IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Appeal No. 24-CF-0242
(Crim. No. 2022-CF2-002599)

SHAQUILLE TAYLOR

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLANT

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LIST OF PARTIES

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STATEMENT OF THE CASE AND JURISDICTION

A grand jury indicted Shaquille Taylor for Aggravated Assault While Armed (motor vehicle), in violation of D.C. Code §§ 22-404.01, 4502 (2001 ed); [1] Assault With A Dangerous Weapon (motor vehicle), in violation of D.C. Code § 22-402; Fleeing A Law Enforcement Officer, in violation of D.C. Code § 50-2201.05(b)(2); Destroying Property Over $1,000 (motor vehicle), in violation of D.C. Code § 22-303; Unlawful Possession Of A Firearm (prior conviction), in violation of D.C. Code § 22-4503 (a)(1),(b)(1); Carrying A Pistol Without A License (outside home or place of business), in violation of D.C. Code § 22-4504(a)(2); Possession Of Unregistered Firearm, in violation of D.C. Code § 7-2502.01(a); and Unlawful

[1] All D.C. Code references are to the 2001 edition.

Possession Of Ammunition, in violation of D.C. Code § 7- 2506.01(a)(3). (R. 219-21 (PDF) (Indictment)). [2]

A jury trial was held in Superior Court before the Honorable Jason Park. On November 3, 2023, the jury returned verdicts of guilty against Mr. Taylor on the charges of Aggravated Assault While Armed, Assault With A Deadly Weapon, Fleeing From A Law Enforcement Officer and Destroying Property and acquitted him on all gun and related offenses (R. 326-27 (PDF) (Verdict Form)).

On March 5, 2024, Mr. Taylor was sentenced to 144 months of incarceration on the count of Aggravated Assault While Armed, followed by 5 years of supervised release. The court imposed concurrent to this sentence and concurrent to each other, 72 months of incarceration for Assault With A Deadly Weapon, 32 months for Fleeing A Law Enforcement Officer, 32 months for Destruction of Property and a fine of $100 for each offense for an aggregate amount of $400.00 payable by Mr. Taylor under the Victims of Violent Crimes Act (R. 361 (PDF)

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[2] References to "R. * (PDF)" are to the Record on Appeal followed by its PDF electronic page number, followed by the specific page number of the original document, if applicable. D.C.App. R. 28(e).

"*/*/* Tr. *" refers to the date of transcribed proceedings in Superior Court followed by the court reporter's designated page numbers.

(Sentence Of The Court)). A timely Notice of Appeal was filed within 30 days of sentencing on March 14, 2024 (R. 362-63 (PDF) (Notice of Appeal)).

This Court has jurisdiction pursuant to D.C. Code § 11- 721(a)(1), which provides the Court of Appeals with jurisdiction to review "all final orders and judgments" of the District of Columbia Superior Court.

STATEMENT OF FACTS

The government's key witness at trial was Secret Service Special Agent Alexander Smead who on May 6, 2022, was working as a Secret Service Uniform Division Officer and whose duties encompassed providing protection for diplomatic locations in the District of Columbia. He testified that in his capacity as a Uniform Division Officer he had powers similar to a Metropolitan Police Department officer in enforcing the District's codes but unlike a regular police officer, Secret Service officers are not required to wear body worn cameras (10/31/23 Tr. 25-28). As a result, the parties in this appeal do not have access to any police video evidence to corroborate or disprove testimony.

Agent Smead told the jury that at about 1:50 a.m. on May 6, 2022, he was in full police uniform with Secret Service insignia and patrolling in a white Chevy Tahoe SUV marked "Police" on the sides of the vehicle along with a gold badge and the words "United States Secret Service Uniform Division" (*id*. at 26-28). The

rear of the vehicle had additional markings indicating Secret Service police and there was a bar on top of the Tahoe with lights that flashed red and blue when activated as well as a smaller set of front windshield lights (*id. at* 28, 50). As he was driving in the 1700 block of Massachusetts Avenue that houses multiple embassies he observed a driver in a dark colored Nissan Altima that was, "blocking one of the driveways that said no parking" (*id*. at 31). Agent Smead could not remember even right after the event which driveway the Altima was blocking and there was no other visual or photographic evidence of the infraction to corroborate his word, not even a photo taken later of a "no parking" sign (*id.* at 31, 84-85). Agent Smead believed the car standing in front of the driveway that was not obstructing traffic otherwise was turned on, he had no idea how long it had been there or why it was stopped in front of the driveway (*id*. at 85, 87-88).

Agent Smead pulled his vehicle behind and adjacent to the left tail light of the Altima, activated his siren very briefly before turning that off and activated his red and blue lights in his efforts to initiate a traffic stop while he was engaged in calling into his control center for information on the Altima's tag number. Agent Smead testified that while he was still seated in his SUV, the driver of the Altima he later identified as Mr. Taylor opened the driver side door of his car and then leaned his head out and looked at him. Agent Smead testified he made eye contact

with Mr. Taylor and that through his car loud speaker he never said he was police, he commanded him to put the car in park position, stay in the car and wait to be approached (10/31/23 Tr. 32-33, 46, 85-88). There were other people and other cars in the area, Agent Smead could not say for certain he knew that Mr. Taylor knew that he was speaking to him (*id*. at 86). Mr. Taylor leaned back into his vehicle, closed the door and sped off driving southeast on Massachusetts Avenue (*id*. at 33-34).

