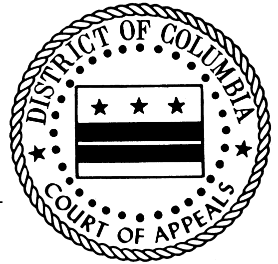

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CASE NO. 23-CF-723

In The
District of Columbia
Court Of Appeals

STEFAN FARMER
Appellant

v.

UNITED STATES of AMERICA,
Appellee

ON APPEAL FROM THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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ISSUES PRESENTED

1. Whether the trial judge erred in excluding testimony from defendant's independent psychologist regarding Mr. Farmer's mental health because the court found Farmer's witness notice did not comply with D.C. Superior Court Federal Rule of Criminal Procedure 16(b).

2. Whether the trial court erred in denying defense counsel's request to give the jury self-defense instructions before their deliberations, given the presence of self-defense evidence put forth at trial and the fact that the jury sent a note requesting instructions on self-defense at the start of their deliberations.

STATEMENT OF THE CASE AND JURISDICTION

In April 2021 Mr. Farmer was arrested for offenses that occurred when he allegedly shot his childhood friend, Mr. Andre Sturdivant, during an altercation on February 25, 2021 (R. 42-51 PDF)[1]. On October 21, 2021 a Grand Jury sitting in the District of Columbia returned a 12-Count Indictment against Mr. Farmer for:

Count 1- Assault with intent to kill while armed,
in violation of 22 D.C. Code §401;

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[1] The abbreviation "(R. _ (PDF)" refers to the PDF record number of the document as identified in the D.C. Superior Court's Index/Certification and in compliance Rule 28(e) of this Court's Amended Rules.

Count 2- Possession of a firearm during a crime of violence,
in violation of 22 D.C. Code §4504(b);
Count 3- Aggravated assault while armed
in violation of 22 D.C. Code §404;
Count 4- Possession of a firearm during a crime of violence,
in violation of 22 D.C. Code §4504(b);
Count 5- Assault with a dangerous weapon,
in violation of 22 D.C. Code §402;
Count 6- Possession of a firearm during a crime of violence,
in violation of 22 D.C. Code §4504(b);
Count 7- Assault with significant bodily injury while armed,
in violation of 22 D.C. Code §404 (a)(2);
Count 8- Possession of a firearm during a crime of violence,
in violation of 22 D.C. Code §4504(b);
Count 9- Unlawful possession of a firearm,
in violation of 22 D.C. Code §4503 (a)(1), (b)(1);
Count 10- Carrying a pistol without a license,
in violation of 22 D.C. Code §4504(a);
Count 11- Possession of an unregistered firearm,
in violation of 7 D.C. Code §2502; and
Count 12- Unlawful possession of ammunition,
in violation of 7 D.C. Code §2506.01.

(R. 107-109 PDF). From February 27 to March 7, 2023 Mr. Farmer was tried before a jury sitting in D.C. Superior Court. He was acquitted on Counts 1 and 2, but found guilty of the remaning (R. 399-402 PDF).

On March 29, 2022 defense counsel filed notice of intent to raise the defense of Not Guilty by Reason of Insanity (NGRI) and on April 6, 2022 the Honorable Robert Okun ordered the Department of Behavioral Health (DBH) to conduct a Criminal Responsibility Examination. In August 2022 DBH Dr. Teresa Grant issued her Report. Based on Dr.

Grant's Report Judge Okun conditionally granted defense counsel's motion to bifurcate the guilt and insanity phases of his trial. In January both parties' filed timely D.C. Superior Court Rule of Criminal Procedure 16 Notices of expert witnesses. In February 2023 Judge Okun transferred the case to Judge Anthony Epstein who, at the trial readiness conference on February 16, 2023, granted the government's motion to exclude the testimony of defense expert Dr. Stephen Lally, Ph.D.

On August 22, 2023 Judge Epstein conducted a sentencing hearing and determined that all lesser assault convictions (i.e., Counts 5 and 7) merged with Aggravated Assault While Armed under Count 3; and that the remaning lesser convictions merged into Count 4 for Possession of a Firearm During a Crime of Violence (8/22/2023 Tr. pp.[2] 3-4). In calculating Mr. Farmer's within guideline range sentences for Counts Three and Four, the court stated that despite the jury's acquittal of Mr. Farmer on Count One (i.e., Assault with Intent to Kill

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[2] The abbreviation "(___ Tr. p. __)" refers to the transcript from the record as identified in D.C. Superior Court case number 18 CF3 9764, and in compliance Rule 28(e) of this Court's amended rules effective June 10, 2024 (Amended Rules)

While Armed), it found "by a preponderance of the evidence that Mr. Farmer intended to kill Mr. Sturdivant when he shot him." *Id.* at 4. The court sentenced Farmer to 144 months on Count Three (the top of the guidelines range identified in the presentencing report (PSR)); and to a within guidelines range of 60 months on Count 4 (R. Sealed 65; R. 423 PDF). Because the court made the sentences consecutive, the total amount of time imposed was 204 months, followed by five years of supervised probation (R. 423 PDF; Tr. 8/22/23). Mr. Farmer filed a timely notice of appeal on August 29, 2023 (R. 424 PDF).

