No. 98-CF-1871

IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

LUIS M. PALACIO,

Appellant,

v.

UNITED STATES,

Appellee.

On Appeal from the
Superior Court of the District of Columbia
F 2902-98

APPELLANT'S BRIEF

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LIST OF PARTIES, INTERVENORS, AMICI & THEIR COUNSEL

A. PARTIES AND AMICI.

Appellant Luis M. Palacio and Appellee the United States of America appeared in the Superior Court for the District of Columbia. Manuel J. Retureta represented Appellant and Asst. U.S. Attorney Margaret Carroll represented the United States.

C. RELATED CASES

Appellant was tried with codefendants Walter A. Bolanos (F 2764-98), represented by Jeffrey Berman and Claudia Crichlow from the D.C. Public Defender Service; and Edgar Cruz (F 2827-98), represented by Anthony Matthews. In this Court Bolanos (98-CF-1821) is represented by the D.C. Public Defender Service and Cruz (98-CF-1872) is represented by Joseph A. Virgilio.

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QUESTIONS PRESENTED

1. Whether the Trial Court lacked jurisdiction to try Appellant as an adult because the counts in the indictment charging assault with intent to murder while armed were defective in that they failed to inform Appellant of the nature of the charges against him, and did not demonstrate that the Grand Jury found essential elements of the offense — malicious intent to kill and the absence of justification, excuse or mitigation, and therefore his conviction must be vacated?
2. Whether Appellant's conviction for aggravated assault while armed on David Rodriguez must be vacated because the government failed to produce any evidence that he suffered serious bodily injury as a result of the stab wounds he sustained?
3. Whether, in the absence of evidence that Appellant had any direct contact with Omar Gonzales, Appellant's conviction for assault with a dangerous weapon on Gonzales must be vacated because the government failed to produce evidence that Appellant aided and abetted the assault?

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

LUIS M. PALACIO, **APPELLANT,** VS. **UNITED STATES,** **APPELLEE.**	**No. 98-CF-1871** **(F 2902-98)**

APPELLANT'S BRIEF

Although Appellant Luis Palacio was a juvenile at the time of the alleged crime, the government acquired jurisdiction to try him as an adult by charging him with three counts of assault with intent to murder while armed. But the indictment was multiplicitous on its face because it included three identically-worded counts charging assault with intent to kill while armed. The counts charging assault with intent to murder while armed were constitutionally defective because they gave no indication that the Grand Jury determined by probable cause two essential elements of assault with intent to murder, whether Palacio exhibited malicious intent to kill and whether he committed the alleged acts in the absence of justification, excuse or mitigation. Because of these defects the Criminal Division lacked jurisdiction to try Palacio, and his convictions must be vacated. *See below at 17 – 24.*

Even if this Court determines that the indictment was valid, Appellant's conviction for aggravated assault while armed must be vacated because the government provided no evidence on an essential element of the offense, that the victim suffered serious bodily injury. *See below at 24 – 29.* In addition, under the circumstances of this case Palacio's conviction on one count of assault with a dangerous weapon must be vacated because he was not a principal and the government did not prove he aided and abetted one of his codefendants in that crime. *See below at 29 – 32.*

STATEMENT OF THE CASE

Police arrested Appellant Luis M. Palacio April 20, 1998 and he was arraigned the next day on a single count of assault with intent to murder while armed. R. 3.[1] Palacio was held without bond, and at the conclusion of a preliminary hearing April 22, 1998 the Hon. Stephen Milliken ruled that he should be held in preventive detention to await trial.. R. 6, R. 7.

The Grand Jury returned an 11-count indictment against Palacio and codefendants Walter A. Bolanos, Edgar A. Cruz and Uvic D. Gutierrez on June 9, 1998.[2] R. 8. Palacio, Bolanos and Gutierrez were charged with three counts of assault with intent to murder while armed in violation of D.C. Code §§ 22-503,[3] 22-2403 and 22-3202 (Counts B, C and D). Each defendant was charged with three counts of assault with intent to kill while armed in violation of D.C. Code §§ 22-501 and 22-3202 (Counts E, F and G); three counts of aggravated assault while armed in violation of D.C. Code §§ 22-504.1 and 22-3202 (Counts H, I and J); and one count of carrying a dangerous weapon in violation of D.C. Code § 22-3204. The government charged Palacio, Bolanos and Gutierrez with assault with intent to murder while armed so it could prosecute them as adults. It did not charge Cruz with assault with intent to murder because he was 23 years old. Each series of three counts related to alleged attacks on three individuals, José Mejia, David Rodriguez and Omar Gonzales.

The Trial Court held a hearing on pretrial motions from July 8 to 10, 1998 and the jury trial began July 17. On July 27, 1998 the jury acquitted Palacio of assault with intent to murder Rodriguez while armed (Count C), but convicted him of the lesser-included offense of assault with a dangerous weapon. It acquitted Palacio of assault with intent to kill Rodriguez while armed (Count F), but convicted him of the lesser-included offense of assault with a dangerous

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[1] References to the Record on Appeal will be designated "R." followed by the document number, and where necessary the relevant page number, i.e. R. 3, 2. References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and relevant page number, i.e. Tr. 7/9/98, 3.

[2] The Trial Court appointed new counsel for Gutierrez just before the trial was scheduled to begin and then severed his case from those of Appellants'.

[3] All D.C. Code citations are to section numbers in effect at the time of trial.

weapon. It acquitted him of assault with intent to kill Gonzales while armed (Count G), but convicted him of the lesser-included offense of assault with a dangerous weapon. The jury convicted Palacio of aggravated assault on Rodriguez while armed (Count I), and carrying a dangerous weapon (Count K). Jurors acquitted Appellant on all other counts.

Defense counsel filed a Motion for Judgment Notwithstanding the Verdict on August 3, 1998, asking the Judge to vacate Palacio's conviction for assault with a dangerous weapon on Gonzales. R. 14. The government filed its opposition September 8, 1998, and the Trial Court denied the motion in an order issued September 15. R. 16, R. 17.

The Trial Judge sentenced Palacio to 40 months to 10 years on each count of assault with a dangerous weapon, seven to 21 years for aggravated assault while armed, and 20 months to five years for carrying a dangerous weapon. R. 22. All sentences run concurrently, and Palacio must serve a five-year mandatory-minimum term for aggravated assault while armed. The Judge assessed an aggregate payment of $500 to the victims' fund. R. 21 He rejected Appellant's request for sentencing under the D.C. Youth Rehabilitation Act. D.C. Code § 24-803 *et seq.*

Palacio filed a timely Notice of Appeal December 16, 1998.

STATEMENT OF FACTS

This case involved a fight that broke out on the playground adjacent to Lincoln Middle School and Bell Multicultural High School shortly before 4 p.m. on April 14, 1998. In it three Bell students, José Mejia, David Rodriguez and Omar Gonzales, were stabbed. All three were taken to the Washington Hospital Center for treatment. The hospital released Rodriguez the next day and Mejia and Gonzales two days after the fight.

Based on testimony at the trial, the origins of the dispute between the victims, members of a gang called the Graffiti Kings, and some of the alleged assailants began in November 1997. Among the assailants, according to the Graffiti Kings, were members of another gang called the Little Brown Union. Members of three other gangs, One-Eight, One-Five and Park Road, were on the playground during the altercation and may have egged on the Graffiti Kings.

The initial encounter April 14th occurred at about 11:45 a.m., when five Graffiti Kings, Gonzales, Rodriguez, Martin Salmeron, Alex Arevalo and Walter Coreas, on their way to lunch in the Lincoln school cafeteria, confronted Bolanos and unidentified male companions on the playground near the swimming pool. Gonzales was angry because he believed Bolanos had "tagged" — drawn graffiti — over graffiti Gonzales and other Graffiti Kings had drawn on a wall of Lincoln school. A Bell security guard intervened and told the Graffiti Kings to go into the school for lunch.