Agent Smead lost sight of the Altima initially, testified he did not chase after it per se but called his Dispatch Center for additional assistance and gave an update of his own movement and location as he went looking or canvassing for the vehicle and travelling in the same direction he saw the vehicle go (*id*. at 35-36, 80-81). Only four blocks away from where they started and around the 1100 block of Massachusetts Avenue, Agent Smead drove up upon an accident that had just occurred but he did not personally see or hear happen (*id*. at 88-89). Agent Smead saw the Altima was disabled, "up on the curb crashed into like a retaining planter style wall on the sidewalk" (*id*. at 37). There was also a green Jaguar with significant front end and other damage sitting disabled in the middle of the street (*id.* at 40, 51). As far as Agent Smead was concerned, this was an accident between two vehicles and he did not know who caused it (*id.* at 92-93).

The first movement Agent Smead noticed was Mr. Taylor trying to climb out the front windshield of his now badly damaged vehicle. Agent Smead went over to the vehicle and gave Mr. Taylor commands to exit. Mr. Taylor who was injured fell onto the hood of the vehicle and then onto the ground Mr. Taylor reached down into his waistband, which caused Agent Smead to think he might have a weapon there (10/31/23 Tr. 43-45, 83, 87). Mr. Taylor complied with the officer's commands to show his hands and lay on his stomach and Agent Smead now having detained Mr. Taylor, handcuffed him, searched him and did not find a weapon (*id.* at 46, 79, 91-92). He was arrested for fleeing from a law enforcement officer and taken by ambulance from the scene to the Washington Hospital Center for medical treatment for injuries he sustained in the crash (*id* at 47).

Agent Smead stayed on the scene and determined both the Jaguar and Altima were inoperable, leaking fluids and needed to be towed. After a private towing company the Secret Service uses was asked to respond for the tow, but before they got there, Agent Smead wasted little time before beginning what he referred to as a routine and extensive inside and out and front to back full "inventory" of the vehicle (*id*. at 48, 60). Agent Smead testified this extensive search and inventory is made of every vehicle the Secret Service asks to tow, for accountability to make sure things "of value" get listed by the officer on the scene

in case they are claimed "missing" later and to determine whether a claimed loss occurred after the car was towed to the private lot (*id*. at 60). He did not testify he was wearing gloves during his inventory as he opened compartments and moved items and debris around the front inside of the vehicle that had been dislodged and strewn around in the crash. His search for things to inventory resulted in his ultimately finding a pistol on the floor of the passenger side of the Altima. He uncovered it under the glove box he had lifted up from the floor that had fallen on top of the gun (*id*. at 61-64, 66-67). Agent Smead testified that crime scene personnel from his agency were already working on site so he asked them to take over, collect evidence and "[t]urn[ing] it from a vehicle inventory to an actual search" (*id*. at 65).

Nija Saunders, a corrections officer, testified she was travelling as the passenger in a car with her then boyfriend Derrick Garnett at the time of the accident. They were stopped at a red light at around 12th Street and Massachusetts Avenue when she heard what sounded like a car going fast and saw headlights of a black car coming straight at them and drove through the red light. She closed here eyes, heard a loud bang and felt debris hit their car. She got out of the car, saw a crashed Jaguar sitting in the street and in another area nearby saw a man trying exit the black car that had crashed by kicking the windshield from inside out. Ms.

Saunders saw a Secret Service vehicle arrive seconds later and the officer from that jump out of his vehicle and onto the hood of the black car and draw his gun on the individual trying to exit it. She saw another man injured but conscious face down on the ground and called for the Secret Service officer on the black car to come over and help him as she and others were telling the man to try not to move. Ms. Saunders saw an ambulance take the man who had been lying on the ground away and spoke to police on the scene and on other occasions before trial (10/31/23 Tr. 96-105, 108-09, 112-13).

Derrick Garnett, also a corrections officer, confirmed that when he and Ms. Saunders were stopped at the red light she brought his attention to a car speeding towards them. Not far behind the car he saw speeding towards them Mr. Garnett also saw what appeared to be a government car with sirens on it that seemed to be pursuing or trailing behind the car coming towards them (11/2/23 Tr. 7, 13, 14-16). Mr. Garnett testified he saw the front of the car coming towards them make contact with the driver's side of a Jaguar that was coming across the intersection on a green light before it veered off and crashed into a retaining wall on the sidewalk (*id*. at 8-9). The man exited the vehicle that was crashed into the wall by pushing the front windshield out from the inside and then it looked like he tried to run but the officer from the vehicle that had been following had jumped out and put the

man to the ground. The man who had been driving the Jaguar was lying on the ground injured (*id*. at 10, 12, 14).

Zackry Everett presented at the scene of the accident as a crime scene investigator for the Uniform Secret Service. The drivers involved in the crash had already been taken from the scene and he engaged in taking photographs of the surrounding area generally and damage to the Altima and Jaguar. As a member of the Secret Service, he did not wear a body worn camera either (10/31/23 Tr. 122-25, 149). As he was working he could see Agent Smead conducting his inventory search on the Altima. Agent Everett was eventually notified a firearm was found on the floor of the passenger side of the Altima. He identified what was admitted Government Exhibit 209 as a photograph he took of the gun in the location where it was found and before he and his partner removed it from the Altima to photograph it further and examine it. They found the gun was loaded with a magazine holding bullets and a round was in the chamber (*id*. at 130-36, 153). Agent Everett identified what was admitted as Government Exhibit 304 as the gun recovered from the Altima, a Springfield Armory XT5 model with a barrel less than 12 inches (*id.* at 137). The gun, was processed for fingerprints but none were

recovered. It was also swabbed for DNA and test fired (*id.* at 139-41, 164-65). [3] Blood was located on both front airbags that had deployed in the Altima as well as other areas on the front driver and passenger sides but no serology tests were performed on the evidence (*id*. at 166-68).