This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF THE FACTS

1. The Indictment

At the time he committed the subject offenses Mr. Farmer had been struggling with mental illness; specifically, as a young adult Farmer began suffering from hallucinations and bouts of paranoia which led to a diagnosis of schizophrenia and bipolar disorder (R. Sealed pp. 32-33). In early 2021, Mr. Farmer was admitted to Prince Georges Hospital Center for psychiatric decompensation. (*Id.* p. 33).

In April 2021, Mr. Farmer was arrested for allegedly shooting his childhood friend (Mr. Andre Sturdivant) in the hand and thigh during an altercation in the early evening of February 25, 2021. That October, a Grand Jury returned a 12-Count Indictment against him which included four related charges of assault while armed counts, and eight possession Counts. In severity, these Counts ranged from Assault with Intent to Kill while armed, in violation of 22 D.C. Code §401 (Count One) to Unlawful Possession of Ammunition, in violation of 7 D.C. Code §2506.01 (Count 12). (R. 107-109 (PDF)).

2. <u>Notice of Not Guilty by Reason of Insanity</u>

Mr. Farmer pled not guilty and in March 2022, filed a notice of intent to raise a not guilty by reason of insanity defense (NGRI). Thereafter, the court ordered a Criminal Responsibility Examination by the D.C. Department of Behavioral Health's Pretrial and Assessment Services Branch (DBH) (R. 129-30 PDF). On August 4, 2022 Teresa Grant, Ph.D. issued a report in which she acknowledged Mr. Farmer's lengthy history of mental health problems noting that:

> Mr. Farmer reported that he was diagnosed with Bipolar Disorder/Schizophrenia in his 40s. He has been admitted to Prince Georges Hospital Center at least twice for psychiatric decompensation (2019 and 2021). Mr. Farmer reported that he

> was most recently treated at Franklin Square Hospital in Baltimore, Maryland. He stated the Sheriff came by our house because my mother said I was acting strange and I was sent to a hospital in Laurel and then taken to Baltimore."

(R. 161 PDF). Also, that "[w]hile he was incarcerated at Pocahontas State Penitentiary, he experienced psychiatric issues in 2016." *Id.* Concluding, Dr. Grant stated:

> [i]t is noteworthy to mention that based on the data reviewed, it is appears *highly unlikely that Mr. Farmer's behaviors were not significantly compromised by the presence of mental disease or defect*."

(R. 172 PDF)(emphasis added).

On October 11, 2022 the court granted the government's request for an independent examination by its expert, Dr. Tarvis Flowers and allowed him review all materials relied upon by Dr. Grant. (R. 174-183; 209-213 PDF). Based largely upon Dr. Grant's conclusion, Judge Okun granted defense counsel's motion to bifurcate the guilt and insanity phases of the trial and for separate juries on each issue (R. 214-218 PDF). The motion noticed that defense would present testimony from Dr. Stephen Lally, who based on an evaluation of Dr. Farmer and a review of his records, would testify "just as DBH Dr. Grant did, that Mr. Farmer's behavior was significantly compromised by the presence of a

mental disease or defect and therefore lacked criminal responsibility" (R. 216 PDF). In granting the motion on October 28, 2022, The Honorable Judge Okun presiding acknowledged that, although poorly written to contain a double negative, the plain text meaning of Dr. Grant's conclusion is that Mr. Farmer's behavior was significantly compromised by the presence of mental disease (Tr. 10/28 8-9). And that there was support for that conclusion in the context of the Report in Dr. Grant's acknowledgment that Mr. Farmer had:

> [A] documented significant history of mental health treatment and diagnoses. I mean Mr. Farmer's been diagnosed with major depression, with schizoeffective disorder, and with bipolar disorder, and with multiple hospitalizations throughout the years.

(Tr. 10/28 p. 9). Further, that defense made a substantial proffer concerning Mr. Farmer's defense on the merits. (*Id.* at 14-15). Judge Okun granted defense counsel's motion to bifurcate on the condition that Dr. Lally's Report supported Dr. Grant's conclusion (*Id.* at 14).

On January 30, 2023 the government filed a Motion to Compel Expert Report [from Dr. Lally] in Compliance With Rule 16, Or In The Alternative To Preclude Testimony and Not Bifurcate Trial (R. 255 PDF). During hearing on February 3, 2023 Judge Okun announced that, due to a scheduling conflict Judge Epstein would be preside over

the trial. In addition, he mentioned Judge Epstein's concerns over Dr. Grant's use of a double negative in her Report, and deferred ruling on the government's motion to compel a report by Dr. Lally (Tr. 2/3/23 pp. 5-6). Defense counsel noted that she had emailed Dr. Grant with that question but had not received a response (*Id.* p. 7).

In the trial readiness hearing on February 16th, Judge Epstein shared a February 8, 2023 email from Dr. Grant in which she corrected her conclusion's use of a double negative and stated:

> *I also apologize for the confusion*, but when writing criminal responsibility reports with my old eyes, LOL, *it can at times be difficult to catch everything* and spell check would not have caught this.
> *What I meant to state* in my statement is it appears highly unlikely that Mr. Farmer's behaviors were significantly compromised by the presence of a mental disease or defect.