At the end of the school day the Graffiti Kings, this time including José Mejia, congregated near the entrance to Bell, where members of One-Eight, One-Five and Park Road gathered as well. The Graffiti Kings could see Bolanos and from nine to 14 other people, most of them males, standing along the fence near the swimming pool at the far end of the playground. The group walked through the playground toward the group near the pool and the 16th Street exit. According to the Graffiti Kings who testified, as they neared the pool one of the people congregated there, some said Palacio, stepped into their path and said something about settling the earlier dispute. One or more of the Graffiti Kings shouted that someone had a knife and that

they should run. Three Graffiti Kings got away, but the others received multiple knife wounds. The latter group retreated back to Bell for treatment in the nurse's office and they eventually were taken by ambulance to the hospital. During the fight bottles were thrown, but there was conflicting testimony about whether the Graffiti Kings or the other group threw them.

The government called eight civilian witnesses and two police witnesses in its case-in-chief and one civilian witness in rebuttal. The defendants collectively called one civilian witness and one police witness. Appellant will discuss in detail only testimony relevant to the issues he raises on appeal.

THE GOVERNMENT'S EVIDENCE

Omar Gonzales's Testimony

Omar Gonzales, 18, testified that he was in the 11th grade at Bell Multicultural High School in April 1998. Tr. 7/21/98, 58. He and José Mejia were close friends and David Rodriguez was his friend as well. *Id.* at 59 – 60. They and three other Bell students, Salmeron, Coreas and Arevalo, formed the Graffiti Kings because they thought it would be a good idea to have a name. *Id.* at 60. They hung out together and some of them "tagged" – drew graffiti using the initials G.K. *Id.* at 61. Gonzales, Coreas, Salmeron, and Arevalo tagged and sometimes Rodriguez did as well, he said.

Gonzales said he went to lunch at Lincoln school on April 14, 1998 with Salmeron, Arevalo, Rodrguez and Coreas. *Id.* at 62. As they were walking across the playground adjacent to Lincoln school he saw "Droopy," Walter Bolanos, sitting with two other Latino males on a bench near the pool at the far end of the playground. *Id.* at 63. Gonzales said he went to talk to Bolanos because he had heard rumors that Bolanos had tagged over graffiti he and Salmeron had drawn. *Id.* at 64. The witness testified that he did not think the Graffiti Kings were having a dispute with Bolanos and he wanted to straighten things out. He claimed that when he asked whether Bolanos had written over G.K. graffiti the defendant stared and responded, "If I did it, what you going to do about it?" As Gonzales spoke Bolanos stood up, and he also said he was

not scared of the Graffiti Kings. *Id.* at 65. Gonzales expressed surprise that Bolanos "wanted to take it to the next level." *Id.* at 64. According to Gonzales his group then went into the Lincoln school cafeteria for lunch, and a security guard from Bell approached them to find out what had happened on the playground. *Id.* at 66 – 7.

At the end of the school day the Graffiti Kings, including Mejia, gathered in front of Bell and walked across the playground, some of them to go to work and others planning to play basketball. *Id.* at 68. While standing in front of Bell he could see 15 to 16 people near the fence around the pool, whom he claimed were members of the Little Brown Union, L.B.U., because that group was there every day.[4] *Id.* at 71 – 3. Gonzales said he did not think anything was going to happen and he did not pay attention to them. *Id.* at 71 – 2. But as the Graffiti Kings walked toward the playground exit onto 16th Street some members of that group came toward them, some words were said and he got stabbed, Gonzales testified. *Id.* at 74. He told jurors he recognized the people who stepped into the path of the Graffiti Kings, but he could not identify them by name. He recalled hearing someone, Casper, he believed, say "Just get the beef over with and go on ahead with the bull shit. Get it over with." *Id.* Gonzales said he thought Casper's real name was Luis. *Id.* at 74 – 5.

Gonzales said he had seen Casper around the neighborhood since he was in 9th grade, but when asked several times whether he saw Casper in the courtroom he said "no." *Id.* at 75. Then he identified Palacio. *Id.* at 75 – 6.

Gonzales testified that he and his friends were surprised when Casper spoke, but then one of his friends shouted that the others had knives and told the Graffiti Kings to run. *Id.* at 76 – 7. The witness said he stood there a few seconds and was stabbed in the arm *Id.* at 77. The knife blade went through his arm into his stomach. Gonzales said he had seen the person who stabbed

[4] The government provided no admissible evidence that any of the defendants was a member of the Little Brown Union.

him a few times before in the neighborhood, and identified Edgar Cruz as the stabber, *Id.* at 79, 80 – 1. He did not see what Casper did after he spoke to the Graffiti Kings. *Id.* at 79.

After he was stabbed Gonzales ran back toward Bell, and a security guard from Lincoln eventually took him to the nurse's office in the high school.

Under cross-examination Gonzales admitted that he was angry that Bolanos had crossed out his tagging, and that such actions were a sign of disrespect, but denied that he threatened Bolanos. *Id.* at 94, 98. The witness said he is 5 feet, 11 inches tall and weighed 200 pounds, and acknowledged that he approached Bolanos at lunch time with four friends. *Id.* at 96.

Gonzales admitted that during lunch his group discussed the incident on the playground and that he and Salmeron expressed their dislike for the fact that Bolanos had disrespected them. *Id.* at 99.

After school, according to Gonzales, he saw the group near the pool, including Bolanos. *Id.* at 104 – 6. He agreed that members of other gangs might have been in front of Bell and may have followed behind the Graffiti Kings as they crossed the playground. Questioned by defense counsel he said he did not know who among the group near the pool stepped out to block the Graffiti Kings, but that it was neither Bolanos nor Palacio. *Id.* at 113, 125. When Palacio spoke he used English, and Gonzales did not interpret the statement as a threat. *Id.* at 125 – 6. At that point he was watching Palacio and did not see a knife in Appellant's hand, he said. *Id.* at 126 – 7.

Martin Salmeron's Testimony

Martin Salmeron, 16, testified that his group did not originate the group's name. Other students made fun of them by calling them G.K, for goalkeeper, gay kids, sometimes golden kids and sometimes Graffiti Kings. Tr/7/21/98, 140 – 1. He admitted that he used to tag, using the name "Steelo." *Id.* at 141.

On April 14, 1998 his group was going to lunch at Lincoln school when they saw Bolanos and three of his friends sitting on a bench near the pool staring at them and pointing. *Id.* at 142. When the group went over to find out what was wrong, he said, Bolanos "caught an

attitude" and tried to act like a tough man. Asked why he was staring at them, Bolanos replied, "what you going to do about it," the witness said. Salmeron said the conversation lasted until a security guard came and broke it up. He said the group talked about the incident during lunch, but denied they planned to do anything about it. *Id.* at 144.

After school he and his five friends met at their lockers in Bell and then set out across the playground. *Id.* at 145 – 7. As they walked he saw the group near the pool, including Bolanos, Uvic Gutierrez and Casper, *Id.* at 153. At some point Palacio walked in front of them and said in Spanish "If you're looking for a hassle, we can do it right now. Why leave it for later?" *Id.* at 154 – 5. But he said he did not see Palacio in the courtroom, and admitted that he had never seen the person who spoke before April 14th or since. *Id.* at 153 – 4. After that, Salmeron said, the person he believed was Palacio moved toward Mejia, Bolanos went toward Rodriguez, and others who had been leaning on the fence surrounded the Graffiti Kings. *Id.* at 156. Palacio and Bolanos pulled out knives, Salmeron testified. Then a short, bald headed guy approached him and he saw Bolanos swing at Rodriguez, making contact. He saw Rodriquez get stabbed in the shoulder and back, but could not identify the person who inflicted the latter wound. *Id.* at 157. He did not recognize the short, bald person armed with a long knife who chased him back toward Bell. *Id.* at 157 – 8.