Agent Everett testified he was familiar with the concept of transfer DNA and where DNA can be transferred from one object to another (*id*. at 154). He did not know if the glove box of the car or all the items that came out of the box and strewn about from the crash had also been moved about during Agent Smead's inventory (*id.* at 154-56). He was familiar with the Secret Service's policy on car chases and that pursuit can only be authorized by a Duty Captain of a shift, or in the event "there was immediate danger to life essentially" (i*d.* at 163-64).

Charity Davis, an FBI laboratory analyst qualified as an expert in DNA analysis, testified that DNA found on the swabs her laboratory was provided with from the gun emanated from four individuals and one of those individuals was Mr. Taylor (11/1/23 Tr. 6, 9, 17). She acknowledged those results did not mean Mr. Taylor possessed the gun and she could not tell what part of the firearm was swabbed for DNA because the swabs were only identified as "from a firearm" and

[3] A small bottle of liquid that said "Cognac" on it was recovered from the back seat of the Altima, measured in milliliters at the lab and according to Agent Everett the liquid smelled like liquor. It was destroyed like all suspected liquor recovered by the Secret Service because liquor is never stored (10/31/23 Tr. 144-47, 158).

not which part of it was swabbed (*id*. at 18-20). She testified that transfer DNA can easily occur through a variety of means, including blood splatter, and her lab did not test for the presence of blood that may have been on the swabs they were given for DNA testing (*id*. at 22-28, 57-62).

D.C. Detective Victor Deperalta, a crash investigator, testified that pursuant to a search warrant he was able to download data from the airbag of the Altima and that data indicated the vehicle was travelling at a speed of 94mph a second before impact and that the braking mechanism, which was operational, was activated by the driver one second prior to impact (11/1/23 Tr. 63-65, 70-75, 100).

Brian Chase, the owner of a private company that consults in accident reconstruction and that the government hired in this case, was qualified as an expert in the field of automotive technology (11/1/23 Tr. 83, 85-86). On February 16, 2023 he conducted an analysis of the Altima at Blue Plains police impoundment lot and determined impact to the car occurred at the front (*id*. at 87, 89). He determined the crash was not the result of a mechanical failure. He had no video footage of the accident or surveillance of events leading up to it. He did not physically examine the Jaguar. By viewing photographs of the Jaguar's damages he formed an opinion they were caused by frontal impact with the Altima (*id*. at 90-91, 109-10). Mr. Chase was able to conclude with certainty the driver of the

Altima took their foot completely off the accelerator pedal having observed a hazard and applied the car break before and through impact with the Jaguar and used the steering mechanism to swerve (*id.* at 114-15).

The driver of the Jaguar was Kareen Gage (11/1/23 Tr. 124). Dr. Jack Sava, a trauma surgeon at the Washington Hospital Center qualified as an expert in trauma surgery, testified he treated Mr. Gage for critical injuries he sustained in a car accident on May 6, 2022, and that treatment included necessary life saving measures. Mr. Gage was treated for shock, pelvic fracture, numerous rib and spine fractures and placed on a ventilator to assist him with breathing during a weeks long stay at the hospital before he was released for rehabilitation (*id*. at 130-39).

The prosecutor read to the jury stipulations agreed to by the parties that: Mr. Taylor had previously been convicted of a crime punishable for a term of incarceration that exceeded one year and that Mr. Taylor was aware of his prior conviction on May 6, 2022; Mr. Taylor did not have a license to carry a pistol in the District of Columbia and that the firearm and ammunition recovered from the Altima was not registered to him; DNA evidence in the case was properly collected, chain of custody was maintained and delivery made to the expert who testified in DNA analysis at trial and who gave opinions based on work done by other biologists (11/2/23 Tr. 16-18).

Defense

Mr. Taylor testified he was 27 years of age and lived in the District of Columbia his entire life. He acknowledged a prior 2018 conviction for robbery with a firearm (11/2/23 Tr. 26-27, 41). He told the jury that on May 6, 2022, he had been working for several hours until about 1:40 or 1:50 a.m. at a nightclub called St. Eve's on Connecticut Avenue. After work he walked to the Altima he was driving that night and where he had it legally parked. He sat in it while he phoned the mother of his two children ages six and nine. The Altima he had permission to drive was owned by this same woman. Mr. Taylor testified he had been working at the nightclub several days a week for several months and had parked the car legally and in the same area every time (*id*. at 27-28, 34-35).

Mr. Taylor testified he had been through a lot trauma in his life, including having been robbed, shot at, and just a couple of weeks before this accident he was in the vicinity where shots were fired. He knew a lot of people were getting carjacked. Something made him feel paranoid as he was sitting in the car so he opened the car door, was about to get out but then saw someone in all black not too far from him walking toward him, that frightened him so he got back in the car and fled. He did not see a vehicle pulled behind him, he did not hear a siren or see any police lights at that time, he just saw a person he could not identify and in all black

coming toward him. He did not hear anyone announce they were a police officer (*id*. at 29-31).

