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

PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

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CONCISE STATEMENT OF ISSUES FOR *EN BANC* REVIEW AND THEIR IMPORTANCE

This Court sitting *en banc* should vacate the holding of the Merits Panel because it conflicts with prior holdings of the Court in *Logan v. United States*, 483 A.2^{d} 664 (D.C. 1984), and *United States v. Hobbs*, 594 A.2^{d} 66 (D.C. 1991), and because it is clearly contrary to the intent of Congress when it adopted D.C. Code § 16-2301(3)(A).

Because the U.S. Attorney wanted to prosecute Appellant Luis M. Palacio and his codefendants Walter Bolaños and Uvic Gutierrez as adults, it charged each of them with both assault with intent to murder while armed (AWIMWA) and assault with intent to kill while armed (AWIKWA). It charged a fourth codefendant who was over 18 years old only with AWIKWA. In this way the government circumvented the jurisdiction of the Family Division of the Superior Court and deprived Palacio of rehabilitation provided to juveniles adjudicated delinquent.

AWIMWA charges in the indictment were identical to related AWIKWA charges, except for the substitution of the word "murder" for the word "kill" and citations to the respective charging statutes. There is no evidence that the grand jury was presented evidence from which it could have found probable cause to believe that Palacio committed the charged crimes with malicious intent to kill, or that the grand jury was instructed that it had to make the evidentiary distinction required to charge Appellant with AWIMWA.

Nonetheless, a Panel of this Court held that evidence sufficient to demonstrate probable cause to believe Palacio committed AWIKWA was sufficient to support the charge of AWIMWA as well. In effect, the Panel said, the distinction this Court drew in *Logan* between the two crimes is irrelevant for charging purposes. The effect of this decision is to overturn the holding of *Logan*, which a Panel of this Court may not do.

When Congress adopted § 16-2301(3)(A) as part of the 1970 D.C. courts reorganization, it clearly intended to limit the U.S. Attorney's discretion to prosecute 16- and 17-year-olds as adults without first obtaining permission from the Family Division to do so. The legislative

history of § 16-2301(3)(A) and D.C. Code § 16-2307 demonstrates Congressional desire to create a very narrow class of the most serious crimes for which juveniles can be tried as adults without going through formal judicial proceedings to transfer the case the Criminal Division. But the Panel held that the government does not have to present evidence of the defendant's malicious intent to kill, and that the grand jury does not have to find probable cause as to that essential element of AWIMWA, which distinguishes that crime from AWIKWA. The Panel opinion effectively rewrites the statute to broaden the class of crimes for which juveniles may automatically be prosecuted as adults, in clear contravention of Congressional intent,

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STATEMENT OF THE CASE

Luis M. Palacio was charged April 21, 1998 with one count of assault with intent to murder while armed. R. 3.[1] The grand jury returned an 11-count indictment against Palacio and codefendants Walter A. Bolaños, Edgar A. Cruz and Uvic D. Gutierrez on June 9, 1998. R. 8. Palacio and his juvenile codefendants were charged with three counts of assault with intent to murder while armed in violation of D.C. Code §§ 22-503,[2] 22-2403 and 22-3202 so they could be prosecuted as adults. 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; three counts of aggravated assault while armed in violation of D.C. Code §§ 22-504.1 and 22-3202; and one count of carrying a dangerous weapon in violation of D.C. Code § 22-3204. 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, 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, but convicted him of the lesser-included offense of assault with a dangerous weapon. It acquitted

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

him of assault with intent to kill Gonzales while armed, 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, and carrying a dangerous weapon. Jurors acquitted Appellant on all other counts.

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 had to serve a five-year mandatory-minimum term for aggravated assault while armed.

Palacio filed a timely Notice of Appeal December 16, 1998. This Court issued an opinion May 10, 2007 vacating Palacio's conviction for aggravated assault while armed and one count of assault with a dangerous weapon and remanded his case for resentencing. It granted a government motion to make non-substantive corrections to the opinion.

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 Bolaños and unidentified male companions on the

playground. Gonzales was angry because he believed Bolaños had "tagged" — drawn graffiti — over graffiti the 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 Bolaños and from nine to 14 other people, most of them males, standing along a fence at the far end of the playground. The Graffiti Kings walked toward the group near the fence. According to the Graffiti Kings who testified, as they approached 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.

ARGUMENT

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 AWIMWA. Those counts were constitutionally defective because they gave no indication that the grand jury determined by probable cause that Palacio exhibited malicious intent to kill. The AWIMWA counts read:

> On or about April 14, 1998, within the District of Columbia, Walter A. Bolaños, 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).

The AWIKWA counts were identical, except that they substituted "kill" for "murder," and cited § 22-501 as the statutory authority for the charge.

In addition, he argued that there was no evidence that the grand jury had been properly instructed on the distinction between AWIMWA and AWIKWA, and therefore it was inevitable that if the grand jury found probable cause to charge the latter it would automatically charge the former as well.[3] *See* Appellant's Brief, 18, 20, 23. Because of this defect the Criminal Division lacked jurisdiction to try Palacio, and his convictions must be vacated.

