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# District of Columbia Criminal Procedure Survey

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# DISTRICT OF COLUMBIA CRIMINAL PROCEDURE SURVEY

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## I. PRE-TRIAL PROCEDURE

### *A. Probable Cause to Arrest*

In *Jefferson v. United States*,[1] the District of Columbia Court of Appeals recognized the controlling force of the United States Supreme Court's decision in *Illinois v. Gates*.[2] In *Gates*, the Supreme Court abandoned the *Aguilar-Spinelli* "two-pronged test"[3] and held that the totality of the circumstances analysis[4] should be employed to determine the existence of

1. 476 A.2d 685 (D.C. 1984).

2. 462 U.S. 213 (1983).

3. *Id.* at 238. Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) comprise the two-pronged test for determining whether an informant's tip establishes probable cause for the issuance of a search warrant. Under *Aguilar's* "basis of knowledge test," the magistrate issuing the warrant "must be informed of some of the underlying circumstances from which the informant concluded that [a crime occurred], and some of the underlying circumstances from which the officer [who seeks the warrant] concluded that the informant . . . was 'credible' or his information 'reliable.'" *Aguilar*, 378 U.S. at 114. Under *Spinelli*, the magistrate must examine the informant's basis of knowledge and evaluate the informant's veracity. *Spinelli*, 393 U.S. at 415-16. Prior to *Gates*, both the basis of knowledge and the veracity prongs of the test had to be satisfied in order for the magistrate to lawfully issue the warrant. *Gates*, 462 U.S. at 228-30. The Massachusetts Supreme Judicial Court refused to follow *Gates* and adhered to the *Aguilar-Spinelli* test in Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985).

4. The totality of the circumstances analysis set out in *Gates* includes an examination of the informant's veracity and basis of knowledge, as well as other indicia of reliability. The corroboration of innocent details provided by the informant can play a part in the totality of the circumstances analysis. *Gates*, 462 U.S. at 233-35, 244-45.

probable cause to issue a warrant.[5]

In *Jefferson*, the defendant moved before trial to suppress evidence by arguing that the two-pronged *Aguilar-Spinelli* test was not met because the facts supported neither the veracity of the informant nor the basis of the informant's knowledge.[6] The trial court reached a finding of probable cause based on the information provided by the informant and denied the motion to suppress.[7] The District of Columbia Court of Appeals, applying the *Gates* totality of the circumstances approach, found sufficient facts to establish probable cause.[8] The court noted that the informant had personal knowledge that the defendant sold narcotics, and that the informant had given information on nine prior occasions that led to arrest and discovery of narcotics.[9] Most significantly, the court considered the corroboration of innocent details in this probable cause analysis,[10] and saw that the description given by the informant matched that of the suspect observed by police officers.[11]

### *B. Drunk Driving Arrests*

The trial court's finding of a valid misdemeanor arrest for drunk driving was reversed by the District of Columbia Court of Appeals in *Schram v. District of Columbia*.[12] In a per curiam opinion, the court found that the requirements for a warrantless misdemeanor arrest[13] were not met and that breathalyzer test results must therefore be suppressed.[14] For a warrantless misdemeanor arrest to be valid, the arresting officer must have probable cause to believe that the offense was committed in his or her presence.[15] In *Schram*, the arresting officer arrived on the scene of an automobile accident after the driver, defendant Schram, was no longer in her vehicle.[16] A

5. *Id.* at 238.
6. *Jefferson*, 476 A.2d at 686.
7. *Id.*
8. *Id.* at 687.
9. *Id.*
10. In accepting the corroboration of innocent details in the probable cause analysis, the court overruled Nance v. United States, 377 A.2d 384 (D.C. 1977). *Jefferson*, 476 A.2d at 686. *Nance* had held that the corroboration of innocent details was not sufficient in itself to establish the veracity of the informant. 377 A.2d at 389-90.
11. 476 A.2d at 687.
12. 485 A.2d 623 (D.C. 1984). For a detailed discussion of this case and of the misdemeanor arrest rule, see Note, *Warrantless Misdemeanor Arrest for Drunk Driving Found Invalid in* Schram v. District of Columbia, 34 CATH. U.L. REV. 1241 (1985).
13. D.C. CODE ANN. § 23-581(a)(1)(B) (1981).
14. 485 A.2d at 624.
15. D.C. CODE ANN. § 23-581(a)(1)(B) (1981).
16. 485 A.2d at 624.