Mr. Taylor recounted that he was scared and drove straight for a few blocks before he looked in the vehicle's rear view mirror and when he did look in the mirror he noticed for the first time police lights a few blocks away coming from behind him and got distracted by this. By the time he looked forward again he realized he was running a red light, tried to break hard but could not stop in time as he wanted to in order to avoid impact with the Jaguar and swerved and crashed (11/2/23 Tr. 31-32, 35, 39, 42). His car ultimately came to a standstill against a wall and he had to push out the front windshield to climb out of the vehicle and then fell to the ground. A Secret Service police officer held a gun to him, told him to stay on the ground, got on top of him and handcuffed him. Mr. Taylor told the jury he did not try to run and was not able to, he had a head injury and sustained a broken arm and broken leg in the crash that required several surgeries (*id.* at 33-34). He remembered being placed on a gurney and taken to Washington Hospital Center for treatment. He testified he was not the only person who drove the Altima and he did not know there was a gun in the vehicle (*id.* at 34-36).

OVERVIEW

The charges in this case emanated from a resulting car accident that the government claimed began with a traffic infraction, an attempt to initiate a traffic stop by a Secret Service Uniform Officer and vehicular flight. Mr. Taylor first challenges on appeal the trial court's denial of his motion to suppress evidence obtained by an "inventory" search of the Nissan Altima he was driving by Secret Service Uniform Officer Smead [Agent Smead by the time of trial] who testified Mr. Taylor was parked in a no parking area blocking a driveway and then fled when the officer attempted to initiate a traffic stop. Agent Smead testified Mr. Taylor fled at a high rate of speed and while he did not chase him, the evidence clearly shows he followed relatively close behind before catching up with Mr. Taylor four blocks later and after Mr. Taylor was engaged in a crash with another vehicle. Mr. Taylor testified in his own behalf and claimed he did not know he was engaged with police until he saw a police vehicle in his rear view mirror while driving.

Mr. Taylor argues on appeal that the vehicle he was driving was unlawfully seized by Agent Smead after the crash and that even if it was lawfully seized, the "inventory" Agent Smead initiated very soon after he arrived on the scene and he claimed to perform was a ruse for an investigatory search based on his contact with

Mr. Taylor and concluded with Agent Smead finding a gun on the floor of the driver's side of the vehicle and a small bottle of liquor in the rear. Mr. Taylor questions Agent Smead's pursuit without authorization for a traffic offense which another Secret Service officer indicated would have been against agency policy. He also claims the inventory search was not lawful because it was not conducted under a specific written policy Agent Smead could name as a basis for the power he believed he had for conducting a warrantless search of the vehicle. A search warrant was not issued for that vehicle until over two months later.

Mr. Taylor was not charged with any open container offense or driving while intoxicated. He was initially charged with fleeing from an officer. He was charged with numerous gun offenses as a result of the discovery of the gun and even though acquitted of the gun offenses, he claims that evidence of the gun that should have been suppressed was prejudicial evidence at his trial and he is entitled to a reversal and a remand for a new trial on all remaining charges.

The second issue raised on appeal is instructional error on the second element of the offense of aggravated assault while armed. During deliberations the jury sent a note asking if could swap, substitute anyone for Mr. Gage, in the second element of the offense. Over objections by defense counsel, the trial court reinstructed the jury to the satisfaction of the government by indicating to the

jurors that they could ‘swap any human life for Mr. Gage’. Mr. Taylor argues on appeal the reinstruction was erroneous, misled or confused the jury, prejudiced him and is reversible error as to the offense of aggravated assault while armed.

Mr. Taylor contends that the instructional error in this case is especially egregious because his defense was that this was an accident, he did not have an extreme indifference to Mr. Gage’s life and that even government expert witnesses testified that data from the Nissan Altima showed without a doubt that while he was driving at a high rate of speed, he did recognize a hazard and attempted to break and swerve to avoid impact with Mr. Gage’s vehicle. He argues on appeal that the reinstruction not only veered they jury from the Red Book instruction but also prejudiced him in putting him at a disadvantage after closing arguments were centered around the original jury instruction, and allowing them to essentially personalize the case and put themselves as in the shoes of the victim with regard to the second element of the offense and take Mr. Gage out of the equation.

Finally, Mr. Taylor argues that if no other relief is granted, his convictions for aggravated assault while armed and assault with a deadly weapon merge.

ARGUMENT

I. The Trial Court Erroneously Denied Mr. Taylor's Motion To Suppress Evidence Recovered By The Secret Service After Pursuit For Traffic Infractions Resulted In Unlawful Seizure Of Vehicle And "Inventory" Of Vehicle After Crash Without Consent Or Reference To Specific Writings Allowing The Warrantless Search.

Prior to trial Mr. Taylor filed a Motion To Suppress Illegally Obtained Evidence (R. 158 (PDF)). The motion asserted (*id.* at 159 (PDF)) that under *Wong Sun v. United States*, 371 U.S. 471 (1963) the gun recovered from the Altima and any other evidence had to be suppressed as that evidence was the poisonous fruit of an illegal stop and subsequent warrantless search conducted in violation of Mr. Taylor's constitutional rights under the Fourth and Fifth Amendments. The motion averred that Agent Smead did not have permission to search the Altima on the scene and he had no warrant to conduct an immediate search of the contents of the vehicle which led to his discovery of a gun under debris on the floor of the passenger side of the vehicle (R. 158-59 (PDF)).