Salmeron denied that the Graffiti Kings did anything to provoke the fight, saying the only one who spoke was Coreas, who shouted that they should run because the other group had knives. *Id.* at 159 – 60.

Salmeron said his group adopted the name Graffiti Kings because other people were calling them derogatory names using the initials G.K., but said it was "nonsense," and he did not use the initials when he tagged. *Id.* at 183. He knew before the group went to lunch April 14th that Bolanos had crossed out their graffiti, and that the Graffiti Kings had to do something about it, he admitted in cross-examination. *Id.* at 165. He said the confrontation was merely an attempt to investigate, but then added that the dispute had begun the previous November. *Id.* at 165 – 6.

In April his friends agreed they had to do something about the fact that Bolanos was disrespecting them. *Id.* at 166.

Salmeron agreed that Gonzales is big and that Rodriguez is even bigger, and that he and Coreas are about the same height. *Id.* When they approached Salmeron spoke first to Bolanos and his three companions, the witness said. *Id.* at 167 – 8. Then Gonzales said, "why you causing our problem. I thought we … ended all this… I thought we didn't have no problem no more." *Id.* at 168. He said the Graffiti Kings were sending Bolanos a message, but denied that it was a threat. The school security guard then arrived and told the Graffiti Kings to go into the cafeteria. *Id*. at 169. He, too, testified that during lunch the group discussed why Bolanos "caught an attitude."

When the Graffiti Kings gathered after school, members of three other gangs, Park Road, One-Eight and One-Fiver, were congregating nearby. He said he did not see the group near the pool because there were too many students on the playground, and he only became aware of them when the two groups were about 30 feet apart. *Id.* at 173, 176. He acknowledged that he did not need to cross the playground en route from school to his afternoon job, but said he walked with his friends. *Id.* at 174. According to Salmeron, Rodriguez was the Graffiti Kings' leader when it is important, but denied that Rodriguez initiated the confrontation after school *Id.* at 177.

The person he believed was Palacio stepped in the path of the Graffiti Kings and said something in Spanish, Salmeron said, and in the next 45 seconds the group by the pool surrounded them. *Id.* at 177 – 9. Then he saw "Palacio" and Bolanos pull knives. *Id.* at 179. The witness said he had no difficulty distinguishing Mejia from Rodriguez and he was certain that "Palacio" attacked Mejia and Bolanos attacked Rodriguez. *Id.* at 181 – 2.

David Rodriguez's Testimony

David Rodriguez, 19, also was is in the 11th grade at Bell. Tr. 7/22/98, 211. He is six feet tall. *Id.* at 256. He initially denied that his group called itself the Graffiti Kings, saying other

people called them other names with the initials G.K. *Id.* at 221. As his group walked toward Lincoln school for lunch on April 14, 1998 Bolanos caught Gonzales's attention by making motions with his hands, he testified. *Id.* at 213. When they approached, Gonzales asked what was wrong and after he spoke, Bolanos, who was with two companions, responded, "I'm not scared of you all. You know, I'm not scared of this other gang, so why should I be scared of you all." *Id.* at 216. During what he described as a brief confrontation, the Graffiti Kings and Bolanos were only a few feet apart and Bolanos was standing "all puffed up," he said. *Id.* at 216 – 7.

Rodriquez claimed the he did not understand what had happened and attempted to ask Gonzales at lunch, but still did not understand. *Id.* at 219.

After school, as they crossed the playground walking close to Lincoln school, Rodriguez said he noticed a group near the pool, including Bolanos, another guy named Kenia, Juan Cruz and others. *Id.* at 222 – 3. Casper came out of the group and asked if they had a problem to say so, he recounted. *Id.* at 230. According to Rodriguez, the Graffiti Kings did not reply and then the other group surrounded and attacked them. *Id.* The witness said he had seen Palacio only once before. *Id.* at 231. Palacio attacked him and stabbed him twice in the arm before he grabbed his attacker's arm to block a stab to his chest. *Id.* at 232. He could not describe the knife he claimed Palacio wielded. *Id.* at 234. Then, he testified, after Palacio ran away, a short guy stabbed him in the stomach and someone he could not identify stabbed him in the back. *Id.* at 232 – 4. At that point a girl named Claudia Alfaro grabbed him and pulled him toward the school, he said. *Id.* at 236.

Rodriguez stated under cross-examination that the Graffiti Kings are not a gang, and admitted that he used to tag. *Id.* at 241. He said that where his graffiti appears, if it includes the initials G.K. someone else added the initials. *Id.* at 243 – 4. He conceded that Gonzales told him before April 14, 1998 that Bolanos had written over their graffiti and that he was aware that Gonzales and Salmeron expressed anger about that. *Id.* at 245. He agreed that Gonzales asked why Bolanos was disrespecting him, but denied that his friend threatened Bolanos. *Id.* at 245 – 6.

By the time the security guard approached, the confrontation had ended and the Graffiti Kings were going toward the cafeteria, he said.

After school members of other gangs gathered near his group, but he denied that the others were encouraging a confrontation. *Id.* at 249. He admitted hearing that people on the playground were waving as his group walked toward the pool. *Id.* at 263. Rodriguez also admitted testifying on direct examination that members of other gangs walked beside his group as it crossed the playground, but said the other gangs may have been behind them. *Id.* at 250 – 1.

He was aware as the Graffiti Kings crossed the playground that Bolanos and others were leaning on the fence near the pool and of the confrontation earlier that day. *Id.* at 263. He acknowledged that he is six feet tall and weighed 280 pounds and that Gonzales is big as well, and said no one blocked the group's way. *Id.* at 264. He said Palacio stepped away from the fence as they neared and said in Spanish, "what is a hassle, if there is a hassle," and "if there's a hassle, if there's a problem, for someone to say something." *Id.* at 266. It was silent for several seconds after Palacio spoke and then the group at the fence attacked, Rodriguez stated. *Id.* at 268.

When he saw the group moving he took his attention off Palacio. Then, he testified, Appellant struck at him twice with a knife having a six inch blade, and the third time he grabbed Appellant's arm. *Id.* at 270 – 1. He denied telling police that Palacio chased him. *Id.* at 270.

Rodriguez described the person who stabbed him in the stomach as being a Latino about 5 feet, 5 inches tall, chubby, with a dark complexion, and said that person was not one of the defendants. *Id.* at 257 – 8.

Dot. Trevor Hewick's Testimony

Det. Trevor Hewick was the primary investigator in the case and was involved in arresting Bolanos and Cruz. He prepared the affidavit supporting the warrant to arrest Palacio, and in it he stated that Appellant chased Rodriguez before stabbing him. *Id.* at 323. Based on his interview with Rodriguez, he also stated in the affidavit that Palacio stepped into the path of the

Graffiti Kings and challenged them, saying in Spanish, "what's up. What's going on?" *Id.* at 323 – 4. He said these were conclusions he drew based on his investigation. *Id.*

Alex Arevalo's Testimony

Alex Arevalo, 16, was in the 11th grade at Bell on April 14, 1998. *Id.* at 344. He said he went to lunch with his friends and on the way Gonzales "wanted to get it off his head," to find out what the problem was, so he approached Bolanos, who was sitting with two friends on a bench near the pool. *Id.* at 345, 347. He could not recall who Bolanos's companions were, but he later claimed that "Casper" was one of them. *Id.* at 347, 360. He said Gonzales wanted to resolve the problem and he asked whether Bolanos had crossed out his graffiti. *Id.* at 346. When Bolanos did not respond, Gonzales asked why he was doing it and said he thought they were "cool." According to Arevalo, Gonzales was the only person who spoke and his group left when the security guard arrived and asked what was going on. *Id.* at 347 – 8.

