many complex and often tenuous circumstances that may shed light on his plea." *United States v Portis*, 542 F2d 414, 418 (7th Cir 1976)(reversed), quoting *United States v Smith*, 507 F2d 710, 712 (4th Cir 1974). "The court is not justified in closing the case until all the evidence offered in good faith and necessary to the ends of justice has been heard." *State v Daggett*, 280 SE2d 545 (W Va 1981) (reversed).

In the present case, the trial court understood that based on Patterson's testimony regarding the dosage of Seroquel appellant was given at the jail, the jury could infer that appellant ***48** was not being treated for psychoses but was merely given a sleep aid. While Blackmon's testimony spoke to the dosage as consistent with treatment of SPD, in rebuttal he could have refuted Patterson's suggestion that such dosage in a detention setting was only consistent with sleep- thus providing a bases for the jury to reject the inference the court recognized. Appellant should have been permitted to refute that point and aid the jury's comprehension of the insanity claim.

Moreover, the trial court employed the wrong analysis when it admonished that because counsel had obtained Dr. Patterson's report before trial, she could have examined Dr. Blackmon about Patterson's dismissal of the constructional apraxia diagnosis and the cube test. As the Portis court correctly understood,

> [A]nticipatory contradictory testimony would of necessity have had to be directed to examination reports. The testimony of the preparer of a report, even though based upon the report, might well have been broader or narrower and almost certainly would have had explicatory aspects. If the jury is to hear refuting testimony, it would ordinarily appear to be preferable that such testimony be directed toward actual testimony heard by the jury. That which will be heard must necessarily remain somewhat in the speculative area until it is articulated from the witness stand.

Portis, 542 F2d at 417. Here, Patterson's March 30, 2007 report [18] made no mention whatsoever of Constructional Apraxia or the cube test administered by Dr. Blackmon. It was not until Patterson actually testified that he articulated his views of the cube test and Blackmon's diagnosis of Constructional Apraxia. Moreover, it was not until Patterson's testimony that he articulated his ***49** scathing view that Blackmon was essentially incompetent. As recognized in Portis, counsel could not have known Patterson's exact views until he articulated them from the witness stand. And in the present case, where appellant called a single expert in support of his case, Patterson's disparaging comments about that expert's competence certainly warranted rebuttal for appellant to support the credibility of his impeached expert. *Hoem, supra.* The trial court was not justified in expediting the trial - even based on its concern as to the expense of recalling Blackmon - because "all the evidence offered in good faith and necessary to the ends of justice [had not] been heard." *Daggett, supra.* Appellant is entitled to a new trial on the issue of insanity.

V APPELLANT'S CONVICTIONS FOR CPWL, UF, UA AND PPW MUST BE VACATED BECAUSE THEY VIOLATE HIS SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS FOR PURPOSES OF SELF-DEFENSE.

Appellant asserted that his CPWL charge was "in direct conflict with the Second Amendment... (5/10/07:609). The trial court, relying on pre-*Heller* cases, concluded that under prevailing law at the time of appellant's trial, "there is no 2nd Amendment issue relating to the charges of carrying a pistol without a license, possession of an unregistered firearm, possession of ammunition,

PPWB, any of these weapons offenses or ammunition offenses even in the home." *Id* at 612. The trial court erred. The Supreme Court has held that "the Second Amendment protects an individual right to keep and bear arms for purposes of self-defense, and that the District's virtually absolute ban on handgun possession in the home violated the Second Amendment." Magnus v United States, 11 A3d 237, 242 (DC 2011), citing *District of Columbia v Heller*, 554 US 570 (2008). This Court has since held it "impermissible under the Second Amendment to convict a defendant for possessing an unregistered handgun in the home when ***50** the District's unconstitutional ban made registration of a handgun impossible unless the defendant was disqualified from registering the handgun for constitutionally permissible reasons." Magnus at 242-43, citing *Plummer v United States*, 983 A2d 323 (DC 2009). These same principles have been extended to possession of ammunition in the home. *Herrington v United States*, 6 A3d 1237 (DC 2010). Under the registration and licensing laws existing at the time of the offense, appellant could not have registered his weapon, and registration was a prerequisite for a license. *Plummer*, 983 A2d at 340. Therefore, his convictions must be reversed. In the alternative, if this Court finds insufficient evidence in the record as to whether appellant would have been able to satisfy the statutory and legislative requirements for possession of weapons and ammunition in his home, then, as in *Plummer*, appellant is entitled to a remand for the trial court to hold a hearing and make those determinations. *Id* at 342.

CONCLUSION

Based on the foregoing, appellant respectfully requests that this Honorable Court: (1) reverse his convictions and remand his case for a new trial on the merits and the insanity phases; and (2) reverse his weapons and ammunition convictions outright, or in the alternative, remand his case for a hearing on disqualification factors.

Footnotes

1 The parties also stipulated that Government Exhibit 106 (certificate of no firearms registration to possess a pistol or ammunition), Government Exhibit 107 (certificate of no firearms registration to possess a shotgun, and Government Exhibit 108 (certificate of no record of license to carry a pistol), were each admissible (5/7/07: 31-33).

2 Overruling the government's objection to this line of questioning and testimony, the court concluded that appellant had a right to present his defense of self-defense even if there could be no expert testimony on "what is probably pretty obvious mental illness to anyone listening..." (5/7/07: 148-49).