> Warrantless searches and seizures are presumptively illegal. Katz v. United States, 389 U.S. 347, 357 (1967). . . . The government has the burden of proving that the evidence was obtained through an exception of the warrant requirement. Bumpers v. North Carolina, 391 U.S. 543, 548 (1968).

(R. 158-59 (PDF)).

The government bears the burden of showing compliance with the constitutional protections afforded citizens against unlawful search and seizure. *Malcolm v. United States,* 332 A.2d 917, 918 (D.C. 1975). On review of a challenge on appeal to a trial court's denial of a motion to suppress evidence on Fourth Amendment constitutional grounds the court will defer to the trial court's factual findings "unless clearly erroneous . . . and will review de novo the court's legal conclusion[s]. *Miles v. United States*, 181 A.3d 633, 637-38 (D.C. 2018) quoting *Sharp v. United States*, 132 A.3d 161, 166 (D.C. 2016).

At the evidentiary hearing on the motion to suppress evidence the government relied only upon Secret Service Special Agent Smead's testimony. He stated that in his previous role as a Secret Service Uniform Division Officer he held on May 6, 2022, his duties included protecting diplomatic locations in the District of Columbia (10/30/23 Tr. 112-14). He recalled that night he was traveling solo in a black and white Chevy Tahoe marked "United States Secret Service Uniform Division" and "police" on the outside of the vehicle and he was wearing a police uniform (*id.* at 114-15). While travelling in the 1700 block of Massachusetts Avenue Agent Smead observed a black Nissan Altima stopped but motor running in a no parking zone and blocking a driveway to an unnamed

Embassy (*id*. at 115, 129). [4] Agent Smead made no effort to tell the driver of the Altima to move the vehicle (*id.* at 130-31). Instead, Agent Smead pulled behind and adjacent to the left tail light of the vehicle and activated his lights and siren to initiate a traffic stop while calling in the Nissan's tag number to his control center. The driver of the Nissan open the car door, stuck his head out and looked at him to where Agent Smead could see his face. Through a loud speaker system in his vehicle Agent Smead did not identify himself as police but commanded to close the car door and stay in his vehicle until approached. Agent Smead identified Mr. Taylor in court as the person he saw who closed the car door and sped off travelling southeast on Massachusetts Avenue (*id*. at 116-17, 130-31). [5]

Agent Smead testified he did not chase the Altima but did look for it and came upon it on Massachusetts Avenue about four blocks away on the sidewalk crashed against a retaining wall with significant front end damage to the vehicle.

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[4] Agent Smead acknowledged at the hearing that his arrest report only stated Mr. Taylor was in a "no parking area" and made no mention of an Embassy driveway or exactly where this signage prohibiting parking was located (*id*. at 131-32). At trial the day after, Agent Smead testified he never remembered with any specificity which driveway to what he saw being blocked by Mr. Taylor and that had the no parking sign (10/31/23 Tr. 31, 84-85).

[5] On cross-examination Agent Smead testified he could not say if Mr. Taylor could be able to see at nighttime the police markings on the side and rear of his vehicle where he stopped in relation to Mr. Taylor's vehicle (*id*. at 133).

There was a disabled green Jaguar sitting in the street with significant front end damage. Agent Smead had not seen or heard the crash but he noticed Mr. Taylor trying to climb out from the collapsed front end of the Altima through the front broken windshield (*id.* at 118, 128, 134-35). Agent Smead helped Mr. Taylor out of the vehicle, put him in handcuffs, arrested him for fleeing a law enforcement and sent him to the Washington Hospital Center in an ambulance for medical treatment (*id*. at 119, 136).[6]

Agent Smead testified he opened the door to Altima after being on the scene maybe a little more than ten minutes and in digging through "[t]o inventory the vehicle before it was towed" he "located a pistol on the passenger floor board" under debris from the crash (*id.* at 120). The gun was not in plain view the floorboard was covered with things strewn all over it, he had to move the open glove compartment that was now on the floor of the car to see and the dashboard had collapsed onto it from impact of the crash all depicted in a photograph admitted as Government Exhibit One (*id.* at 121-23, 127-28). According to Agent Snead, although he never saw Taylor make a furtive movement before he left in the car, and had no reason to believe there was contraband in the Altima, he had the

[6] Agent Smead testified that when he laid him on the ground he was injured from the crash and "he rolled and reached hard into the front of his waistband" (*id.* at 135-36).

right to immediately and on the scene thoroughly and systematically search and perform an accounting and inventory of the inside of the Altima regardless of circumstances because this is Secret Service policy in every case where they request a tow from the private company the agency normally contracts with to tow vehicles to that company's lot (*id*. at 123-25, 135). Agent Snead testified he was not looking for evidence of a crime when he searched the vehicle, it was to mitigate any claim something valuable was missing from the vehicle later. After he was done, crime scene recovered the gun and removed it from the Altima before it was towed. (*id*. at 125-26).

After Agent Smead's testimony defense counsel argued that the government had not met its burden to establish an exception to the warrant requirement in this case, Agent Smead had "searched the vehicle before the tow" (*id*. at 138) and failed to produce any "certified policy" (*id*.). "[T]here's a difference between what Officers just do routinely and what policies actually states it's supposed to do. Just because they do it routinely doesn't mean it's actually legal or lawful" (*id*. at 138-39). Agent Smead never stated he had consent to search. He stated that he did not have a warrant to search the Altima on May 6, 2022. The prosecutor asked the court to take judicial notice that a search warrant was issued for the vehicle over two months later on July 21, 2022 (10/30/23 at 126-27).