(2/16/23 Tr. p. 5)(emphasis added). Defense counsel responded stating "having now heard her [Dr. Grant's] response and heard that clarification. . . I no longer would call Dr. Grant to testify in the way that I indicated based on what I [then] understood her report to say" (*Id.* p. 6). Judge Epstein then granted the government's Rule 16 motion and excluded defense counsel from introducing the testimony of

Dr. Lally as its expert at trial concluding that defendant's Notice did not comply with Rule 16. (2/16/23 Tr. pp 8-9).

3. <u>The Trial and Jury Instructions</u>

Judge Epstein presided over Mr. Farmer's jury trial conducted from February 27th through March 6, 2023. The undisputed evidence was that Mr. Farmer shot Mr. Sturdivant in his hand and thigh during an altercation on February 25, 2021 (R. 43 PDF). Sturdivant did not initially identify Mr. Farmer as the assailant in his report to the police and testified that Mr. Farmer did not appear himself that day.

On March 2, 2023, the government rested and defense counsel moved for judgment of acquittal which the court denied (3/2/23 Tr. pp. 50, 52, and 54 PDF). On March 3rd the court granted the government's request to deny defense counsel's request to provide the jury with instructions on self-defense on the assault charges. (*Id.* pp. 58-66; Order at R.338-345 PDF; *see* Jury Instructions at 3/6/23 Tr. pp. 79-90). The jury began their deliberations on the morning of March 6th and by late afternoon they sent two notes asking for instructions related to self-defense as follows:

1. Is there a jury instruction of definition of *self-defense*?

2. With respect to charge 4.101, what is the definition of voluntary? *If the Defendant acted in self-defense*, would that mean he acted involuntarily?

(R. 387 & 388 PDF (emphasis added)). On March 7, 2023 the court responded to the jury's notes by reading portions from The Redbook's self-defense jury instructions initially requested by defense counsel. And, at the government's request but over defense counsel's objection, the court also included jury instructions on "Self-Defense Where Defendant Might Have Been the Aggressor" the government sought. *Compare* R. 358-60, to R 394-97 PDF). The court then allowed each side ten minutes to argue for/against self-defense (3/7/23 Tr. pp. 11-32).

On March 7, 2023 the jury returned a verdict acquitting Mr. Famer on Counts One (Assault with intent to kill while armed) and Two (Possession of a firearm during a crime of violence) but found him guilty on the remaining Counts—Three through Twelve (R. 399-402 PDF).

4. <u>Sentencing</u>

In early August 2023, both Mr. Farmer and the government filed Memoranda in Aid of Sentencing (Mtn Supp. at A; R. 405 PDF, respectively). Mr. Farmer's Memorandum attached the Report of Dr. Lally (Mtn Supp. at A. 1). As represented in its Rule 16 Notice, Dr.

Lally's Report discussed many of the same bases and information as Dr. Grant's. (*Id. compare* with Notice at R. Sealed 29). And like Dr. Grant's, Dr. Lally's Report confirmed Mr. Farmer's history of hospitalizations and mental health diagnoses, and the fact that he had long suffered from bipolar and schizoaffective disorders, depression and other psychotic disorders (Def. Sent. Memo. Mtn. Supp. at A. p. 2, citing Reports of Grant and Lally). Citing Dr. Grant's Report, Dr. Lally concludes:

> At the time of the instant offense, it is clear not only from Mr. Farmer's report, but the report of collateral sources as well as mental health records, that he was experiencing both manic and psychotic symptoms. *As Dr. Grant noted*, it is difficult to ascertain the impact at that time of any possible illicit substances, but there is no question that aside from those substances there is an underlying mental disorder.

(Mtn Supp. at A 1. P. 5) (emphasis added)

On August 22, 2023 Mr. Farmer appeared before Judge Epstein for sentencing (02/16/2023 Tr. *generally*). During his sentencing hearing, Judge Epstein agreed with the government that Count Four's possession conviction was a Group 7, not a Group 5 offense, and that all of the assault convictions (Counts 5 and 7) merged with Aggravated Assault While Armed (Count 3). (8/22/23 Tr. pp 2-3). The court then

sentenced Mr. Farmer to the top of the guidelines range on his Aggravated Assault While Armed (Count 3) conviction, and to 60 months on Possession of a Firearm During a Crime of Violence (Count 4); sentences on both counts to run consecutively for a total of 204 months incarceration. In sentencing, the court considered conduct Mr. Farmer had been acquitted on under Count One stating:

> Let me say at the outset, because it may inform anything you want to say in addition to what you've said in your sentencing memorandum, I find by a preponderance of the evidence that Mr. Farmer intended to kill Mr. Sturdivant when he shot at him. I understand that the jury found Mr. Farmer not guilty on the AWIC charge. The jury had a reasonable doubt about an intent to kill.