breathalyzer test of Schram at the scene indicated that she was legally intoxicated.[17] The court of appeals held that the offense, driving while intoxicated, could not have been committed in the presence of the police officer because when the officer arrived on the scene, Schram was not in her car.[18]

### C. Miranda *Rights*

The District of Columbia Court of Appeals, in *Miley v. United States*,[19] affirmed the trial court's decision to admit defendant's statements that were made during custodial interrogation but before *Miranda* warnings were given.[20] The trial court had held that no interrogation took place in this case and denied defendant's motion to suppress statements.[21] The court of appeals found that an interrogation had in fact taken place[22] and that suppression was called for under *Miranda v. Arizona*.[23] The trial court's denial of the suppression motion, however, was viewed as harmless error[24] because the defendant could have been convicted of gun charges[25] in the absence of defendant's statements on the basis of the arresting officer's testimony.[26]

At the time of defendant's initial confrontation with the police in the stairwell of a building, the arresting officer saw a gun on the floor where the defendant had been crouching.[27] Prior to the arrest and *Miranda* warnings, but after the defendant was ordered at gunpoint out of the stairwell, the officer asked defendant to explain why he carried a gun.[28] The defendant replied that he carried the gun for his own protection.[29] The court of appeals found that the circumstances of this confrontation indicated that the defendant was in custody[30] and that the officer's question was an

17. *Id.* The breathalyzer test indicated a blood alcohol content (BAC) of .27% in defendant Schram. *Id.* Per se intoxication occurs at .10% BAC. D.C. CODE ANN. § 40-716(b)(1) (Supp. 1985).

18. 485 A.2d at 624 & n.1.

19. 477 A.2d 720 (D.C. 1984).

20. *Id.* at 724.

21. *Id.* at 721.

22. *Id.* at 724.

23. 384 U.S. 436 (1966).

24. 477 A.2d at 721, 724.

25. Carrying a pistol without a license, D.C. CODE ANN. § 22-3204 (1981); possession of an unregistered firearm, D.C. CODE ANN. § 6-2311 (1981); and unlawful possession of ammunition, D.C. CODE ANN. § 6-2361 (1981 & Supp. 1985).

26. 477 A.2d at 724.

27. *Id.* at 722.

28. *Id.*

29. *Id.*

30. *Id.* at 722-23. *Miranda*, 384 U.S. at 444, indicates that defendant is in custody when deprived of freedom in any significant way.

interrogation.[31]

In *Rogers v. United States*,[32] the District of Columbia Court of Appeals found no violation of a defendant's asserted right to be silent where the defendant initiated the conversation with police officers while in custody.[33] In *Rogers*, the defendant was convicted of second degree murder while armed,[34] among lesser offenses. On appeal, the defendant argued that denial of his motion at trial to suppress statements made to police officers while in custody was a violation of his fifth amendment rights under *Miranda*.[35] Shortly after his arrest, the defendant was advised of his rights and he invoked his right to remain silent and his right to counsel.[36] The defendant, however, then stated spontaneously, "I had to sacrifice him,"[37] referring to the person he had killed. Following up on this statement, the police asked questions and were able to gain additional information from defendant enabling them to recover the body of the victim.[38]

The court of appeals found that the defendant had shown a willingness to discuss the investigation and had initiated the conversation with the police.[39] The court also found that the defendant had made a knowing waiver of his asserted right to have an attorney present during interrogation.[40] The court stated that even though defendant exhibited bizarre rhyming patterns of speech, he was responsive to police questions when not rhyming.[41] Furthermore, the defendant had been in custody just a short time, and the police treatment of defendant showed no efforts to trick or to coerce him.[42] The court held that these facts supported the conclusion that the defendant made

31. 477 A.2d at 723-24. *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980). *Innis* indicates that interrogation occurs when the police officer acts in such a way that the officer should know is "reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. *But see* Owens v. United States, 340 A.2d 821 (D.C. 1975) (no interrogation occurred where police officer asked subject "what he was doing on the roof"). *Id.* at 822, 824.

32. 483 A.2d 277 (D.C. 1984).

33. *Id.* at 285.

34. D.C. CODE ANN. §§ 22-2403, 22-3202 (1981 & Supp. 1985).

35. *Rogers*, 483 A.2d at 279.

36. *Id.* at 281.

37. *Id.*

38. *Id.* at 281-82.

39. *Id.* at 285. Under Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), the accused can waive his right to have an attorney present during questioning, even after he has invoked that right, by the accused's initiating conversation with the police.