The Panel agreed with Appellant that an indictment for AWIMWA must allege: "(1) defendant assaulted the complainant; (2) defendant did so with specific intent to kill the complainant; (3) there were no mitigating circumstances …; and (4) that at the time of the commission of the offense the defendant was armed." *Slip Op.*, 17 (citing *Howard v. United States*, 656 A.2d 1106, 1114 (D.C. 1995); *Cain v. United States*, 532 A.2d 1001, 1004 (D.C. 1987)). But it concluded that, because the government "ordinarily is not obligated to present … evidence that is favorable to an accused," and did not present "evidence of provocation or mitigating circumstances" to the grand jury in this case, the grand jury "did not need to find probable cause as to that element." *Id.*

Following the Panel's logic, the government could obtain an indictment for first-degree murder even if the grand jury was not instructed that it needed to determine whether there was probable cause to believe the defendant premeditated and deliberated, and the prosecutor presented no evidence as to those elements of the crime. From the Panel's perspective, absence of premeditation and deliberation would be merely a defense that would reduce the conviction to one for second-degree murder.

It is noteworthy that the Panel never discussed the two seminal cases interpreting § 16-2301(3)(A), *Logan v. United States*, 483 A.2d 664 (D.C. 1984), and *United States v. Hobbs*, 594

[3] The Panel ordered the government to submit the grand jury transcript under seal for its review. In its opposition to Palacio's motion to unseal the transcript so his lawyer could review it, the government represented that the transcript provided no significant evidence regarding the instructions given.

A.2d 66 (D.C. 1991). Nonetheless, the Panel's Opinion effectively overrules *Logan*. In doing so it ignores the clear intent of Congress that § 16-2301(3)(A)[4] is to be construed narrowly so that the U.S. Attorney can circumvent the formal transfer procedure established by D.C. Code § 16-2307 only when juveniles have committed "the few most serious offenses." 116 Cong. Rec. 25,204 (1970). In short, the Panel opinion lowers the threshold for prosecuting juveniles in the Superior Court as adults without review by a Judge of the Family Division.

By holding that the government need not present any more or any different evidence to the grand jury to obtain an indictment for AWIMWA than it does to obtain an indictment for AWIKWA, the Panel reduced the jurisdictional barrier defined by the statute to a mere matter of nomenclature. In any case involving a juvenile over 16 years of age where there is sufficient evidence to obtain an indictment for AWIKWA, the U.S. Attorney can label the crime AWIMWA in the indictment to usurp the Family Division's jurisdiction.

Logan, supra, at 670 – 1, recognized that assault with intent to kill, defined in § 22-501, and assault with intent to murder, referred to in § 16-2301(3)(A), are two distinct crimes. It rejected the government's argument "that the distinction between the words murder and kill in the two statutes is simply a matter of semantics that should not be permitted to cloud congressional intent." *Id.* at 670. It went on to say that "the element of malice, the state of mind required for an act of murder, cannot be equated with specific intent to kill: 'intent may be, and often is, an ingredient of malice, but never its exact counterpart.' " *Id.* at 671 (quoting *Carter v. United States*, 437 F.2d 692, 696 (D.C. Cir. 1970)(*per curiam*), *cert. denied*, 402 U.S. 912, 91 S. Ct. 1393, 28 L. Ed. 2d 655 (1971)). The Court noted that a charge of assault with intent to kill may properly be brought in cases where, if death had resulted, the proper charge would have

[4] 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 …

been voluntary manslaughter. *Id.* at 672 – 3. A charge of assault with intent to murder would not be proper in such cases. The *Logan* Court instructed that:

> *a prosecutor should not bring* or maintain charges involving malice unless he or she has "sufficient admissible evidence" to persuade the jury that the suspect indeed acted with malice — i.e., acted with an intent to kill and without adequate provocation, justification, or excuse. ABA STANDARD FOR CRIMINAL JUSTICE 3-3.9(a) (1979); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1979) (*making it unprofessional conduct for a prosecutor to institute* or maintain criminal charges if he or she knows or *it is obvious that the charges are not supported by probable cause*).

Logan, supra, at 673 n. 11 (emphasis added).

Congress clearly intended to limit the number of crimes for which the U.S. Attorney could preempt the Family Division's jurisdiction and prosecute a juvenile as an adult, and AWIKWA is not one of those crimes.

The initial House provision in the District of Columbia Court Reform and Criminal Procedure Act of 1970 would have permitted the U.S. Attorney, without permission of the Family Division, to prosecute a juvenile over 16 years old for "murder, manslaughter, rape, mayhem, arson, kidnapping, burglary, robbery, any assault with intent to commit any such offense, or assault with a dangerous weapon." H.R. 16196, 91st Cong., 2d Sess. § 121, 116 Cong. Rec. 8,129 (1970). But the conference committee adopted the Senate version, excluding manslaughter and attempt to commit manslaughter, and Congress passed that version. P.L. 91-358, title 1, § 121(a) (1970). *See, also, Logan, supra*, at 674 (attempt to commit manslaughter would be charged as assault with intent to kill, and could not automatically be transferred to the Criminal Division under § 16-2301(3)(A)).