(Tr. 8/22 p. 4). The court did not find that Mr. Farmer acted in self-defense, nor was it persuaded by Dr. Lally's report (filed in sentencing) that diagnosed Mr. Farmer with bipolar disorder and schizoaffective disorder (*Id.* p. 22). Instead, it relied on Dr. Grant's report which, as corrected, stated “”it appears highly unlikely that Mr. Farmer's behaviors were significantly compromised by the presence of a mental disease of defect. (*Id.* p. 23). On August 29, 2023 Mr. Farmer filed a timely notice of appeal (R. 424 PDF).

SUMMARY OF THE ARGUMENT

At the time of the subject offense, Mr. Farmer was 48 years-old and had a history of struggling with mental health problems. The reports from Farmer's mental health experts, Drs. Theresa Grant and Stephen Lally, recognized that as a young adult he began suffering from hallucinations and bouts of paranoia which led to a diagnosis of schizophrenia and bipolar disorder; and that in early 2021 he was admitted to Prince Georges Hospital Center for psychiatric decompensation. (R. Sealed pp. 29-45). Accordingly, defense counsel noted Farmer's intent to raise the defense of not guilty by reason of insanity, and timely filed a Notice identifying Drs. Grant and Lally as his expert witnesses in compliance with D.C. Superior Court Rule of Criminal Procedure 16(b).

Applying the appropriate *de novo* review, this Court should find that Farmer's 16(b) Notice complied with the Rule's requirements as set out in its plain text and confirmed by this Court in *Miller v. United States,* 115 A.3d 564 (D.C. 2015). The Notice provided the requisite written "*summary*" of the testimony of intended trial experts Drs. Grant and Lally; and—by its content and the attachment of Dr. Grant's report

and the experts' resumes—it described the witnesses opinions, bases, and qualifications. Sup. Ct. Rule 16(b)(1). Nothing more was required.

Neither the language of the Rule, nor this Court's precedents, required counsel to file a (then incomplete) report by Dr. Lally. Thus, the trial court erred in granting the government's motion claiming that without Lally's Report, Framer's Notice did not comply with Rule 16(b). Even assuming, *arguendo,* that Farmer's Notice did not comply with the Rule, the trial court's sanction of excluding Dr. Lally's testimony was an abuse of discretion given the lesser available option of continuing his trial until the inevitable time when the doctor's report was completed.

In addition, the trial court erred in granting the government's request to exclude defense counsel's jury instructions on self-defense when there was both evidence of self-defense in the record, and defense counsel had argued it to the jury. The court's error was underscored by the fact that, shortly after deliberations, the jury sent a note asking "[i]s there a jury instruction or definition of self-defense" (R 387 PDF). The court's subsequent response, which included instructions defense counsel objected to as they related to finding Mr. Farmer the aggressor, did not remove the taint of the court's initial error so as to render it

harmless. Consequently, for the foregoing reasons, this court should find sufficient error to vacate and remand Mr. Farmer's conviction.

ARGUMENT

I. Because Farmer's Notice of Experts Complied with The Requirements of Rule 16(b), The Trial Court Erred In Excluding the Testimony of His Expert Witness

A. Standard of Review

This court imposes a two-pronged test in reviewing Mr. Farmer's claim that the trial court erred in both finding that he had not complied with D.C. Superior Court Rule of Criminal Procedure 16 (Rule 16), and in excluding Dr. Lally's testimony as a sanction for that noncompliance. *Miller v. United States,* 115 A.3d 564, 566 (D.C. 2015). First, it reviews the trial court's finding *de novo* since "a party's compliance with ... Rule 16 disclosure requirements is a question of law." *Id.,* quoting *Murphy–Bey v. United States,* 982 A.2d 682, 688 (D.C.2009). Applying that standard to its review of the record here reveals that Mr. Farmer's Notice for expert witnesses Drs. Theresa Grant and Stephen Lally fully complied with the Rule.

Second, if it finds that the defendant violated Rule 16, this court reviews the trial court's decision to impose sanctions (including exclusion of evidence not disclosed) for an abuse of discretion. *Id.* at 689.

This Court applies a three-factor test for determining whether the trial court abused its discretion in excluding witness testimony which considers: 1) the reason for the nondisclosure, 2) the impact of the nondisclosure on the trial of the particular case; and 3) the impact of the particular sanction on the proper administration of justice. *Miller,* 115 A.3d 568, citing *United States v. Ferguson,* 866 A.2d 54, 59 (D.C. 2005). In applying this test, it is evident that the trial court abused its discretion when it excluded Dr. Lally's testimony instead of granting counsel a continuance for him to complete his report.

B. Mr. Farmer Timely Filed Notice of Experts, Complied with D.C. Superior Court Rule of Criminal Procedure 16(b).

Mr. Farmer provided proper notice under Superior Court Criminal Rule 12, of his intent to raise the defense of Not Guilty by Reason of insanity (NGRI); and on January 17, 2023 filed a timely Rule 16(b)(1)(C) Notice identifying his intent to call Department of Behavioral Health (DBH) doctor Teresa Grant, and/or Dr. Stephen Lally, Ph.D., ABPP as expert witnesses on his behalf (R. Sealed 29). The Notice attached Dr. Grant's 15-page, August 2022, Report in which she expressly stated that:

> [I]t appears highly unlikely that Mr. Farmer's behavior was not significantly compromised by the presence of mental disease or defect"

(R. Sealed 29-45). Farmer's Notice did not include a Report by Dr. Lally because he had not completed it then. The Notice did state, consistent with the court's October 22, 2022 findings in conditionally granting Farmer's motion to bifurcate the guilt and insanity phases of his trial, that the defense expects both Drs. Grant and Lally will testify consistently with Dr. Grant's Report (R. Sealed 29 PDF). Rule 16(b) does not require. Thus, when Judge Epstein took over the case from Judge Okun for trial on February 16, 2023, the former erred by granting the government's motion to preclude Dr. Lally's testimony believing without it the Notice did not comply with Rule 16 (R. 255 DF).