40. 483 A.2d at 285. Oregon v. Bradshaw, 462 U.S. 1039, 1046 (1983), states that the accused makes a knowing waiver of his right to silence and of his right to have an attorney present where the totality of the circumstances shows that defendant understood his rights and that the police engaged in no impropriety.

41. 483 A.2d at 285.

42. *Id.*

a knowing waiver of his *Miranda* rights.[43]

## II. Trial Procedure

### A. *Voir Dire*

In *Young v. United States*,[44] a three-judge panel of the District of Columbia Court of Appeals held that exclusion of the defendant from the bench voir dire of prospective jurors did not require reversal of defendant's subsequent conviction.[45] In *Young*,[46] the defendant was accused of unlawful entry and attempted second degree burglary.[47] Before jury selection began for the trial on this charge, the trial judge refused defendant's request to participate in the voir dire of veniremen at the bench.[48] Two prospective jurors who were questioned at the bench without defendant being present eventually became sworn jurors.[49] The defendant was convicted of unlawful entry and he appealed.[50] The defendant claimed that the trial judge erred, under *Robinson v. United States*,[51] in excluding him from the bench voir dire.[52]

In an opinion by Judge Yeagley, the unanimous panel reiterated the *Robinson* holding that review of cases involving exclusion of defendants from the bench during voir dire would take place on an ad hoc basis and would not call for per se reversal.[53] Examining the record in *Young*,[54] the panel concluded that because appellant neither proved nor claimed prejudice, and because the entire bench voir dire totaled just twelve pages of transcript, appellant's presence at the bench during voir dire of two jurors would not have changed the outcome of the case.[55] The court noted in contrast that the bench voir dire in *Robinson* involved twenty-six jurors and forty pages of transcript.[56]

In *Boone v. United States*,[57] the full District of Columbia Court of Appeals

43. *Id.*
44. 478 A.2d 287 (D.C. 1984).
45. *Id.* at 290-91.
46. *Id.* at 288.
47. D.C. Code Ann. §§ 22-3102, 22-103, 22-1801 (1981).
48. 478 A.2d at 288.
49. *Id.* at 290.
50. *Id.* at 287.
51. 448 A.2d 853 (D.C. 1982), *reh'g en banc denied by equally divided court*, 456 A.2d 848 (D.C. 1983) (per curiam).
52. 478 A.2d at 290.
53. *Id.* (citing Robinson v. United States, 448 A.2d 853, 856 (D.C. 1982), *reh'g en banc denied by an equally divided court*, 456 A.2d 848 (D.C. 1983) (per curiam)).
54. 478 A.2d at 290.
55. *Id.* at 291.
56. *Id.*
57. 483 A.2d 1135 (D.C. 1984).

handled another appeal under *Robinson*, and held six to three that failure to permit defendant to be present at bench voir dire was reversible error.[58] In *Boone*,[59] the defendant was charged with assault with intent to kill while armed,[60] malicious disfigurement,[61] and possession of a prohibited weapon.[62] His request to be present at the bench voir dire of prospective jurors was denied by the trial judge.[63] After his conviction he appealed, claiming the trial judge erred in refusing his request to be present at the bench voir dire.[64]

Relying in part on the *Robinson* holding, the majority opinion in *Boone* stated that such an exclusion severely limited defendant's ability to exercise *peremptory* challenges to prospective jurors and, thus, constituted reversible error.[65] It noted that twenty-three prospective jurors were questioned at the bench, filling thirty pages of transcript,[66] much closer to the facts in the *Robinson* case than those in *Young*.[67] The majority opinion noted that an ad hoc review of such exclusion cases would continue,[68] although dicta concerning alternatives to face-to-face confrontation between defendants and prospective jurors seem to suggest a mandatory defendant presence in some form at the bench during voir dire.[69]

Part II of a concurring opinion written by Judge Belson, and joined in part by five judges of the nine-member court,[70] stated forcefully that a defendant has a fundamental constitutional right to be present during voir dire at the bench to protect his ability to exercise challenges for cause to prospective jurors.[71] The concurring opinion also makes clear that a proposed amendment to Superior Court Rule of Criminal Procedure 43(a), which would allow judges to require defendant to remain seated at counsel table during voir dire held at the bench, "violates the Constitution."[72] In Part I of his concurrence, Judge Belson, not joined by any other judge, was careful to