After school, he testified, as they went through the hole in the fence around the playground, he noticed that people started following them and he thought something was going to happen. *Id.* at 351 – 2. They walked across the playground until he saw 13 or 14 people near the pool staring at them and not talking among themselves. *Id.* at 355 – 6. He began paying attention because he sensed there would be trouble. He said Casper approached his group and said something very rapidly in Spanish and then "pulled a knife or something." *Id.* at 356. At that point, Arevalo testified, he shouted to his friends to run.

When cross-examined, Arevalo denied that he thought up the name Graffiti Kings and said it was a group decision. *Id.* at 362.

As the Graffiti Kings crossed the playground members of One-Eight and Park Road were around them and that contributed to his feeling of unease. *Id.* at 368. As they started across the playground he saw Bolanos and his friends at the other end. As they approached the pool Casper stepped out and spoke, and the Graffiti Kings did not respond. *Id.* at 370. He said he did not understand what was said because he does not speak Spanish. *Id.* at 385. But he noticed that the

people leaning on the fence began moving in twos and threes. *Id.* at 381 – 2. Out of the corner of his eye, he testified, he saw Bolanos moving toward Rodriguez and Gonzales. *Id.* at 387.

Arevalo testified that he saw an object in Palacio's hand, "a knife or something," and when he saw that he shouted to his friends and began running. *Id.* at 387 – 8. After that the only one of his friends that he saw was Coreas, who was running in front of him. *Id.*

Walter Coreas's Testimony

Walter Coreas, 18, was in the 11th grade at Bell in April 1998, and he, too, went to lunch with his friends at Lincoln school. Tr. 7/23/98, 402. On their way Gonzales wanted to talk to Bolanos about some tagging on the wall of Lincoln school. Gonzales asked why Bolanos did something to some tagging and Bolanos got very upset and said he was not scared of them, according to Coreas. *Id.* at 403 – 4. Coreas said he told Gonzales to forget about it and go to lunch, and they did not discuss the matter further. *Id.* at 404 – 5.

After school, he said, there were a lot of people on the playground and it looked like any other day as they began walking toward 16th Street. *Id.* at 407. His group was walking and talking, and suddenly a group of teenagers stopped them and a boy standing in front of him said "you guys got [a] problem with me." *Id.* at 408. Then someone passed in front of him with a knife and he yelled to his friends and began running. *Id.* at 409. As he did so a bottle landed near him and broke. *Id.* at 415.

When he first saw the other group it included 13 to 15 people, of whom he only recognized three, Bolanos, Casper and Uvic Gutierrez. *Id.* at 410 – 11, 413. He could only see Bolanos's and Palacio's faces because other people were blocking his view of them, and he could not identify the person with the knife. That person was chubby and dark complected, and was not one of the defendants, he testified. *Id.* at 413.

Under cross-examination he testified that he had known Palacio for about a year, and that he did not recognize the individuals who blocked his group or the person who spoke. *Id.* at 419.

José Mejia's Testimony

José Mejia, 19, testified that he spent the lunch period with his girlfriend that day. Tr. 7/20/98, 93. After classes he had an argument with his girlfriend and then met his friends in front of Bell. *Id.* at 55 – 6. He said he was late for his after-school job and was preoccupied about the argument as they took a shortcut across the playground. He walked in front of his friends, the Graffiti Kings. *Id.* at 57.

According to Mejia, Arevalo made up the group's name several months earlier because several of his friends liked to tag their initials on walls. *Id.* at 58. Asked why they called themselves the Graffiti Kings he said, "I have no idea," but added that everyone likes to form little groups. *Id.* at 59 – 60. He denied that he tagged and said the group was not a gang.

Mejia said he was not paying attention to what was going on around them until he heard one of his friends shout that a group of people leaning on the fence near the pool had knives. *Id.* at 60 – 1. Then he saw Bolanos and Edgar Cruz coming toward him with knives and he began backing up rapidly, but he tripped and fell on his back. *Id.* at 61. He was stabbed in the chest and shoulder before he could get up again and run away.

Mejia said he knew Bolanos by his real name and as Droopy, and that he had seen Cruz in the neighborhood., but did not know his name. *Id.* at 64. He knew Palacio by his last name and by the nickname Charles Speaker. *Id.* at 65.

Under cross-examination Mejia initially denied knowing anything about the confrontation earlier in the day or that Bolanos had written over graffiti drawn by Gonzales and Salmeron. He denied telling Det. Hewick that Charles Speaker and Shorty Cruz, Edgar Cruz's brother, confronted him on the playground that day. *Id.* at 117.

He denied that the Graffiti Kings were a gang or that they laid claim to the wall at Lincoln school where they tagged. *Id.* at 111 – 13. He said, as well, that he was not one of the taggers in the group.

Confronted with his Grand Jury testimony, Mejia said he first saw Bolanos and other people leaning on the fence near the pool when the Graffiti Kings entered the playground. *Id.* at

123 – 4. He said the group of about 15 people included a few girls. *Id.* at 127. One of the girls was Kenia, he said. Tr. 7/21/98, 15. As the Graffiti Kings approached the pool, he said, Charles Speaker said "let's get this started," before anyone said they saw knives. Tr. 7/20/98, 128.

Mejia said he had a contract with the principal at Bell under which he could be expelled from the school if he engaged in certain activities, including injuring someone, damaging school property, using violence or making threats, or hanging out with members of a gang. *Id.* at 136 – 7.

When he came out of the school at the end of the day his friends were across the street talking to members of other gangs and he did not know if they discussed a confrontation with the group near the pool. Tr. 7/21/98, 13. He said members of other gangs, One-Eight, One-Five and Park Road, might have been around the Graffiti Kings as they crossed the playground. *Id.* at 28.

Mejia did not see Palacio with a knife. *Id.* at 30..

In redirect examination Mejia said he knew who was leaning on the fence because they hung out there every day. *Id.* at 36 – 7. He recalled that Palacio spoke English, and he did not react when he heard the statement because he usually doesn't pay attention to what most people say. *Id.* at 39 – 40. After Palacio spoke one of his friends shouted that someone had a knife. *Id.*

THE DEFENSE'S EVIDENCE

Sandra Rosanes's Testimony

Sandra Rosanes, 15, was a student at Lincoln Middle School and testified that she knows the defendants and the Graffiti Kings. Tr. 7/23/98, 471 – 3. She was on the playground near the pool when the Graffiti Kings confronted Bolanos at lunchtime and again after school. At lunchtime she was waiting for her sister and a friend, and Bolanos was sitting on the same bench with a friend. She said Gonzales, Rodriguez, Salmeron, Mejia, Coreas and Arevalo approached and Gonzales asked why Bolanos had crossed out his name. *Id.* at 475 – 6. She said Bolanos admitted marking over Gonzales's graffiti and said he did it because Gonzales had drawn over his graffiti. *Id.* at 476. Gonzales replied, "well, we're going to have to settle this." Gonzales did

not shout, but he has a deep voice, so he sounded angry, according to Rosanes. *Id.* at 486. Then the school security guard came and asked what was going on. *Id.* at 476 – 7. Gonzales said "nothing," and the Graffiti Kings went to the cafeteria.

After school she returned to the same area to wait for her sister and her friend Kenia because they were going to the zoo, and Kenia told her that Bolanos would go with them. *Id.* at 479. Bolanos and his friends were leaning on the fence near the pool.