The trial court credited Agent Smead's testimony that as a factual matter he saw Mr. Taylor parked illegally in a no parking area, attempted to conduct a traffic stop and had probable cause for a stop based on the no parking infraction (10/31/23 Tr. 139-40). The court found that because Mr. Taylor "fled" there was no "actual seizure" of him at that time (*id.* at 140). The court credited Agent Smead's testimony that Mr. Taylor was attempting to flee after the crash through the front windshield and that he was placed under arrest (*id*. at 140-41) . The court found that the Altima was disabled after the crash, had to be towed and under the "Community Care taking function" . . . "the first requirement for the inventory search has been established by the Government by a preponderance of the evidence that that vehicle was going to end up lawfully in the possession of the police" (*id.* at 141). The trial court found that Agent Smead's testimony alone and without documentation of any written policy that the Secret Service searches every vehicle for inventory as a matter of procedure, met "the [second] requirement that the inventory search be conducted pursuant to an establish[ed] law enforcement policy" (*id*.). The trial court denied the motion to suppress finding the warrantless search of the Altima that produced the gun permissible under the "inventory search exception to the warrant requirement" (*id.* at 142). Mr. Taylor contends on appeal

that the trial court's ruling was erroneous and the evidence obtained as a result of the warrantless search should have been suppressed.

As an initial matter, it is questionable whether Agent Smead should have been on the scene of the crash to begin with to take charge or as the principal arresting officer. After Mr. Taylor fled his presence, Agent Smead stated he did not chase Mr. Taylor but he certainly indicated he pursued him by following in the direction he said Mr. Taylor went and came upon the crash seconds after it happened (10/31/23 Tr. 35-36, 80-81). Government eye-witness Nija Saunders confirmed Agent Smead was not far behind Mr. Taylor (10/31/23 Tr. 96-105, 108-09). Derrick Garnett testified he saw what appeared to be a government car with sirens to be pursuing or trailing behind the Altima (11/2/23 Tr. 7, 13, 14-16). Mr. Taylor testified he saw Agent Smead in his rear view mirror and that was actually what distracted him from keeping his eyes in front of him and on the road (11/2/23 Tr. 31-32, 35, 39, 42).

Agent Everett, the crime scene investigator for the Uniform Secret Service testified he was familiar with the Secret Service's policy on car chases and that pursuit can only be authorized by a Duty Captain of a shift, or in the event "there was immediate danger to life essentially" (10/31/23 Tr. 163-64). Agent Smead did not show he had authority to pursue in any way from a shift supervisor or other

authorization and a result the means and determination by which he came upon the scene and to perform an inventory search within maybe a little more than 10 minutes of his arrival is questionable (10/30/23 Tr. 120).

Agent Smead was clear that his coming upon the gun and liquor was pursuant to an inventory search he was conducting and that he was not conducting a search of the Altima incident to an arrest because he believed it contained evidence related to the offense of fleeing or the crash or that he otherwise had probable cause to search the car based on his initial but incorrect thinking Mr. Taylor may have possessed a gun when he reached down the front of his pants after climbing out of the windshield. *Arizona v. Gant* 556 U.S. 332, 346 (2009) (police have right to search vehicle if believe it contains evidence relevant to arrest or crime).

"[A]s *Opperman* [7] makes clear, a condition precedent to a constitutionally permissible inventory search is lawful possession by the authorities of the vehicle. We too have repeatedly so held. *See, e.g.*, *Mayfield v. United States*, D.C. App. 276 A.2d 123 (1971); *United States v. Pannell*, D.C. App., 256 A.2d 925 (1969) [incapable or making other arrangements to move car]; *Williams v. United States*,

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[7] *South Dakota v. Opperman*, 428 U.S. 364 (1976).

D.C. App., 170 A.2d 233 (1961) [consent to inventory]." *Arrington v. United States*, 382 A.2d 14, 18 (D.C. 1978). In this case Agent Smead did not inquire into or obtain consent to inventory or testify that Mr. Taylor, or someone else was incapable of making arrangements to move the vehicle or that inquiry was made in this respect before Agent Smead undertook a caretaking role.

In this case Agent Smead conducted what he called an inventory search as a "pretext to concealing an investigatory police motive." *Opperman,* 428 U.S. 376. According to Agent Smead, Mr. Taylor fled his police presence at a high rate of speed and then when he climbed out of windshield he reached in his pants. Rather than think Mr. Taylor was hurt from such vast impact, Agent Smead thought he had a gun, he jumped on the hood of the Altima, pulled a weapon on Mr. Taylor and thought that his initial flight could be consciousness of guilt (10/30/23 Tr. 135-36). Yet, Agent Smead insisted this was simply an inventory he conducted and not a search.

Even if the Altima was going to wind up in police property as the trial court held, the government did not show that the search was conducted according to an established law enforcement policy. While Agent Smead testified there was one, he was trained in it and he acted in accordance with that lawful power he firmly believed he had every time he requested a tow regardless of circumstance, the

government failed, as defense counsel complained, to produce any lawful written policy to conduct an inventory search (10/31/23 Tr. 138). Defense counsel argued "there's a difference between what Officers just do routinely and what policies actually states it's supposed to do. Just because they do it routinely doesn't mean it's actually legal or lawful" (*id.* at 138-39).