58. *Id.* at 1143.
59. *Id.* at 1136.
60. D.C. CODE ANN. §§ 22-501, 22-3202 (1981 & Supp. 1985).
61. *Id.* §§ 22-506, 22-3202.
62. *Id.* § 22-3214 (1981).
63. 483 A.2d at 1136-37.
64. *Id.*
65. *Id.* at 1140.
66. *Id.*
67. *See supra* notes 54-56 and accompanying text.
68. 483 A.2d at 1141 & n.73.
69. *Id.* at 1144.
70. The five judges joined in part II of the concurrence, dealing with challenges for cause, but did not join in part I, concerning peremptory challenges. *Id.* at 1142-44.
71. *Id.* at 1144 (Belson, J., concurring).
72. *Id.* at 1143 (Belson, J., concurring).

point out that no constitutional right attaches to the exercise of peremptory challenges.[73] An additional concurring opinion, authored by Judge Ferren, and joined in by four others, including the author of the majority opinion, stated that because the same proceeding involves challenges for cause and peremptory challenges, "a defendant's right to be present at voir dire for either purpose necessarily embraces the right to be present for the other."[74] Given this concurrence, and the fact that a majority of the court joined Judge Belson's concurrence, the court may have suggested that a fundamental constitutional right exists to be present at the bench for either peremptory challenges or challenges for cause.

Three dissenting judges in *Boone* stated that the matter of defendant's presence at bench voir dire lay within the discretion of the trial court.[75] The court found no abuse of discretion in the trial judge's refusal to allow defendant to be present at the bench and endorsed the trial judge's balancing of factors for and against the defendant's presence.[76] The trial judge weighed the benefit that the defendant might gain, for the purpose of exercising challenges, by hearing veniremen first-hand, against the prejudice the veniremen might experience by discussing intimate details face-to-face with the accused.[77] The dissenting judges went on to endorse the former local practice.[78] In this method of voir dire, the defendant remains at the counsel table and is not present at the bench.[79] The defense counsel then conveys the substance of the bench voir dire to defendant.[80] Through the use of this method, the dissent hoped that the defendant could effectively exercise his challenges while avoiding embarrassment to the veniremen.[81]

### *B. Double Jeopardy*

In *Parker v. United States*,[82] the District of Columbia Court of Appeals held that the fifth amendment's double jeopardy clause barred the defendant's convictions for unauthorized use of a motor vehicle[83] and for grand larceny[84] because both crimes arose from the same acts.[85] On defendant's

73. *Id.* at 1142 (Belson, J., concurring).
74. *Id.* at 1142 (Ferren, J., concurring).
75. *Id.* at 1145 (quoting United States v. Bryant, 471 F.2d 1040, 1044 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 112 (1973)).
76. 483 A.2d at 1145.
77. *Id.*
78. *Id.* at 1149.
79. *Id.*
80. *Id.*
81. *Id.*
82. 476 A.2d 173 (D.C. 1984).
83. D.C. CODE ANN. § 22-2204 (1981 & Supp. 1985).
84. D.C. CODE ANN. § 22-2201 (1981 & Supp. 1985).

appeal on other grounds, the government raised the double jeopardy issue.[86] The government claimed that the charges grew out of two distinct events, the actual taking of the car and then its unauthorized use, separated by three days.[87] The convictions for the two offenses, the government argued, were therefore not prohibited by the double jeopardy clause.[88]

The court of appeals rejected this view,[89] holding that the issue had been settled by the United States Supreme Court in *Brown v. Ohio*.[90] In *Brown*, a defendant was convicted of auto theft and joyriding.[91] On appeal, the Supreme Court rejected the government's claim that the nine-day period between the acts of defendant that gave rise to convictions for both offenses avoided the double jeopardy prohibition.[92] The court of appeals in *Parker* adopted the Supreme Court's statement in *Brown* that the double jeopardy clause cannot be avoided "by the simple expedient of dividing a single crime into a series of temporal or spatial units."[93] The two convictions in *Parker* thus fell within the Supreme Court's holding in *Brown*.[94] The court of appeals vacated the unauthorized use conviction because it violated the double jeopardy clause of the Constitution.[95] The conviction subjected defendant to multiple punishment for the same offense because the degree of proof required for a conviction for unauthorized use was no more than that required for grand larceny.[96]

This result in *Parker* also follows from the court of appeals' earlier ruling in *Arnold v. United States*.[97] The *Arnold* court, also relying on *Brown*, vacated a conviction for unauthorized use of a motor vehicle obtained with a conviction for grand larceny of the same vehicle.[98] The court vacated the unauthorized use conviction because it required no further proof than that necessary to establish the grand larceny conviction.[99]