3 Dr. Blackmon,a licensed psychiatrist in private practice for nearly 30 years, had conducted "several thousand evaluations of severely mentally ill patients" with schizophrenia. He lectures at George Washington University in law and psychiatry and scientific evidence, is board certified in psychiatric neurology, and is an attorney (5/15:172-77).

4 The prosecutor incorrectly cited Higgins v United States, 401 F2d 396, 398 (DC Cir 1968), as support for the court notifying jurors during voir dire that there might be an insanity phase (4/23/07: 36-37). Higgins does not address this issue. Jackson, however, is directly on point and found reversible error in this procedure.

5 There are two transcripts for proceedings held on 4/24 (one for voir dire and one for other proceedings. For 4/25, counsel received only an electronic transcript that does not have page numbers. The trial court gave the above-cited instruction to the first panel of potential jurors on April 24 and to the second panel called on April 25. See, App D, E.

6 Instructions 5.07 ("Insanity") and 5.08 ("Insanity - Evaluation of Evidence") are published in the Fourth Edition of the Criminal Jury Instructions for the District of Columbia. The current publication of these same instructions are contained in the Fifth Edition as Instructions 9.400 and 9.401.

7 The trial court read both instructions to the jury (5/22/07:17-24), except that it substituted language allowing the jury to consider "all of the evidence represented at both phases of the trial."

8 The extremely disturbing nature of the 911 call was expressly noted by the trial court: "To this day, the tape of the 911 call that Mr. Jackson's brother made in the course of this assault, in the course of this murder, is among the most chilling pieces of evidence, if not the most chilling piece of evidence to which I have ever been exposed. That 911 call I think brought home to everyone who heard it the sheer brutality of this murder and its extremely frightening and disturbing nature." (10/26/07: 43).

9 In Taylor, the court found prejudice even though it did not think that the prosecutor 'was knowledgeably departing from a position this court had recently taken." Taylor, 510 F2d at 1290. In the present case, the prosecutor and the trial court had the benefit of Taylor, and while appellant does not claim that the prosecutor intentionally made the comments despite knowing of Taylor, because Taylor was available at the time of appellant's trial, the error of the trial court in permitting the comments was plain.

10 Counsel initially moved to allow expert testimony that appellant has SPD and that as a result, he believed his brother was possessed by a demon who intended to kill him." R. 61 at 6. The trial court denied the motion as an attempt to introduce "diminished capacity" evidence, disallowed by *Bethea.*

11 Bethea set forth the following as the standard for proving insanity: "A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." Bethea at 79. Bethea "retain[ed] the DC Circuit's definition that "[a] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." Bethea at 81, citing Bethea at 70 n11, quoting McDonald v United States, 312 F2d 847, 851 (DC Cir 1962).

12 Clark had challenged under the due process clause Arizona's rules confining to the insanity defense consideration of capacity evidence and consideration of characteristic behavior associated with mental disease. *Clark,* 548 US at 867.

13 Brawner determined that "[a]ssuming the introduction of evidence showing 'abnormal mental condition,' the judge will consider an appropriate instruction making it clear to the jury that even though defendant did not have an abnormal mental condition that absolves him of criminal responsibility, e.g., if he had substantial capacity to appreciate the wrongfulness of his act or to control his behavior he may have had a condition that...deprived him of the capacity for the premeditation required for first degree murder." Brawner, 471 F2d at 1002, n 75.

14 Mott overruled Gonzales only "to the extent it allowed evidence of a defendant's diminished mental capacity as a defense," which in Gonzales was "expert testimony that [the defendant's] low intelligence and probable organic brain damage affected his ability to reason..." Mott at 544.

15 Rule 704(b) provides: "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

16 Defense counsel first asked Dr. Blackmon: "[W]ere you able to make a determination to a reasonable scientific certainty as to whether on November 20th 2003, [appellant] appreciated the wrongfulness of his conduct?" (5/22/07: 201). An objection was sustained and the court admonished that counsel was "not allowed to ask him to state an opinion on the ultimate issue here..." *Id* at 202. Subsequently, counsel asked, "Going back to November 20, 2003,... did Mr. Jackson, Junior know what he was doing in your opinion?" (5/22/07: 213). The objection was sustained. Counsel then asked, "On November 20, 2003, in your expert opinion was Mr. Jackson's mental processes so impaired that he could not [know] that killing his brother was wrong?" *Id* at 213-214. The objection was sustained. Id at 214. Counsel then asked, "And what did you observe in Mr. Jackson Junior's mental status during the psychiatric examination that would have a bearing on the state of mind on November 20, 2003?" Id. The court said, "You can answer if you're able to say that something you observed three and a half years later would have had a bearing on... his..." The prosecutor objected, however, and counsel withdrew the question. *Id* at 215.

17 Dr. Blackmon had testified on direct that " [s]eroquel is a very, very powerful psychiatric drug" "used for major thought disorders and breaks with reality." (5/15/07:211). On cross, when asked if Seroquel is also used for sleep, Dr. Blackmon responded, "At very low doses." *Id* at 250-51. The prosecutor suggested that appellant was only taking very low doses at the jail but Blackmon said no, that he had been taking doses in the hundreds of milligrams, and that he did not think that the dosage was consistent with taking them for the purpose of sleeping. *Id* at 251. Dr. Patterson, on the other hand, called 200-300 mg "[b]aby doses," "most frequently used for sleep," (5/16/07:478), "particularly in correctional facilitie" (5/17/07 (part 2): 34), the implication being that appellant did not have a mental illness.

18 Appellant has filed a motion to supplement the appellate record to include Dr. Patterson's report. App J.