1. <u>Farmer's Notice Complied with Rule 16</u>

In *Miller v. United States,* 115 A.3d 564 (D.C. 2015) this court confirmed *de novo* review of a defendant's claim that the trial court erred in finding he had not complied with Rule 16. This Court further confirmed that its review begins with reading the Rule's plain text, which requires defendants to "'disclose to the government a written *summary* of testimony of any expert witness that the defendant intends

to use as evidence at trial"'. *Id.* citing D.C. Super. Ct. R. Crim. P. 16(b)(1)(C); *see also, Austin v. United States,* 64 A.3d 413 (D.C. 2013). On January 17, 2023 defense counsel filed Notice of its Rule 16 summary identifying Drs. Grant and Lally as testifying experts on Mr. Farmer's mental state relative to his charged offenses (R. Sealed 29-45 PDF). And on February 2nd counsel filed a supplement to that Notice in its response to the government's motion to compel (R. 274-280 PDF).

The Rule's text only further requires that the summary describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications. D.C. Super. Ct. R. Crim. P. 16(b)(1)(C). Neither the Rule's text, nor controlling precedents, require defendant to provide a report authored by each expert it identifies. As Judge Epstein tacitly acknowledged in presiding over the February 16, 2023 hearing on the government's motion to compel a report by Dr. Lally:

> Well, I agree that at least for now the criminal rules don't require a report. . . . I agree with you that Rule 16 doesn't require a report from Dr. Lalley or any expert.

(2/16/23 Tr. pp 7-8). Because a competent review of the full record reveals that Mr. Farmer's Notice provided sufficient description of its

proposed experts' opinions, reasons, and qualifications, his Notice complied with the Rule.

It is noteworthy that the text of Rule 16(b)(1)(C) governing defendant's expert witness disclosure obligations, is echoed in Rule 16(a)(1)(G)[3] governing the government's obligation. *See* Sup. Ct. R. Crim. P. 16(b)(1)(C); *compare* Rule 16(a)(1)(G). Consequently, it is compelling that the language and information in defendant's January 17, 2023 Rule 16(b) Notice for Drs. Grant and Lally, is substantially the same as in the government's January 15, 2023 Rule 16(a) Notice for Dr. Flowers. Both read:

Prosecutor's Rule 16(a)(1) Notice	Farmer's Rule 16(b)(1) Notice
The Government expects that Dr. Flower will testify consistently with his attached report. Dr. Flower will testify that he has concluded that to a reasonable degree of psychological certainty, Mr. Farmer did not lack the substantial capacity to appreciate the wrongfulness of	The defense expects that both Dr. Grant and Dr. Lally will testify consistently with the report generated by Dr. Teresa Grant. *See* attached. Specifically, both Dr. Lally and Dr. Grant will testify that they have concluded that to a reasonable degree of psychological certainty,

[3] Rule 16(a)(1)(G) requires the government give "defendant a written summary of expert testimony that government intends to use as evidence at trial . . . [and that the summary] must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Sup. Ct. R. Crim. P. 16(a)(1)(G).

his conduct or conform his conduct to the requirements of the law due to mental disease or defect. In sum, this is because (1) there are indications of capacity for the appreciation of wrongfulness and controlling his conduct before and after the offense, and (2) to the extent those capacities were impaired at the time of the offense, it appears likely they would not have been sufficiently impaired in the absence of the effects of substance use, which does not fall within the legal definition of a mental disease or defect. For more details, please refer to Dr. Farmer's [sic] attached report.	Mr. Farmer lacked the substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law due to mental disease or defect. In sum, this is because (1) Mr. Farmer has been diagnosed with bipolar disorder, schizoaffective disorder, and major depression, among other things, and (2) there is no way to determine whether Mr. Farmer was actually under the influence of a narcotic around the time of the offense. For more details, please refer to Dr. Grant's attached report.

(R. Sealed 11-27, & 29-45 PDF). Thus both Notices comply, as both provide:

- any available report (Dr. Lally has not authored a report);
- the bases and reasons for the expert opinion, and
- a summary of that opinion.

See Def. R. 29 PDF; *compare* Gov. R. 9 PDF).

The single difference in defendant's Notice is that although it included an April 2022 Report from Dr. Grant, it did not include one from Dr. Lally which was not completed. This singular difference is

of no moment since the Notice provided that "Dr. Lally will testify *consistently with the report generated by Dr. Teresa Grant*" and attached Dr. Grant's fulsome 15-page Report (R. Sealed 29)(emphasis added). The reasonableness of this analogous reference is underscored by the fact that it is consistent with Judge Okun's conditional grant of Mr. Farmer's Motion to Bifurcate the guilt from the insanity phases of trial during the parties October 28, 2022 hearing (10/28/2022 Tr. pp 8-9). At the time of the hearing the language in Dr. Grant's report stated:

> [I]t's highly *unlikely* that Mr. Farmer's behaviors *were not* significantly compromised by the presence of a mental disease or defect.