After many Lincoln students left the playground, Gonzales and his friends, including three people who had not been there at the lunchtime confrontation, walked from Bell straight to the area near the pool. *Id.* at 480 – 1, 489. Rosanes said the Graffiti Kings stood there for a while and Gonzales said to Bolanos, "What's up?" Bolanos responded, "what's up," and Palacio said, "What are you going to do, just stand there?" *Id.* at 481, 483. Then, without provocation, she testified, Gonzales hit Palacio and about nine people from each side began brawling. *Id.* at 483, 527. The Graffiti Kings then turned and ran back toward Bell, but as they did they threw bottles, she testified. *Id.*

Rosanes said Palacio did not have a knife in his hand and he did not punch anyone after he spoke to Gonzales. *Id.* at 489 – 90. She later saw him fighting when a person, she thinks Rodriguez, was holding him in a headlock, she added. *Id.* at 490.

Under cross-examination by the prosecutor, Rosanes said she thought Mejia was with the group at the earlier confrontation, but she believed that was true because she usually saw the six Bell students together. *Id.* at 497 – 9. She confirmed that Bolanos said he was not scared of the Graffiti Kings, and said he was angry because they had accused him of writing over their names. *Id.* at 499 – 500.

Before the fight broke out the group near the pool did not block the Graffiti Kings' path, she said. *Id.* at 510. The Graffiti Kings walked directly toward Bolanos and his friends.

ARGUMENT

THE GOVERNMENT MANUFACTURED JURISDICTION OVER APPELLANT AS AN ADULT BY CHARGING ASSAULT WITH INTENT TO MURDER WHILE ARMED

Pursuant to D.C. Code § 16-2301(3)(A),[5] the U.S. Attorney charged Palacio and Bolanos, who were 17 years old when these crimes occurred, as adults with assault with intent to murder while armed (AWIMWA) and assault with intent to kill while armed (AWIKWA). It charged Cruz, who was 23 years old, with assault with intent to kill while armed. Count B, C and D stated:

> On or about April 14, 1998, within the District of Columbia, Walter A. Bolanos, also known as "Droopy"; Uvic D. Gutierrez; Luis M. Palacio, also known as "Casper"; and other persons whose identities are unknown to the grand jury, while armed with a knife, or other deadly or dangerous weapon, assaulted [victim] with intent to murder him. (Assault With Intent To Murder While Armed, in violation of 22 D.C. Code, Section 503, 2403, 3202)

Before trial Bolanos's counsel, joined at the motion hearing by Palacio's counsel (Tr. 7/10/98, 216), moved to dismiss either the AWIMWA or AWIKWA counts, arguing that the indictment was multiplicitous. He noted that the jury must find a specific intent to kill to convict for AWIK, and that specific intent to kill is one of the forms of malice on which jurors could base a conviction for AWIM. If jurors determine that the defendant had a specific intent to kill and the issue of mitigation did not arise, counsel argued, there is no difference between AWIK and AWIM.

Counsel argued in addition that the counts in the indictment charging AWIMWA lacked sufficient specificity to comply with the Indictment Clause of the Fifth Amendment because they

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[5] The statute provides in relevant part:

> (3) The term "child" means an individual who is under 18 years of age, except that the term "child" does not include an individual who is sixteen years of age or older and —
>
> (A) charged by the United States attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense, or (ii) an offense listed in clause (i) and any other offense properly joinable with such an offense …

provided no indication of the type of malice on which the Grand Jury based those charges. Because the Grand Jury did not specify the form of malice, there was a significant danger that Palacio and Bolanos would be convicted twice for the same offense. He added that the cumulation of six counts each against the two younger defendants as opposed to only three counts against Cruz would have a greater psychological impact on jurors and would be prejudicial.

In failing to specify the level of malice supporting its probable cause finding, the Grand Jury did not adequately apprise the younger defendants of the nature of the charges against them and deprived them of the ability to adequately prepare their defenses, according to counsel. Furthermore, the indictment did not adequately reflect the Grand Jury's intent.

Bolanos sought dismissal of the AWIMWA counts. In addition, he moved to unseal the Grand Jury minutes to determine whether its members were properly instructed regarding the findings required to charge the younger defendants with AWIMWA, and to attempt to discern the form of malice found.

In the hearing, the prosecutor acknowledged that the charging decision was driven by the desire to prosecute Palacio and Bolanos as adults, and Cruz was not indicted for AWIMWA because that was unnecessary to obtain jurisdiction over him.. Tr. 7/8/98A, 57 – 60[6]. She insisted that the government was not required to announce in advance the form of malice, although it must prove it at trial. Tr. 7/10/98, 217. She added that the grand jurors did not have to be of one mind about the form of malice involved. *Id.* at 218.

[6] The transcript of the motions hearing held July 8, 1998 is in two volumes, one prepared by Larry F. Pavlish and the other by Kathleen Peterson Hart. The dates on the first page of the Pavlish transcript are July 8, 9 & 10, 1998, and the 72-page transcript is in two sections. The second section, beginning at page 49, is the transcript of proceedings at 10:05 a.m. July 8, and the first section, beginning at page 1, covers proceedings the same day beginning at 2:45 p.m. The 32-page Hart transcript covers proceedings beginning at 3:15 p.m. The Pavlish transcript will be designated Tr. 7/8/98A and the Hart transcript will be designated Tr. 7/8/98B.

The Judge expressed reservations, saying it would be very difficult to instruct the jury in a manner that would address the concerns defense counsel expressed. He requested authorities indicating whether he could look behind the indictment to address issues raised in the motion. Tr. 7/8/98A, 62. But the Judge later stated that only the jury could decided the appropriate form of malice, noting that only two forms would be applicable in this case —specific intent to kill and reckless disregard for the victim's life. *Id.* at 221 – 2.

However, the Trial Court continued to be concerned about the multiplicity argument, agreeing with the defense that in the absence of mitigating circumstances AWIKWA is one form of AWIMWA. *Id.* at 224. It rejected the prosecutor's argument that prosecuting Bolanos and Palacio for AWIKWA and AWIMWA was no different than charging lesser-included offenses, which the government often does. *Id.* at 224 -5. It said the government can charge AWIKWA and the crimes below it in the hierarchy, but AWIKWA is not a lesser-included offense of AWIMWA.

Because the jury acquitted the defendants of all AWIMWA and AWIKWA counts the multiplicity issue raised by defense counsel is moot. However, because the counts in the indictment charging Palacio with AWIMWA were defective, the Trial Court erred in refusing to dismiss them. The error had significant prejudicial impact on Appellant because he was deprived of the protection and rehabilitation afforded in the Family Division of the Superior Court and was exposed to a sentence of up to 15 years to life in prison under § 22-3202(a), far greater than the approximately four years of supervision he would have faced if he had been adjudicated delinquent. In addition, because Appellant was convicted of a felony he faces deportation upon release from prison, which would not be the case if he had been adjudicated in a juvenile proceeding. *See, Logan v. United States*, 483 A.2^{d} 664, 676 (D.C. 1984). As a result, this case is very different from *Hunter v. United States*, 590 A.2^{d} 1048, 1051 (D.C. 1991), in which the Court ruled that acquittal on the AWIMWA charge rendered the adult appellant's attack on the indictment moot.

Standard of Review

The proposition that a court lacking jurisdiction over a criminal defendant cannot convict and sentence him for the charged crime is so fundamental to our system of justice that the defendant cannot waive his right to challenge jurisdictional defects. Such a challenge may be brought at any time. D.C. Crim. R. 12(b)(2). *See, also, Arrington v. United States*, 585 A.2^{d} 1342, 1344 n. 2 (D.C. 1991); *Smith v. United States*, 304 A.2^{d} 28, 34 & n. 3 (D.C. 1973)("Had we found that appellant was entitled to prosecution by indictment in this case, the failure to so prosecute would have constituted plain error and of necessity caused us to reverse the conviction below in that the trial court would not have had jurisdiction to hear the case…."); *Ex parte Wilson*, 114 U.S. 417, 429, 5 S. Ct. 935, 29 L. Ed. 89 (1885)(convicting, sentencing defendant without indictment or presentment by grand jury exceeded trial court's jurisdiction, and defendant entitled to be discharged).