The trial court erred in failing to grant the motion to suppress and appellant is entitled to a new trial with the evidence obtained from the warrantless search suppressed. The government showed a warrant to search the Altima was not obtained until over two months after the crash and the warrantless search by Agent Smead (*id.* at 126-27). Although the jury acquitted on the gun charges, evidence underlying those charges was a substantial portion of the trial and witness testimony and there is no assurance the evidence or lack thereof was not prejudicial or used by the jury to compromise a verdict or in some other way influence a verdict on the remaining counts.

II. The Trial Court's Response To A Jury Note Allowing Them To Substitute Any Human For The Complainant To Satisfy The Second Element Of Aggravated Assault While Armed Was Erroneous.

"In reviewing a challenge to a jury instruction that was preserved at trial, the central question for this court is whether it is an adequate statement of the law, and whether it is supported by evidence in the case." *Wheeler v. United States*, 930

A.2d 232, 238 (D.C.2007) (citation omitted). *Fitzgerald v. United States*, 228 A.3d 429 (D.C. 2020) held that,

> Decisions regarding instructing the jury are committed to the discretion of the trial court and are reversed only for abuse of discretion; however, the accuracy of an instruction itself is a legal question that we review de novo. *See, e.g., Brown v. United States*, 139 A.3d 870, 875 (D.C. 2016); *Taylor v. District of Columbia*, 49 A.3d 1259, 1263-64 (D.C. 2012); *Jordan v. United States*, 18 A.3d 703, 707 (D.C. 2011); *see also Fleming v. United States*, 224 A.3d 213, 219 (D.C. 2020) (en banc) ("Although our terminology has not always been entirely clear on this point, we review de novo whether challenged jury instructions adequately state the law."). With respect to re-instruction in particular, we have stated that the trial court must appropriately and effectively respond to demonstrated confusion on the part of the jury and must address, with "concrete accuracy," any specific difficulties the jury is having in understanding the law. *Colbert v. United States*, 125 A.3d 326, 334 (D.C. 2015).

The Court of Appeals will reverse a conviction due to instructional error if the Court cannot say with fair assurance that the judgment was not substantially swayed by the error. *Gray v. United States*, 155 A.3d 377 (D.C. 2017). The Red Book "aims to accurately reflect the law." *Fitzgerald, supra*, n. 12.

On November 2, 2023, the jury was given final instructions including the elements of aggravated assault while armed in accordance with D.C. Criminal Jury Instruction (Redbook Instruction) 4.103 AGGRAVATED ASSAULT: D.C. Official Code § 22-404.01 (2001) (11/2/23 Tr. 63-64):

> The elements of the crime of aggravated assault while armed, each of which the Government must prove beyond a reasonable doubt are that, number one, Shaquille Taylor caused serious bodily injury to Kareem Gage. Number two, Mr. Taylor was aware that his conduct created an extreme risk of serious bodily injury to Mr. Gage and under circumstances which demonstrated an extreme indifference to human life, Mr. Taylor engaged in that conduct nonetheless and number three, at the time of the offense Mr. Taylor was armed with or had readily available a weapon and that weapon was dangerous.

Closing arguments followed the jury instructions. In closing argument the prosecutor argued Mr. Taylor fled police and disregarded the life of others because he didn't want to get caught with loaded gun in the car (*id*. at 76, 99-103). The prosecutor repeated the second element of the crime verbatim and exactly as the jury was instructed and said this "second element, this is heart of this charge"(*id*. at 77). Defense counsel argued this was an accident, Mr. Taylor claimed he was not fleeing from a police officer but from a man dressed in black that spooked him coming toward him, there was without a doubt evidence the defendant tried to avoid hitting Mr. Gage's car, he did not exhibit an extreme indifference to human life when noticed risk after being distracted to police lights behind him and had he no idea about the firearm (*id*. at 85-94). The jury was excused at 3:41p.m. for deliberations, released at 4:39 p.m. and asked to return at 9:30 a.m. next day (*id*. at 109, 113).

After a first jury note on day one of deliberations not relevant for appeal purposes (R. 320 (PDF)), the next day at 12:49 p.m. the jury sent out a note asking "is 1.b specific to injuring Mr. Gage or can we swap any human life with "Mr. Gage"?" (R. 321 (PDF) (11/3/23 Tr. 3)). The court and counsel agreed the jury was referring to the second element of the jury instructions on aggravated assault while armed (*id.* at 4). The defense argued the jury instruction does not state anything about swapping (*id*. at 4-6) "it specifically says the conduct created an extreme risk of serious bodily injury to Mr. Gage and under the circumstances demonstrated an extreme indifference to human life" (*id*. at 5). The court called for a lunch break, said the parties should try to agree on something and suggested the court and parties should research relevant case law if any (*id.* at 6-8).

After the lunch break the defense indicated the parties were not able to work something out in response to the jury note (*id*. at 9). The defense objected to the reinstruction as given to now take Mr. Gage out of the equation and preserved its objections as the trial court acknowledged (*id*. at 13-14). The court reinstructed the jury in a note that said 2:02 p.m. and soon thereafter at 2:50 p.m. the jury announced they reached a verdict (R. 322, 325 (PDF)). The reinstruction included the following charge to the jury:

> I understand you to be asking whether the government must prove beyond a reasonable doubt that Mr. Taylor was aware

> that his conduct created an extreme risk of serious bodily injury to Mr. Gage specifically, or whether the government must prove beyond a reasonable doubt that Mr. Taylor was aware that his conduct created an extreme risk of serious bodily injury to "any human life."
>
> I instruct you as follows: To satisfy the second element of Aggravated Assault While Armed, the government must prove beyond a reasonable doubt that Mr. Taylor was aware that his conduct created an extreme risk of serious bodily injury to another person and under circumstances which demonstrated an extreme indifference to human life, Mr. Taylor engaged in that conduct nonetheless.