(*Id.* p. 9)(emphasis added). Applying accepted rules of English grammar, court and counsel read the doctor's use of the double negative ("unlikely" and "were not") to cancel each other out and to create a positive. *See* Strunk and White, The Elements of Style, p. 19 (4th edition 20000; *see also,* Fowler's, A Dictionary of Modern English Usage, p. 202 (2nd Ed. 1965) (double negatives often cancel each other out and produce a positive meaning). Consistently, Judge Okun read Dr. Grant's Report as finding it was *likely* that Mr.

Farmer's behaviors were significantly compromised by mental disease (10/28/22 Tr. p. 8). Judge Okun found this reading was supported by Dr. Grant's other findings in her Report in which she acknowledged "a documented significant history of mental health treatment and diagnoses. . . Mr. Farmer's been diagnosed with major depression, with schizoeffective disorder, and with bipolar disorder with multiple hospitalizations throughout the years" (Tr. 10/28/22 p. 9). The government did not contact Dr. Grant for clarification (*Id.* pp. 11-12).

In addition to information provided the government in Farmer's Notice, the government was provided with "the medical records of the defendant, *including all records*, evaluations, notes, testing, and raw *data on which Teresa Grant of DBH, relied* in issuing her Criminal Responsibility Evaluation dated August 4, 2022" (R. 174 PDF & 209-213)(emphasis added). The government was able to utilize this information to obtain a report by its own expert, Dr. Flowers. (R. 11-27 PDF)

Still, on January 30, 2023 the government filed a motion to either compel Dr. Lally's report, or exclude his testimony. Defendant's counsel responded on February 2nd by supplementing

her initial notice with four pages of information on the bases and reasons for the opinions of Farmer's experts that his behavior was significantly compromised by the presence of a mental disease or defect including: 1) Materials reviewed (related to court documents and criminal history information; mental health records/information; other sources of information; clinical evaluation; and miscellaneous data) and 2) Bases/Reasons for testimony; and 3) Dr. Lally's Curriculum Vitae (R 274-280 PDF).

Consistent with Farmer's representation in his Rule 16 Notice, Dr. Lally's Report (which although excluded from trial appeared as an attachment to defendant's sentencing memorandum) relied upon much of the same materials and basis as Dr. Grant's. (*Id.* *compare* with Notice at R. Sealed 29). Like Dr. Grant's, Dr. Lally's Report confirmed Mr. Farmer's significant history of hospitalizations and mental health diagnoses, and that he has for a long time suffered from bipolar and schizoaffective disorders, depression and other psychotic disorders (Def. Sent. Memo. Mtn. Supp. at A p. 2, citing Reports of Grant and Lally). Citing Dr. Grant's Report, Dr. Lally concluded:

> At the time of the instant offense, it is clear not only from Mr. Farmer's report, but the report of collateral sources as well as mental health records, that he was experiencing both manic and psychotic symptoms. *As Dr. Grant noted*, it is difficult to ascertain the impact at that time of any possible illicit substances, but there is no question that aside from those substances there is an underlying mental disorder.

(Mtn Supp. at A 1. P. 5)(emphasis added).

Judge Epstein's reliance on *Miller* to find noncompliance is misplaced given the distinguishing facts here. 115 A.3d at 567. In *Miller,* unlike here, the defendant's Rule 16 notice only included a letter of what he "expected" his expert might testify to regarding what a child of the complainant's age might report. *Id*. Unlike here, Miller did not include a report or other bases identifying his expert's reasons for her likely opinion or intended testimony, or a resume describing the experts qualifications. In contrast, here since April 2022 the government has had Dr. Grant's 15-page Report which Dr. Lally would testify consistent with, since October 2022 it had access to the records used for Dr. Grant's evaluation sufficient for its expert to develop its own, and since January 2023 the government has had Farmer's Notice and a supplement under Rule 16. Because, in total the government has had sufficient information to prepare for its examination of experts Grant

and Lally, the trial court erred in finding Farmer's Notice did not comply with Rule 16.

2. The trial court abused its discretion in excluding Dr. Lally's testimony after Dr. Grant's eleventh-hour correction of her Report.

Even assuming, *arguendo,* that from its *de novo* review this court finds Farmer's did not comply with Rule 16, it should find that Judge Epstein abused his discretion in excluding Dr. Lally's testimony as a result. (R. 29 PDF; 10/28/22 Tr. pp 8-9). Consideration of a following three-factor test is required in determining whether the trial court abused its discretion: 1) the reason for the nondisclosure, 2) the impact of the nondisclosure on the trial of the particular case; *and* 3) the impact of the particular sanction on the proper administration of justice. *Miller,* 115 A.3d 568, citing *United States v. Ferguson,* 866 A.2d 54, 59 (D.C. 2005).