In this case defense counsel raised the issue before jeopardy attached, and counsel for Bolanos moved to unseal the Grand Jury transcripts in an effort to discover whether the body considered the applicable form of malice. Counsel suggested as well that the Trial Court require a special verdict in which jurors indicated the form of malice supporting their verdict if they convicted Bolanos and Palacio of AWIMWA. The Trial Court rejected these proposals and ultimately concluded that the indictment was not defective, although it was multiplicitous on its face.

If this Court determines that the indictment was defective it must vacate Palacio's convictions because the Criminal Division lacked jurisdiction to prosecute him unless the U.S. Attorney first obtained permission from the Family Division to try him as an adult. D.C. Code § 16-2307.

The Indictment Was Defective

This Court recognized in *Cain v. United States*, 532 A.2^{d} 1001, 1004 (D.C. 1987), that an indictment must allege all essential elements of the crime charged to serve three essential interests: to permit the defendant to adequately prepare his defense, to act as a bar to future

prosecution for the same offense, and to accurately reflect the intent of the Grand Jury and the facts on which it based its probable cause determination. The Court explained that the third interest

> arises from the Fifth Amendment's mandate that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The purpose of this requirement … is "to limit [a defendant's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." … To allow the prosecutor or the court to guess what was in the minds of the grand jurors at the time they returned the indictment would deprive the defendant of this "basic protection." … "For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

United States v. Bradford, 482 A.2d 430, 433 (D.C., 1984)(citations omitted). The Supreme Court has stated that

> there is an important corollary purpose to be served by the requirement that an indictment set out "the specific offence, coming under the general description," with which the defendant is charged. This purpose … is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

Russell v. United States, 369 U.S. 749, 768, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962).

An indictment that merely restates the charge in the language used in the statute is inadequate "unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished . . .." *United States v. Pendergrast*, 313 A.2d 103, 104 (D.C. 1973).

In Palacio's case, the Grand Jury could indict him for AWIMWA only if it found that when he committed the alleged crime he had a malicious intent to kill and that no factor justified, excused or mitigated the act. This Court has recognized four forms of malice that in a murder case satisfy the malice requirement: 1) that the defendant had the specific intent to kill; 2) that he had the specific intent to commit serious bodily harm; 3) that he acted in wanton and willful disregard of an unreasonable human risk — "depraved heart" murder; and 4) that the killing occurred during the commission of a felony — "felony murder." *Comer v. United States*, 584

A.2d 26, 38 – 9 (D.C. 1990). Both the defendant's state of mind and the absence of justification, excuse or mitigation are components of malice required to convict a defendant for AWIMWA. *Howard v. United States*, 656 A.2d 1106, 1114 (D.C. 1995).

In *Logan*, *supra*, the Court analyzed the legislative history of § 16-2301(3)(A) to determine whether the U.S. Attorney could try a juvenile over 16 years old as an adult for AWIKWA under D.C. Code § 22-501. It rejected the government's argument that the distinction between AWIMWA and AWIKWA was merely semantic, and recognized that, if approved, the government's position that § 16-2301(3)(A) permits prosecution under § 22-501 for AWIKWA

> would make it possible for a seventeen-year-old youth who committed an assault with a specific intent to kill — but who acted with adequate provocation, justification or excuse — to be charged and tried as an adult under § 16-2301(3)(A) only so long as the victim of the assault survived. If the victim died, the crime would be manslaughter and the youth could not be tried as an adult without prior judicial approval pursuant to § 16-2307.

Id. at 674 – 5.

Instead, the Court concluded that "the purpose of the relevant language in § 16-2301(3)(A) is to authorize the prosecution of certain juveniles as adults only when they are charged with an assault committed with a malicious intent to kill." *Id.* at 483 A.2d 676. Reading *Logan* and *Comer* together, this statement appears to say that in order to charge assault with intent to murder the Grand Jury would have to find probable cause to believe that at the time of the crime the defendant had one of the four states of mind required for murder and the absence of justification, excuse or mitigation. But in *Hobbs v. United States*, 816 A.2d 21, 35 (D.C. 1991), in explaining why aggravated assault while armed does not merge with assault with intent to murder while armed, the Court held the former requires proof of bodily injury and the latter "requires proof of specific intent to kill and malice." As a result, the notes accompanying Instruction 4.10, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, 4th Ed., 1993, 1996, state,

> [t]he Court of Appeals has not explicitly set out the elements of the offense of assault with intent to murder…. [H]owever, it has indicated strongly that an intent to kill is an

> essential element…. The conclusion that an intent to kill is required is consistent with the law in virtually all the jurisdictions in which assault with intent to murder is a crime.[7]

Regardless of whether a specific intent to kill is an essential element of AWIMWA, or one of the other three mental states would suffice, the U.S. Attorney could, without approval from the Family Division, transfer Palacio's case to the Criminal Division only if the Grand Jury found probable cause to believe that Appellant had the requisite state of mind and that no justification, excuse or mitigating factor applied.

The text of counts B, C and D of the indictment, charging Palacio, Bolanos and Gutierrez with assault with intent to murder while armed, are identical to counts E, F and G, charging all four defendants with assault with intent to kill while armed. The former do not identify the state of mind grand jurors believed the defendants exhibited when they committed the alleged crimes, and more importantly, do not indicate whether the grand jurors agreed there was probable cause to believe the defendants lacked justification, excuse or acted in the absence of some mitigating factor. In other words, from the text of the indictment it is impossible to determine whether the Grand Jury found all elements of the crime by probable cause.

Because counts B, C and D of the indictment charging AWIMWA were fatally flawed the Criminal Division of the Superior Court lacked jurisdiction to try Palacio as an adult. § 16-2301(3)(A)(i), § 16-2307. The U.S. Attorney could prosecute Palacio on lesser offenses enumerated in the indictment only with permission from the Family Division, which it did not obtain. § 16-2307. Therefore, the Criminal Division could not convict and sentence Appellant for assault with a dangerous weapon and aggravated assault while armed.

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[7] The notes state that the Court's pronouncements in this area are open to some interpretation:

> The Committee recognizes that certain statements in *Logan* might be taken to indicate that intent to seriously injure or awareness of extreme risk of death or serious bodily injury would be sufficient … In view of the other statements from the Court of Appeals and the case law in other jurisdictions [] the Committee recommends that the jury be instructed that intent to kill is a required element.

Because Palacio challenged the indictment before jeopardy attached, this Court should vacate Palacio's adult convictions and remand his case to the Family Division of the Superior Court. *Logan, supra,* 483 A.2d at 677.

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT APPELLANT'S CONVICTION FOR AGGRAVATED ASSAULT ON RODRIGUEZ WHILE ARMED

To convict Palacio of aggravated assault while armed, the jury had to find that Rodriguez suffered "serious bodily injury;" that Appellant intended to cause serious bodily injury, and that he engaged in conduct that posed a grave risk of such injury or manifested extreme indifference to human life. Instruction 4.06A, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, 4th Ed., 1993, 1996. Neither the statute, § 22-503, nor the jury instruction defines the term "serious bodily injury."

The notes accompanying the jury instruction suggest the definition provided by the Model Penal Code § 210.0(3), which states, "[s]erious bodily injury means bodily injury which (1) creates a substantial risk of death; (2) causes serious permanent disfigurement; or (3) causes protracted loss or impairment of the functions of any bodily member or organ." In addition, the notes cite D.C. Code § 22-4101(7), which defines "serious bodily injury" as an aggravating factor to be considered in sentencing individuals convicted of sex offenses. To the list of characteristics associated with serious bodily injury that section adds extreme physical pain, unconsciousness, and protracted loss or impairment of mental faculty.