(R. 321 (PDF)).

When a ruling by a trial judge is discretionary, to determine if there was an abuse of that discretion, the Court will review the lower court ruling to determine: 1) whether the court exercised its discretion or applied a uniform policy in its decision-making; 2) whether the court employed the correct legal standard or principle to the claim; and 3) whether there was a firm factual foundation on the record to support the trial court's ruling. *Johnson v. United States*, 398 A.2d 354, 363-64 (D.C. 1979). "An informed choice . . . requires that the trial court's determination be based upon and drawn from a firm factual foundation." *Id.* at 364. That informed choice also requires reliance upon and application of the correct legal standard. *McFerguson v. United States*, 870 A.2d 1199, 1203 (D.C. 2005).

Mr. Taylor argues on appeal the reinstruction was erroneous, veered from the Redbook instruction, misled or confused the jury, prejudiced him and is reversible error as to the offense of aggravated assault while armed. Mr. Taylor contends that the instructional error in this case is especially egregious because his defense as articulated in closing argument was that this was an accident, he did not have an extreme indifference to Mr. Gage's life and that even two government expert witnesses testified that data from the Nissan Altima showed without a doubt that although he was driving at a high rate of speed, he did recognize a hazard and when he did, he attempted to break and swerved in an attempt to avoid impact with Mr. Gage's vehicle.

D.C. Detective Victor Deperalta, a crash investigator, testified that pursuant to a search warrant he was able to download data from the airbag of the Altima and that data indicated the vehicle was travelling at a speed of 94mph a second before impact and that the braking mechanism, which was operational, was activated by the driver one second prior to impact (11/1/23 Tr. 63-65, 70-75, 100). Brian Chase, the owner of a private company that consults in accident reconstruction and that the government hired in this case, was qualified as an expert in the field of automotive technology (*id*. at 83, 85-86). On February 16, 2023 he conducted an analysis of the Altima that wound up at the Blue Plains police impoundment lot

(*id*. at 87, 89). He determined the crash was not the result of a mechanical failure. He had no video footage of the accident or surveillance of events leading up to it. He did not physically examine the Jaguar. By viewing photographs of the Jaguar's damages he formed an opinion they were caused by frontal impact with the Altima (*id*. at 90-91, 109-10). Mr. Chase was able to conclude with certainty the driver of the Altima took their foot completely off the accelerator pedal having observed a hazard and applied the car break before and through impact with the Jaguar and used the steering mechanism to swerve (*id.* at 114-15).

Mr. Taylor was on trial for injuring Mr. Gage. Mr. Gage was named in the indictment as the victim in this case. While it is unknown what prompted the jury note, once the spotlight was taken off Mr. Gage, the jury came back with a verdict 48 minutes later. In closing arguments the parties went back and forth as to what the jury should consider. The defense focused on accident and evidence showing that Mr. Taylor attempted to mitigate any injury to Mr. Gage. The jury reinstruction allowed for the jurors to only concentrate on what occurred before impact and the offense itself and albeit unintentionally blew up Mr. Taylor's closing argument and defense he based on the initial instructions.

He argues on appeal that the reinstruction not only caused a direct hit to his defense that he could not now reargue in light of the reinstruction, but also

prejudiced him in allowing them to essentially personalize the case and put themselves as in the shoes of the victim with regard to the second element of the offense. To basically answer "yes" to the "swap [of] any human life with "Mr. Gage"" as the jurors asked if they could do, also meant they could swap theirs for his as well and in their deliberations personalize the occurrence, and have a bias that Mr. Taylor would have created a grave risk to them or their family as well if they happened to be on the road that night and regardless of what ultimately happened. Why the question was asked is unknown, but what the jury could do with the answer given goes beyond what the original jury instruction contemplated, put the defense at a disadvantage after closing argument and without redress. As a result, this court cannot say with fair assurance that the judgment was not substantially swayed by the error. *Gray, supra.* Mr. Taylor's conviction for aggravated assault while armed should be reversed and vacated and a new trial ordered on that count.

III. The Convictions For Aggravated Assault While Armed and Assault With Deadly Weapon Merge.

On March 5, 2024, Mr. Taylor was sentenced to 144 months of incarceration for Aggravated Assault While Armed along with a concurrent sentence of 72 months for Assault With A Deadly Weapon (R. 361 (PDF) (Sentence Of The Court)). The offense of Assault With A Deadly Weapon merges with Aggravated

Assault While Armed for purposes of sentencing and must be vacated along with the $100 assessed for that offense under the Victim of Violent Crime Compensation Act. *Frye v. United States*, 926 A.2d 1085, 1100 (D.C. 2005). The trial court noted at the sentencing hearing that merger of these offenses for sentencing purposes would be appropriate if the convictions are remaining after appeal (3/5/24 Tr. 4-6).

CONCLUSION

For all the foregoing reasons and any other reasons this Court deems appropriate, this case should be reversed, the convictions vacated and a new trial ordered and if no other relief is granted the conviction for assault with a deadly weapon must be vacated as merged with aggravated assault while armed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's electronic E-Filing system upon counsel for appellee Chrisellen R. Kolb, Chief, Appellate Division, U.S. Attorneys Office, this 25th day of October, 2024.

/s/: *Mindy Daniels*
Mindy Daniels