On the first factor, the reason for the nondisclosure, Judge Epstein relies on Dr. Grant's February 8, 2023 email correcting the language in her report for the first time (02/16/23 Tr. p. 5-8) In her email Dr. Grant writes that what she "meant to state" was:

> I also apologize for the confusion, but when writing criminal responsibility reports with my old eyes, LOL, it can at times be

> difficult to catch everything and spell check would not have caught this.
> *What I meant to state* in my statement is it appears highly unlikely that Mr. Farmer's behaviors were significantly compromised by the presence of a mental disease or defect.

(02/16/2023 Tr. p 5) (emphasis added). From this eleventh-hour correction the court surmised that at the time of its January 17th Notice defense counsel should have known[4] that Dr. Grant would correct her earlier statement—even though both the previous Judge and counsel had read it as then written—favoring Mr. Farmer NGRI defense. *Id.* pp 6-8). And should have further realized that the Notice's statement that Dr. Lally would testify in a manner consistent with Dr. Grant's was false when counsel filed it in January. Because the three factors for an abuse of discretion analysis are set out in the conjunctive, the court's abuse of discretion on this factor confirms his overall err in excluding Dr. Lally's testimony.

Considering factor two (impact of the nondisclosure on the trial) the result is the same. Because of Dr. Grant's eleventh-hour change in

[4] Judge Epstein gave no weight to defense counsel's statement that she had in fact emailed Dr. Grant earlier for clarification on her Report's language but that she did not respond (02/3/23 Tr. p. 7).

her Report, excluding Dr. Lally's testimony left Mr. Farmer with the highly prejudicial result of having no expert on his behalf. Finally, the third factor (exclusion's impact on the proper administration of justice) also weighs heavily in Mr. Farmer's favor.

Defendant's have a Sixth Amendment right to a defense that includes securing the testimony of necessary witness. *Feaster v. United States,* 631 A.2d 400, 405 (D.C. 1993), *see also, Washington v. Texas,* 388 U.S. 14, 23 1967). By excluding his only expert witness, Mr. Farmer's defense was severely compromised. Further, because release of Dr. Lally's Report was imminent, the proper administration of justice favored issuing a continuance until that time instead of exclusion. Consequently, consideration of these factors reveals the court abused its discretion in excluding Dr. Lally's testimony. *See, e.g., Washington,* 388 U.S. at 19 (the Constitution embodies a fundamental "right to present a defense, the right to present the defendant's version of the facts.")

For the foregoing reasons, this court should vacate and remand to the trial court for a ruling not excluding Dr. Lally's testimony. *See, Russell v. United States,* 17 A.3d 581 (D.C. 2011).

II. The Trial Court Erred in Denying Defense Counsel's Request to Give the Jury Instructions on Self-Defense Until After the Jury Requested Self-Defense Instructions By Note During Deliberations

A. Standard of Review

"[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Hernandez v. United States*, 853 A.2d 202, 205 (D.C. 2004). "In reviewing the denial of a requested defense instruction, [this] court examines the evidence in the light most favorable to the defendant." *Id.* "'A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.'" *Reid v. United States*, 581 A.2d 359, 367 (D.C. 1990) (quoting *Adams,* 558 A.2d 348, 349 (D.C. 1989) (quoting in turn *Mathews v. United States*, 485 U.S. 58, 63 (1988)). Accordingly, the trial court erred in failing to provide the jury with instructions on self-defense until after they requested them in their deliberations.

B. There Was Sufficient Evidence at Trial to Support Giving the Jury Instructions on Self-Defense

On March 2, 2023, after the government rested and the court denied defense counsel's motion for judgment of acquittal, the

government requested the court not provide the self-defense instruction defense counsel had requested. (3/2/23 Tr. pp. 50, 52, and 54). In a March 3rd written Order for the court, Judge Epstein granted the government's request to exclude any instruction on self-defense. (*Id.* pp. 58-66; Order at R.338-345 PDF; *see* Jury Instructions at 3/6/23 Tr. pp. 79-90). Specifically, the Order stated that:

> Viewng the evidence in the light most favorable to Mr. Farmer, the Court concludes that there is no evidence on the record that, under the circumstances as they appeared to him at the time of the incident, Mr. farmer could reasonably believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by firing his handgun at Mr. Sturdivant.

(R. 339 PDF).

1. <u>The Evidence At Trial Was Sufficient For Self-Defense</u>

In contrast to the court's Order, there was sufficient evidence related to self-defense entered at trial including evidence that:

> - Mr. Sturdivant [the victim] and Mr. Farmer were in a heated argument, as evidenced by the Ring audio;
> - Mr. Sturdivant shoved closed the driver's door on Mr. Farmer as Mr. Farmer sat in his car;
> - Thereafter—as can be seen in the available Ring video (Gov. Exh. 15) –Mr. Sturdivant raised his arm in a manner consistent with pointing a gun at Mr. Farmer;
> - As also can be seen or *at the very least* reasonably inferred from Gov. Exh. 15 that Mr. Studivant can be seen reaching into his right waistband with his right hand immediately before he is shot.