The District of Columbia Court of Appeals, in *Routh v. United States*,[100]

85. 476 A.2d at 176.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. 432 U.S. 161 (1977).
91. *Id.* at 162.
92. *Id.* at 169.
93. 476 A.2d at 176 (citing *Brown*, 432 U.S. at 169).
94. 476 A.2d at 176.
95. *Id.*
96. *Id.* at 176-77.
97. 467 A.2d 136 (D.C. 1983).
98. *Id.* at 139.
99. *Id.*
100. 483 A.2d 638 (D.C. 1984).

held that the fifth amendment's double jeopardy clause prohibited retrial of defendant where the trial court granted the prosecutor's motion for a mistrial because the prosecution had failed to show the "manifest necessity" to sustain such a motion.[101] In *Routh*,[102] the defendant was charged with assault with intent to kill,[103] carrying a pistol without a license[104] and destruction of property.[105] The eyewitness to the shooting was also the victim of the alleged attack.[106] The prosecution wanted a crime scene technician to corroborate testimony of the eyewitness and to authenticate photographs taken at the scene.[107] This technician became unavailable due to illness after the jury had been impaneled.[108] The prosecution then made a motion for mistrial due to the unavailability of the ill technician.[109] The trial court granted the motion over defendant's objection.[110] Defendant then moved to dismiss the indictment.[111] The trial judge denied the motion and defendant appealed.[112]

On defendant's appeal, the court of appeals found[113] that the trial judge's decision to grant the prosecution's motion for a mistrial did not meet the strict standard of review for such actions stated by the Supreme Court in *Arizona v. Washington*.[114] According to the *Routh* court, when a trial judge decides to grant a mistrial based on the unavailability of "critical prosecution evidence," *Arizona* requires that he must base that decision on a finding that the evidence is essential to the case and the resulting mistrial is of "manifest necessity."[115] The court of appeals held in *Routh* that the prosecution failed to show that the crime scene technician was essential.[116] The trial judge's decision to grant the mistrial without such a showing, the court held, lacked sound discretion because no manifest necessity existed.[117] In his dissent, Judge Pair saw no abuse of discretion and maintained that the mistrial

101. *Id.* at 639, 645.
102. *Id.* at 640.
103. D.C. CODE ANN. 22-501, 22-3202 (1981 & Supp. 1985).
104. *Id.* § 22-3204 (1981).
105. *Id.* § 22-403 (1981).
106. 483 A.2d at 640.
107. *Id.*
108. *Id.* at 641.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 645.
114. 434 U.S. 497, 508 (1978). *See* Coleman v. United States, 449 A.2d 327, 329 (D.C. 1982) (dismissal is required where mistrial unnecessarily declared).
115. 483 A.3d at 642 (quoting *Arizona*, 434 U.S. at 508).
116. *Id.* at 645.
117. *Id.*

was necessary because the unavailable witness was needed to accurately reconstruct the crime scene.[118] Nor did Judge Pair see any indication that the prosecution sought the mistrial in order to obtain another opportunity to convict defendant.[119]

### *C. Prosecutorial Misconduct*

In *Hawthorne v. United States*,[120] the District of Columbia Court of Appeals reversed the felony murder[121] convictions of two codefendants and remanded for a new trial after finding that the defendants were substantially prejudiced by the prosecutor's misconduct in his closing arguments.[122] At the close of evidence, the prosecutor delivered his closing argument by taking on the character of the victim of the murder and by making much of this argument in the first person.[123] The defense moved for a mistrial immediately after the conclusion of this closing argument, and on appeal, defendants renewed their claim of substantial prejudice.[124] The court of appeals found that the prosecutor's performance in his closing argument expressed his personal opinion about the victim's thoughts.[125] The court also found that the prosecutor employed facts not in evidence, and that these facts only served to inflame the jury.[126] These actions by the prosecutor amounted to prosecutorial excess that resulted in substantial prejudice to defendants requiring reversal, according to the court.[127]

In *Sherrod v. United States*,[128] the District of Columbia Court of Appeals rejected the defendant's claim of plain error[129] in the prosecutor's misconduct during closing argument.[130] In *Sherrod*,[131] the defendant was accused