In advocating Senate passage of the bill Maryland Sen. Joseph Tydings told colleagues,

> The overwhelming majority of 16- and 17-year-olds presently handled in the juvenile court system will be unaffected by the conference report on S. 2601.[5] The District of Columbia crime bill merely provides that in the unusual case where a 16- or 17-year old is the subject of a bona fide charge of murder, forcible rape, first-degree burglary, or armed robbery — or felonious assault with intent to commit one of the aforesaid serious

[5] S. 2601, 91st Cong., 2d Sess. (1970).

> offenses — the 16- or 17-year-old must be sent to adult court for trial and sentencing — like an 18-year-old.
>
> … [U]nlike the House version of S. 2601, the list of offenses for which the age limit may be lowered does not now include manslaughter, mayhem, arson, kidnaping (sic), second-degree burglary, breaking into vending machines, assault with a dangerous weapon, "unarmed" robbery … and assault with intent to commit one of these offenses.
>
> … [O]rdinarily the preferred method for shifting a child to the adult court is by the traditional means of formal transfer proceeding. The Senate conferees fully expect that the Criminal Division will turn back or dismiss the indictment in any case where the prosecutor categorizes as one of the few most serious offenses acts which under other circumstances would not be similarly categorized — whenever, in other words, the prosecutor seeks unfairly to circumvent the preferred transfer proceeding. In fact, the discretion left to the prosecutor with the new definition of "child" can only operate in the child's benefit: the courts will protect against abuses in the nature of unnecessarily high charges….

116 Cong. Rec. 25,204 (1970).

In the case at bar, the government proceeded against Cruz on AWIKWA only and admitted that it sought indictments of Palacio, Bolaños and Gutierrez for AWIMWA solely to gain jurisdiction over them as adults.[6] Tr. 7/8/98A, 57 – 60.[7] The legislative history demonstrates that this is the type of case in which Congress expected trial judges to step in and prevent the government from unfairly attempting to circumvent § 16-2307.

The error in the Panel's reasoning becomes even more evident when viewed in light of the legislative history of § 16-2307, which provides the procedure for transferring juveniles who have committed serious felonies to the Criminal Division for prosecution as adults. The highly controversial provision in H.R. 16196 would have created a presumption in favor of transfer and

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[6] Charging AWIM as opposed to AWIK cannot be viewed as an effort to obtain a greater sentence because the maximum penalty for the former is five years in prison and the maximum penalty for the latter is 15 years. In addition, under § 22-3202(a), a person convicted of either AWIMWA or AWIKWA faced a maximum sentence of life in prison.

[7] 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.

would have placed the burden on the juvenile to demonstrate that s/he did not pose a danger to public safety. 116 Cong. Rec. 24,341 (1970).

> In the area of the formal transfer of juveniles for criminal prosecution (until now referred to under the law as "waiver"), the Senate conferees prevailed on the most controversial issues in disagreement. First, the Senate conferees insisted that a juvenile cannot fairly be required to bear the burden of disproving the appropriateness of transfer. Placing such a burden on the child (as under the House version) would have contravened the general rule of law that a moving party, here the government, must establish the grounds for his motion, the House version would have placed the burden on the party, the juvenile, least able to bear it….

Id. at 24,346. *See, also In re D.R.J,* 734 A.2^{d} 162, 163 (D.C. 1999)(although statute requires juvenile to come forward with evidence rebutting presumption, burden remains on the government, which, with or without benefit of unrebutted presumption, must prove by preponderance of evidence that transfer is dictated by public safety).

The Panel opinion in Palacio's case creates the anomalous result that in a formal transfer proceeding under § 16-2307 the government must present evidence supporting its motion and the juvenile has the opportunity to present contrary evidence. But when the government proceeds pursuant to § 16-2301(3)(A) in a grand jury proceeding where the juvenile has no opportunity to respond, it has no obligation to demonstrate an essential element of the offense, that the juvenile acted with malicious intent. The error is particularly problematic where, as in Palacio's case, that element is the basis for the Criminal Division's assertion of jurisdiction.

Even if, as a general proposition, the U.S. Attorney has no duty to introduce exculpatory evidence when presenting a case to the grand jury, when seeking to prosecute a juvenile as an adult for AWIMWA without a formal transfer, the grand jury must find probable cause to believe the juvenile acted with malicious intent to kill. It is not enough for the grand jury to find that the juvenile acted with one of the other states of mind that would be sufficient to support a charge of AWIKWA.

CONCLUSION

For the reasons stated above and any others that may appear to the Court, Appellant Luis Palacio respectfully request that the Court vacate the Opinion issued May 10, 2007, reconsider whether the counts in the indictment charging Appellant with assault with intent to murder while armed must be vacated, and that it vacate those counts and remand this case for further proceedings in the Family Court because the Criminal Division was without jurisdiction to try him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Luis M. Palacio, certify that on July 6, 2007 I served a true copy of the attached Petition for Rehearing and Suggestion of Rehearing *en Banc* by first-class mail on counsel listed below.

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