When the Court convened July 22, 1998 counsel for Bolanos offered a jury instruction on aggravated assault which would apply equally to all three defendants. Tr. 7/22/98, 209. After the government rested, Palacio's trial counsel argued that there was insufficient evidence of serious bodily injury to support conviction for aggravated assault while armed. Tr. 7/23/98, 452 – 3. In response, the prosecutor erroneously argued that the medical records demonstrated that Rodriguez suffered a penetrating wound in his abdomen. *Id.* at 454 – 5. But the Judge noted that Rodriguez suffered injury to his skin but no internal organs, and noted that the government could

not argue loss or impairment of some function. *Id.* at 455. Nonetheless, he denied Appellant's motion. Trial counsel renewed the motion for judgment of acquittal after the defendants rested. Tr. 7/27/98, 11.

Standard of Review

In this case counsel for Palacio and his codefendants argued that they were entitled to acquittal as a matter of law on the charge of aggravated assault while armed. Their motions satisfied the requirements of D.C. Crim. R. 29. The Court

> review[s] such claims in the "light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." … This court can reverse only where the government has produced no evidence from which a reasonable mind might infer guilt beyond a reasonable doubt

Jones v. United States, 477 A.2^{d} 231, 246 (D.C.,1984)(citations omitted). The D.C. Circuit has held that an appellate court must conduct *de novo* review of the record and does not defer to the Trial Court's factual findings. *United States v. Johnson*, 952 F.2^{d} 1407, 1410 (D.C. Cir. 1992).

The Trial Court Applied the Wrong Standard To Conclude There Was Sufficient Evidence To Support the Verdict

The Trial Court adopted a combination of the Model Penal Code and § 22-4101(7) definitions in denying motions for judgments of acquittal made by Palacio and his co-appellants. He found as to each victim that the acts each defendant allegedly committed posed a substantial risk of death. *Id.* at 455. The Judge then stated,

> There is not protracted loss or impairment of the function of any bodily member or organ, but in the case of Mr. Mejia and Mr. Gonzales, taking those facts in the light most favorable to the government, there would have been, but for medical attention, and reasonable minded jurors could reasonably find, suffering of extreme physical pain.

Id. at 455 – 6. Implicitly, the Judge found that the wounds Rodriguez suffered were not life threatening. Furthermore, he did not find that Rodriguez suffered extreme physical pain.

Near the end of the trial the Judge told counsel he would use the Model Penal Code definition in the final jury instruction, and referring to § 22-4101(7) he said, "I am convinced that

the definition [in] the context of the sexual assault is a different context."[8] Tr. 7/27/98, 13. But shortly before sending the jury to begin deliberations the Judge apparently changed his position, adopting "extreme physical pain" as an indicium of serious bodily injury.

> It occurred to me … that there was a distinction in the medication that was given, but each complainant was given prescribed pain medication.
>
> This is not go home and take a couple of aspirins. There was a prescription for pain medication to be taken as needed, and thus it had to be contemplated by a physician that there would be significant pain over a sustained period. And it was to be taken as needed rather than any specific schedule.
>
> The person as to whom I had said I had the greatest question as to the sufficiency of the evidence on the aggravated assault charge was David Rodriguez. And it was in his record … that there was not the single pain medication, but double medication. Indeed, that may have resulted from a fair construction of people the evidence that he was confronted by a greater number of people and sustained a greater number of blows, and that, while not as severe in any injury, that in the aggregate the injuries were more severe.
>
> I think that's an additional reason why the case goes as to all three, but specifically as to Mr. Rodriguez. And it made it very difficult for me to rule out pronounced, prolonged, or profound pain as a way of measuring the seriousness of an injury.
>
> But in the end, I used simply the model penal code in fairness all around.

Id. at 128 – 9.

The Model Penal Code definition does not identify pain, whether pronounced, prolonged or profound, as a characteristic of serious bodily injury. More importantly, there is no evidence in the record that Rodriquez suffered significant pain. It is clear from the explanation that, but for his finding that Rodriquez suffered pain, the Judge would have correctly concluded that there was insufficient evidence to support convictions for aggravated assault on him.

After Palacio's trial this Court held that the § 22-4101(7) definition applied under § 22-504.1. *Nixon v. United States*, 730 A.2[d] 145, 150 (D.C. 1999). According to that definition,

[8] After stating the elements of aggravated assault while armed the Judge told jurors, "Serious bodily injury means bodily injury which creates a substantial risk of death or causes serious permanent disfigurement or causes protracted loss or impairment of functions of any bodily member or organ." Tr. 7/27/98, 51.

" 'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

Rodriguez was admitted to the hospital at 7:35 p.m. on April 14, 1998 for observation following treatment in the emergency room. Palacio's Supplemental Record, 1. The hospital discharged him on April 15th at 1 p.m. with a prescription for Percocet to be taken as needed for pain, but not more than every 4 to 6 hours. *Id.* at 3, 14. Hospital personnel described his injuries as trauma to the skin, subcutaneous tissue and breast, including an "open wound of abdominal wall, anterior, uncomplicated," and an "open wound, without complication, upper arm." *Id.* at 2. His wrist wound was described as "superficial." *Id.* at 4. Despite the complainant's testimony that he was stabbed in the back, there is no mention in the medical records of back wounds.

Mejia testified in detail about the pain he suffered and how it affected his dealings with investigators at the scene and in the hospital. But Rodriguez was never asked whether he suffered pain and never volunteered that he did. Even under the § 22-4101(7) definition, it would be pure speculation for jurors to conclude that he suffered the level of pain required to support a finding of serious bodily injury.

The Trial Court's determination, based on the quantity of pain medication prescribed, was fundamentally flawed for two reasons. First, as the Judge recognized, the pain medication was prescribed "PRN," meaning that Rodriguez could take it at intervals of four to six hours if he felt pain. Nothing in the record supports a conclusion that he ever took the medication.

Second, Rodriguez described himself as being the tallest, heaviest member of the Graffiti Kings — 6 feet tall and 280 pounds. Other witnesses corroborated his description. Physicians take physical characteristics, particularly weight, into consideration in prescribing many medications, including painkillers. It is very likely that Rodriguez's weight dictated larger doses of pain medication for him than for his friends who suffered more serious injuries.

In addition, the government placed the medical records in evidence by stipulation and did not call the treating physician as a witness. Jurors, even if they read the medical records, lacked

the special knowledge needed to determine whether pain medication prescribed for Rodriguez supported a conclusion that he suffered serious bodily injury. As a result, any conclusion they reached concerning the level of pain Rodriguez might have suffered and the duration of that pain would have been no less speculative than the Judge's conclusion.

In *Nixon, supra*, this Court found insufficient more detailed evidence concerning injuries the complainants suffered than that offered by the government in Palacio's case. It noted that,

> the only evidence presented as to the injuries of Mr. Jones and Mr. Ball came during the testimony of Mr. Taylor. He stated that he saw two holes on Mr. Jones' body, including "a hole coming out behind his ear [with] blood coming out"; and that Mr. Ball "was grabbing his shoulder and the back of his shirt was bleeding like he got hit in the back of his neck or his shoulder." Both men were able to run after the shooting and thus were not unconscious and did not manifest immobilizing pain. Neither Mr. Jones nor Mr. Ball testified, and no medical evidence was introduced through health professionals who treated either man, or through any of their medical records. Thus, the record on appeal is silent as to how the holes on Mr. Jones' body affected him. In the case of Mr. Ball, the record reveals no direct evidence that he suffered any bullet wound. However, given Mr. Taylor's testimony that Mr. Ball "was grabbing his shoulder and the back of his shirt was bleeding," the government is entitled to an inference that he was shot. Nonetheless, no evidence presented at trial permitted a reasonable juror to infer that his injury, or those suffered by Mr. Jones, posed "a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty."