118. *Id.* at 647 (Pair, J., dissenting).
119. *Id.* at 648 (Pair, J., dissenting).
120. 476 A.2d 164 (D.C. 1984).
121. D.C. CODE ANN. § 22-2401 (1981).
122. 476 A.2d at 173.
123. *Id.* at 170.
124. Defense counsel made the tactical decision to refrain from objecting *during* the prosecutor's closing argument. On appeal, the government claimed that this was a waiver of objection and that the "plain error" standard therefore governed. The court of appeals disagreed and held that the defense preserved the issue for review by objecting at the end of the prosecutor's closing argument. *Id.* at 169-70.
125. *Id.* at 171-72.
126. *Id.*
127. *Id.* at 172-73.
128. 478 A.2d 644 (D.C. 1984).
129. The court in *Sherrod* applied the plain error standard to the review of the prosecutor's conduct because the defense did not object to the prosecutor's closing and rebuttal arguments. *Id.* at 655.
130. *Id.* at 658.
131. *Id.* at 649.

of first degree murder while armed[132] and assault with intent to kill.[133]

In his closing argument, the prosecutor expressed his personal belief that, at the scene of the crime, defendant thought he had killed an individual who later appeared to testify at trial.[134] The prosecutor also commented that the defendant was therefore surprised by the witness' appearance at trial.[135] The court found these comments improper and contrary to the rule that counsel must avoid expressing personal opinions so that the jury can focus on the evidence.[136] The prosecutor during closing also expressed his opinion as to the demeanor of two witnesses by stating that the jury saw fear in the faces of two witnesses who testified against defendant.[137] The court found this comment improper because it is for the jury to evaluate subjective demeanor evidence.[138] Furthermore, the court found the prosecutor's comment on the defendant's decision to testify last to be improper because it was an attempt to draw adverse inferences on the defendant's exercise of his constitutional right.[139]

The prosecutor's closing comment on the credibility of defense witnesses, however, was not seen as improper.[140] The testimony of these witnesses contained inconsistencies and the prosecutor was, therefore, free to comment on them.[141] The court thus found no impropriety in the comment on the veracity of witnesses.[142] Similarly, there was no impropriety in the prosecutor's comment on defendant's way of life and activities related to heroin use.[143] The court found this to be a reasonable inference from the evidence and an effective rebuttal to the defense counsel's closing statement comparing defendant, who had no prior criminal record, with the government witnesses who were heroin users.[144] In its summation, the court held that neither alone nor in combination did the instances of prosecutorial misconduct constitute plain error.[145]

In *Bowler v. United States*,[146] the District of Columbia Court of Appeals

132. D.C. CODE ANN. §§ 22-2401, 22-3202 (1981 & Supp. 1985).
133. *Id.* § 22-501 (1981).
134. 478 A.2d at 655-66.
135. *Id.*
136. *Id.* at 656.
137. *Id.*
138. *Id.*
139. *Id.* at 656-57.
140. *Id.*
141. *Id.* at 657.
142. *Id.*
143. *Id.* at 657-58.
144. *Id.*
145. *Id.* at 658.
146. 480 A.2d 687 (D.C. 1984).

reversed a second degree murder[147] conviction based on plain error in the prosecutor's conduct.[148] Much of the prosecutorial misconduct was viewed by the court as having contaminated the jury's deliberation on the issue of malice necessary for a verdict of second degree murder.[149] On remand, the government was given the option of retrying defendant on the second degree murder charge or of accepting entry of a judgment of manslaughter, which does not require a showing of malice.[150]

The court of appeals in *Bowler* also found prosecutorial misconduct in statements made during opening, closing, and rebuttal arguments that highlighted the fact that the defendant elected not to testify.[151] Defendant was the sole eyewitness to the murder committed by him, and the prosecutor commented repeatedly on the lack of any eyewitness testimony during the case.[152] Judge Mack and Chief Judge Newman of the three-judge panel found these comments to be "tantamount to comment on [defendant's] . . . failure to testify."[153] In his opinion, concurring in part and dissenting in part, Judge Gallagher disagreed with this conclusion, and stated that the prosecutor's comments were "within the bounds of reasonable advocacy."[154]

### *D. Bad Acts and Other Crimes Evidence*

The District of Columbia Court of Appeals, in *Jones v. United States*,[155] rejected the defendant's claim of abuse of discretion in the lower court's admission at trial of evidence of defendant's prior bad acts.[156] In *Jones*, the defendant was convicted of first degree murder[157] and lesser offenses.[158] These charges grew out of an argument and shooting at which defendant's girlfriend was killed.[159] The defendant and his girlfriend had carried on a tumultuous relationship for many years.[160] The government intended to produce at trial witnesses who heard defendant threaten to shoot his girlfriend on numerous occasions and who also had seen the defendant carrying