(R. 335-36 PDF). Further, that the evidence at trial did not support finding that the government met its burden of proving that Mr. Farmer did not act in self-defense (R. 335 PDF) (noting Detective Kaselowicz's acknowledgement on cross-examination that it was impossible to tell from Gov Exh. 15 whether or not Mr. Sturdivant is holing anything in his hand when he raises his arm at Mr. Farmer, or whether Sturdivant has anything in his waistband).

This Court's decision in *United States v. Hernandz,* 853 A.2d 202 (2004), compels a finding that the trial court erred in not finding that the evidence in this case was sufficient to require instructions on self-defense. In *Hernandez, "*the government's evidence depicted a multiple stabbing by defendant precipitated by nothing more than a question by the victim." *Hernandez* at 203. Nonetheless, because defense evidence fairly raised a question for the jury about whether the defendant and victim had struggled, the Court gave a self-defense instruction. *See also Wilson v. United States,* 673 A.2d 670 (D.C.1996). In *Reid v. United States,* 581 A.2d 359 this Court found the self-defense instruction warranted even though the defense presented evidence that the

defendant was "playing with knives" when a police officer encountered him in an alley surrounded by other men, since "the circumstance of [his] engaging in an argument with several others while holding a knife could have indicated that [he] was outnumbered and was in the process of warding off an attack by the group." *Id.* at 367. Applying such precedents, this Court should the evidence here is sufficient to merit the self-defense instructions defense requested.

2. The Court's Order Denying Instructions On Self-Defense Invaded The Province Of The Jury.

It is the Jury's (and not the Judge's) exclusive province to weigh the evidence as a whole at trial. *See, e.g., Wheeler v. United States,* 930 A.2d 232, 235 (D.C. 2007). The Court's determination that insufficient evidence exists to warrant self-defense instructions invades the jury's province to weigh the evidence. Because the trial court repeatedly relies upon its own view of the evidence in its Order, it errs in impermissibly invading the jury's role. Notably, in imposing its own view of the weight of the evidence at trial, the court states that:

1. [T]he evidence establishes a legitimate reason for Mr. Sturdivant to go into the yard – to get away from the street and sidewalk so that Mr. Farmer would not try to shoot him again after he started drive in the direction that Mr. Sturdivant left the scene;

2. [F]ollowing up on unconfirmed information in the immediate aftermath of a shooting does not support an inference that the information was true;

3. [A]ny suspicion that Mr. Sturdivant entered the yard to hide a firearm (a firearm of which there is no direct or other circumstantial evidence) would not be a doubt based on reason.

(R. 343 PDF). Because these facts related to Mr. Farmer's self-defense claim, it was the right of the jury, and not the court, to weigh them in that light. *See e.g., Stevenson v. United States,* 162 U.S. 313, 315-16 (1989) (when a trial court refuses to instruct on an issue because it believes the evidence supporting the request is incredible or too weak, it improperly assumes the jury's role as fact finder).

3. The Jury's Notes Requesting Instructions On Self-Defense Support Finding Of Error

Further evidence that self-defense instructions were warranted is provided by the fact that shortly after the jury began their deliberations, they sent two notes ask for instructions on self-defense as follows:

1. Is there a jury instruction of definition of *self-defense*?

2. With respect to charge 4.101, what is the definition of voluntary? *If the Defendant acted in self-defense*, would that mean he acted involuntarily?

(R. 387 & 388 PDF (emphasis added); 03/06/23 Tr. pp 154-156, 159-161). On March 7, 2023 the court responded to the jury's notes by reading portions from The Redbook's self-defense jury instructions encompassing language from Self-Defense sections 9.500 et seq. (R. 394-97 PDF, including portions of Criminal Jury Instructions for the District of Columbia, Nos. 9.500, 9.501, 9.503, 9.504, and 6.501 (5th ed. 2022). The self-defense instructions the court issued, however, differed from those defense counsel initially requested in one important section. Over defense counsel's objection (03/06/23 Tr. p. 165-166), the court's issued version included the government's request for additional instruction under Section 9.504—Where Defendant Might Have Been the Aggressor.(*Compare* R. 358-60, to R 394-97 PDF; *see* 03/06/23 Tr. pp 162-). With this inclusion, the court told the jury:

> "[i]f you find that Mr. Farmer was the aggressor or provoked imminent danger of bodily harm upon himself, he cannot reply upon the right of self-defense to justify his use of force

(R. 396). Defense counsel moved for mistrial since, even with brief additional argument, Mr. Farmer could not get a fair trial where self-defense should have been instructed originally (03/06/23 Tr. p. 167). Neither the court's modified and late jury instructions, nor the parties'

brief arguments thereafter, were sufficient to remove the harm caused by its failure to initially provide the jury with the self-defense instructions defense counsel requested and the evidence supported. Accordingly, the court's error was not harmless.

Consequently, for the foregoing reasons, this court should find sufficient error to vacate and remand Mr. Farmer's conviction.

CONCLUSION

For the aforementioned reasons identified in this brief, and any others appearing to this Court in this case, it should vacate and reverse Mr. Farmer's sentence from the D.C. Superior Court.

Respectfully submitted,

_/s/____________________

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served electronically upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney, this 13th day of September, 2024.

/s/_______________
Robin M. Earnest