Id. at 150. Citing *Williams v. State*, 696 S.W.2^{d} 896 (Tex. Crim. App. 1985), the Court held that the government cannot necessarily prove serious bodily injury merely by placing medical records into evidence to support its claim.

> A knife wound, or a gunshot wound, although caused by a deadly weapon … is not, *per se*, serious bodily injury. The shooting of an individual is a serious and grave matter. Yet, it is the burden of the State to prove that such an act created a substantial risk of death, or caused death, a serious permanent disfigurement, or protracted loss or impairment of the functions of any bodily member or organ.

Id. at 150 – 151.

The wounds Rodriguez suffered were not life threatening or disfiguring; did not render him unconscious; and did not impair his physical or mental abilities. Rodriguez testified that after Palacio struck twice he was able to grab Appellant's arm to prevent a third blow, and that

he eventually broke away from his attackers and ran back to Bell Multicultural High School, demonstrating that he did not suffer immobilizing pain. *Nixon, supra*. There is no evidence in the form of testimony or medical records supporting a conclusion that he suffered extreme physical pain. Therefore, Palacio's conviction for aggravated assault on Rodriguez must be vacated because the government failed to prove an essential element of that offense, that he caused serious bodily injury.

PALACIO'S CONVICTION FOR ASSAULT WITH A DANGEROUS WEAPON ON GONZALES MUST BE VACATED

At trial witnesses testified that Bolanos and Cruz stabbed Mejia, that Cruz stabbed Gonzales, and that Palacio and an unidentified short, chubby, bald assailant stabbed Rodriguez. One witness, Salmeron, claimed that the person he believed was Palacio stabbed Mejia and Bolanos stabbed Rodriguez. No witness testified that Palacio stabbed Gonzales, and Gonzales testified that he never saw Palacio with a knife in his hand.

On the verdict forms jurors were asked to decide whether each defendant committed the charged assaultive offenses against each complainant. In every instance but one where jurors convicted, the verdicts reflected a determination that the defendant acted as a principal, not an aider and abettor. Jurors convicted Bolanos of aggravated assault while armed and assault with a dangerous weapon against Mejia, and carrying a dangerous weapon. They convicted Cruz of aggravated assault while armed and assault with a dangerous weapon against Mejia and Gonzales, and carrying a dangerous weapon. Jurors convicted Palacio of aggravated assault while armed and assault with a dangerous weapon against Rodriguez, assault with a dangerous weapon against Gonzales, and carrying a dangerous weapon.

Because there is no evidence that Palacio fought with Gonzales, the only basis on which the jury could have convicted Appellant of assault with a dangerous weapon against Gonzales was that he acted as an aider and abettor. This determination is both inconsistent and not supported by the evidence. Appellant challenged this conviction in a post-trial motion, which the Trial Court denied.

Palacio Was Not an Aider and Abettor in the Assault on Gonzales

To be convicted of aiding and abetting, a defendant must have knowingly associated himself with the person who committed the crime, participated in the crime as something he wished to bring about, and intended by his actions to make it succeed. Instruction 4.02, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, 4th Ed., 1993, 1996. The defendant must engage in some affirmative conduct in planning or carrying out the crime. *Id.* Mere physical presence is insufficient to establish guilt. *Id. See, also,* D.C. Code § 22-105.

The evidence presented in this case clearly demonstrates that what occurred on April 14, 1998 on the playground outside Lincoln school was a brawl between to groups of young men. Although the origin of the dispute may have been several months earlier, the immediate impetus was a threatening midday encounter by five of the Graffiti Kings with Bolanos. All of the Graffiti Kings present were much bigger than Bolanos, and by all accounts he was outnumbered. The Graffiti Kings testified that Bolanos and his friends hung out near the pool every day after school, that they saw that group leaning on the fence in its usual place when they entered the playground and walked in the direction of the pool and 16th Street.

Considering the evidence in a light most favorable to the government, Palacio stepped away from the fence and made a statement to the Graffiti Kings which Gonzales, who took the lead in confronting Bolanos about the tagging, interpreted as non-threatening. After a period of silence that followed Palacio's statement, one or more of the individuals in the group near the pool pulled a knife and attacked the Graffiti Kings. Gonzales testified that he watched as Palacio spoke and never saw a knife in Appellant's hand. Mejia and others testified that Bolanos attacked him, and he said Cruz stabbed him as well. Gonzales testified that Cruz stabbed him in the arm once and the knife blade went through and penetrated his abdomen. Rodriguez testified that Palacio attacked him and then ran off.

By all accounts the group near the pool remained in place as the Graffiti Kings approached. The government produced no evidence that the defendants were aware before the

Graffiti Kings reached the vicinity of the pool that there would be a confrontation, or that they planned a response. Although Mejia testified that Bolanos and Cruz acted in concert to attack him, the government produced no evidence that Palacio acted in concert with either of his codefendants. The evidence shows that he left the area after Rodriguez fended him off.

Even if evaluated in a light most favorable to the government, there is no evidence that Palacio participated with Cruz in the attack on Gonzales or that Appellant wished that attack to succeed.

As the Trial Court instructed jurors, "you should give separate consideration and return separate verdicts with respect to each defendant, as to each count. Each defendant is entitled to have his guilt or innocence as to each of the crimes charged to him determined from his own conduct and from the evidence which applies to him…." Instruction 2.54, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, 4th Ed., 1993, 1996.

The only evidence against Palacio related to the assault on Gonzales was that he made a non-threatening statement to the group at large and was nearby, engaged in a fight with someone else when Gonzales was stabbed. *See*, *Howard, supra*, 656 A.2d at 1110 (defendant helped acquire weapons, held one of them during attack, warned codefendant of danger and left scene with codefendant); *Rogers v. United States*, 174 A.2d 356, 358 (D.C. 1961)(although defendant not direct participant in assault he acted in concert with others in a manner that could be interpreted as threatening); *Murchison v. United States*, 486 A.2d 77, 81 (D.C. 1984)(defendant handed gun to shooter during incident in club starting chain of events culminating with shooting outside several minutes later). Palacio did not participate in any way in the fight with Gonzales.

The Verdicts Were Inconsistent

This Court has held generally that juries may return inconsistent verdicts, i.e. convicting one defendant of first-degree murder and another defendant of second-degree murder. *See, e.g. Ellis v. United States*, 395 A.2d 404, 411 n. 5 (D.C. 1978). In such cases it has held that,

> [t]he law correctly recognizes that it must make room for jurors' negotiation and compromise during deliberation. Therefore, a jury verdict need not be logically

> consistent. The only question for review is whether the evidence was sufficient to support the conviction under the guilty verdict.

Steadman v. United States, 358 A.2^{d} 329, 332 (D.C. 1976)(citing *Branch v. United States*, 263 A.2^{d} 258, 259 (1970)).

In this case, because the verdicts are inconsistent and there was no evidence to convict Palacio of aiding and abetting the assault on Gonzales, the Trial Court erred in denying the post-trial motion for a directed verdict of acquittal.

CONCLUSION

For the reasons stated above and any others that may appear after oral argument, Appellant Luis M. Palacio respectfully requests that the Court vacate his conviction and remand his case to the Superior Court Family Division. Alternatively, Appellant requests that the Court vacate his conviction for aggravated assault while armed on Rodriguez and assault with a dangerous weapon on Gonzales, and remand his case to the Superior Court Criminal Division for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S Becker, counsel for Luis M. Palacio, certify that on February 12, 2004 I served a true copy of the attached Appellant's brief by first-class mail on counsel listed below.

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