147. D.C. CODE ANN. § 22-2403 (1981).
148. 480 A.2d at 680.
149. *Id.*
150. *Id.*
151. *Id.* at 682-83.
152. *Id.*
153. 480 A.2d at 684.
154. *Id.* at 688 (Gallagher, J., concurring in part and dissenting in part).
155. 477 A.2d 231 (D.C. 1984).
156. *Id.* at 234.
157. D.C. CODE ANN. § 22-2401 (1981).
158. 477 A.2d at 233.
159. *Id.* at 234.
160. *Id.*

a gun prior to the killing.[161] Over defense objection, the trial judge allowed the prosecutor to introduce the evidence of the threats and of the gun possession as relevant to defendant's motive and intent.[162] An effort was made by the trial judge to limit the remoteness of this evidence by only allowing evidence of the gun possession that occurred in the late spring and summer of 1980, the period immediately prior to the murder in August 1980.[163] The trial judge failed to give a cautionary instruction sua sponte, and the defense did not request the instruction.[164]

On appeal, the defendant claimed that the trial judge erred in admitting the evidence of the gun possession.[165] The court of appeals stated that this type of evidence was not in and of itself wrongful conduct.[166] The court was able to draw this conclusion by distinguishing these facts from those which would require the application of the principles enunciated in *Drew v. United States*.[167] The court found, however, that where evidence of gun possession was presented in connection with defendant's prior threats, the gun evidence constituted prior bad acts evidence.[168] By this interpretation, the gun evidence could then be admitted to show intent and malice.[169] The court then went on to conclude that the trial judge did not abuse his discretion in admitting the gun evidence.[170] This holding was based on the court's acceptance of the trial judge's examination of the probative value of the evidence as well as on the court's acceptance of the trial judge's limitation of the gun possession evidence to that period immediately prior to the killing.[171]

As for the failure of the trial judge to give sua sponte a cautionary instruction to the jury on the limited use of this evidence, the court found no plain error.[172] The court repeated its refusal to set a per se rule requiring reversal

161. *Id.*
162. *Id.* at 234 & n.3.
163. *Id.* at 239.
164. *Id.* at 241.
165. *Id.* at 237.
166. *Id.* at 237-38 (citing Fornah v. United States, 460 A.2d 556, 562 (D.C. 1983)).
167. 477 A.2d at 237-38. *Drew* states the rule that evidence of other crimes is admissible to show intent, motive, absence of mistake or accident, common scheme or plan, or identity. 331 F.2d 85, 90 (D.C. Cir. 1964). There must be a "concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed" in order for the other crimes evidence to be admissible to show one or more of these elements. If the similarity test is met, any prejudicial effect in the jury's use of the evidence to infer defendant's disposition to commit the crime charged is held to be outweighed by the probative value of the evidence. *Id. See* FED. R. EVID. 404(b).
168. 477 A.2d at 238.
169. *Id.*
170. *Id.* at 240-41.
171. *Id.* at 239-40.
172. *Id.* at 242.

where the trial judge fails to give the cautionary instruction when bad acts evidence is admitted.[173] Examining the facts of the case, the court of appeals saw little risk that the jury misused the bad acts evidence when determining defendant's intent.[174] This is because the prosecutor in his closing argument did not contend that the gun evidence displayed a predisposition on the part of defendant to commit the crime in question.[175] Rather, defense counsel in his closing argument maintained that the evidence was used only for the showing of intent.[176]

In *Gates v. United States*,[177] the District of Columbia Court of Appeals held that the trial court did not abuse its discretion in admitting evidence of other crimes.[178] Defendant in *Gates* was charged with rape while armed,[179] first degree murder while armed,[180] and lesser offenses.[181] The government intended to introduce evidence that the defendant had committed attempted robbery a few weeks before the murder in question.[182] The defendant's pretrial attempt to exclude this evidence failed and testimony regarding the defendant's actions at the time of the attempted robbery was admitted at trial over his objection.[183] This evidence revealed that the defendant was armed and pushed himself on top of the victim on the ground.[184] It was admitted to show defendant's intent, plan, and identity.[185] Subsequently, the defendant was convicted of rape, murder, and gun charges.[186] On appeal, he argued that this evidence did not show sufficient similarity with the crime charged.[187] The prejudicial effect thus outweighed the probative value, the defendant argued.[188]

The District of Columbia Court of Appeals, in a detailed examination of the similarities between the evidence and the crime charged, concluded that there was sufficient similarity for admission under the *Drew* common plan or identity tests.[189] In this examination, the court found that the two attacks

173. *Id.*
174. *Id.* at 242-46.
175. *Id.* at 243.
176. *Id.*
177. 481 A.2d 120 (D.C. 1984).
178. *Id.* at 123.
179. D.C. CODE ANN. §§ 22-2801, 22-3202 (1981 & Supp. 1985).
180. *Id.* §§ 22-2401, 22-2302.
181. 481 A.2d at 121.
182. *Id.* at 122.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 121.
187. *Id.* at 123.
188. *Id.*
189. *Id.* (citing *Drew*, 331 F.2d at 89-90).

were within a few hundred yards of each other and within nineteen days of each other; that both victims were of the same race and approximate age; and that both attacks began as robberies but became assaults.[190]

The court of appeals also held in *Gates* that the trial court did not abuse its discretion in excluding other crimes evidence offered by the accused.[191] Defendant hoped to employ other crimes evidence to show that he had been misidentified in a previous rape case.[192] This evidence would have shown that a rape had occurred in the same park as the rape in question.[193] It would also have shown that the defendant was identified as the rapist, but that it was impossible for him to have been the rapist because he was incarcerated at the time the rape occurred.[194] By use of this evidence, defendant hoped to offset the prejudicial effect of the government's other crimes evidence and to argue that a look-alike rapist had committed the offense in question.[195] The trial court ruled this evidence inadmissible because the *Drew* similarities test was not satisfied.[196] On appeal, the court of appeals agreed and pointed out that the defendant's other crimes evidence lacked the detailed similarity that the government's other crimes evidence possessed.[197] In addition, part of defendant's proffer was inadmissible because it was based on hearsay presented by a police officer that a rape victim had identified defendant as the assailant.[198] This presentation, without the testimony of the victim, also lacked the detailed similarity necessary for the *Drew* test.[199] Significantly, in holding that the trial court did not abuse its discretion in excluding defendant's proffered other crimes evidence, the court of appeals explicitly refused to decide whether defendant can offer evidence of other crimes committed by someone other than defendant.[200]

### *E. Closing Argument*

In *Sherrod v. United States*,[201] the District of Columbia Court of Appeals rejected the defendant's claim of error in the trial court's refusal to allow defense counsel to read aloud from the trial transcript during closing argu-

190. *Id.* at 122.
191. *Id.* at 124.
192. *Id.*
193. *Id.*
194. *Id.* at 124-25.
195. *Id.*
196. *Id.* at 125.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. 478 A.2d 644 (D.C. 1984).

ment.[202] In *Sherrod*,[203] the defendant was on trial for first degree murder while armed[204] and for assault with intent to kill.[205] At closing argument, the defense requested a reading from the transcript to show that the prosecutor had distorted the evidence presented by two defense witnesses.[206] The trial judge at first allowed the request but the prosecutor objected on the grounds that the reading would highlight these portions of testimony.[207] The prosecutor maintained that the jury should be guided by its memory of the testimony unaffected by any emphasis that might result from a reading of the testimony.[208] The trial judge allowed defense counsel to instead refer to the transcript during delivery of his closing argument.[209] Counsel could then make comments to the jury on the testimony without actually reading it.[210] Defendant appealed this ruling, seeking review of the trial judge's refusal to allow counsel to read the transcript aloud during closing.[211]

On appeal, the court of appeals affirmed the trial court and held that allowing counsel to read from the transcript during closing was within the discretion of the trial judge.[212] The court saw little risk of undue emphasis of the portions that might be read aloud and rejected a per se rule prohibiting the practice of reading from the transcript during closing argument.[213] In addition, the court saw no flaw in the trial judge's exercise of discretion in this case because defense counsel, after silently reading the transcript, did make reference in his closing argument to portions of the witness' testimony.[214] Thus, the trial court's decision to bar reading aloud during closing did not prejudice defendant.[215]

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202. *Id.* at 664.
203. *Id.* at 649.
204. D.C. CODE ANN. §§ 22-2401, 22-3202 (1981 & Supp. 1985).
205. *Id.* § 22-501 (1981).
206. 478 A.2d at 662.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 664.
213. *Id.*
214. *Id.*
215. *Id.*