APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 25, 2019 Decided May 29, 2020

No. 18-5350

DUANE JOSEPH JOHNSON,
APPELLANT

v.

E. D. WILSON, WARDEN,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-00178)

Amanda J. Sterling argued the cause for appellant. On the briefs were *Alex Young K. Oh* and *Michelle Parikh*.

Sharon A. Sprague, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Jessie K. Liu*, U.S. Attorney, and *Elizabeth Trosman* and *Chrisellen R. Kolb*, Assistant U.S. Attorneys. *Lauren R. Bates* and *R. Craig Lawrence*, Assistant U.S. Attorneys, entered appearances.

Before: MILLETT and KATSAS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KATSAS.

KATSAS, *Circuit Judge*: In this federal habeas action, Duane Johnson contends that he received ineffective assistance of counsel during the direct appeal of his murder conviction in D.C. Superior Court. Among other things, Johnson argues that his appellate counsel labored under two conflicts of interest and failed to argue that the government withheld exculpatory evidence. We reject all of Johnson's contentions.

I

A

Around 4 a.m. on April 26, 1994, Keith Nash was shot twice and killed. His sister, Sharon Nash, was shot once but survived. Duane Johnson, who was then in a parked car with the Nashes and three other people, was charged with murder and other offenses in the Superior Court of the District of Columbia. At trial, the prosecution and the defense told conflicting stories about Johnson's role in the shootings.

According to the prosecution, Johnson shot the Nashes as part of an attempted robbery. That evening, Keith, Sharon, Victor Williams, and LaTina Gary piled into Keith's sedan and went out looking for cocaine. The group tried to buy from Johnson, who had previously supplied Williams, but his price was too high. Johnson, who was with Damitra Rowel, nonetheless asked for a ride. Keith agreed, and the pair crammed into the back seat of his car. At that time, Keith was driving, Sharon was seated in the front passenger seat, and the four others were in the back seat, with Johnson at the far left and Williams at the far right. When they reached an alley, Johnson ordered Keith to shut off the engine, put a gun to his head, and demanded money. When Keith refused, Johnson fired three shots, hitting Keith twice in the neck and Sharon once in her left side. Johnson and Rowel ran away. Williams

grabbed Keith's gun and fired shots after Johnson. Then Williams and Gary called 911 to report the shootings.

In Johnson's rendition, Keith and Sharon were shot accidentally as Johnson resisted Williams's attempt to rob him. Williams asked Johnson to get in the car to go make a drug sale to nearby buyers. Skeptical, the unarmed Johnson asked Rowel to come with him. Keith drove to the alley and turned off the engine. Then Williams pulled a gun on Johnson and tried to rob him. Johnson tussled with Williams, whose gun went off several times. Johnson and Rowel escaped from the car and ran away, with Williams firing after Johnson.

The jury believed the prosecution. It found Johnson guilty of first-degree felony murder while armed, second-degree murder while armed, and various lesser charges. The Superior Court sentenced Johnson to 51 years to life in prison.

At trial and on direct appeal, Johnson was represented by appointed counsel Frederick Sullivan. On appeal, Sullivan argued that the evidence was insufficient to convict Johnson and that the Superior Court had erred by not instructing the jury on manslaughter. The D.C. Court of Appeals rejected both arguments but remanded for vacatur of the duplicative counts of conviction. On remand, the Superior Court resentenced Johnson to 46 years to life in prison.

B

Since his resentencing, Johnson has raised various collateral attacks on his conviction. Convictions in the D.C. Superior Court are subject to a unique regime of collateral review. A prisoner in custody under a Superior Court sentence "may move the court to vacate, set aside, or correct the sentence." D.C. Code § 23-110(a). To the extent this remedy is available, it is exclusive. *See id.* § 23-110(g). Thus, federal

courts cannot consider habeas petitions filed by prisoners who have adequate and effective section 23-110 remedies available to them. *See Blair-Bey v. Quick*, 151 F.3d 1036, 1042 (D.C. Cir. 1998). From 1998 to 2006, Johnson filed four section 23-110 motions, variously alleging ineffective assistance of counsel and violations of *Brady v. Maryland*, 373 U.S. 83 (1963). His first three motions were denied or withdrawn.

In 2007, Johnson discovered that Sullivan, between 1985 and 1987, had represented Williams on charges of first-degree burglary and armed robbery. Williams had testified for the prosecution at Johnson's trial. Johnson moved to amend his fourth section 23-110 motion to allege that Sullivan had provided ineffective assistance at trial while laboring under a conflict of interest from his prior representation of Williams. Johnson also sought to raise a claim that Sullivan had provided ineffective assistance in his direct appeal while laboring under the same conflict. In the D.C. court system, a prisoner can raise claims for ineffective assistance of appellate counsel only through a motion to the D.C. Court of Appeals to recall its mandate, not through a motion to the Superior Court under section 23-110. *See Watson v. United States*, 536 A.2d 1056, 1060 (D.C. 1987) (en banc). Johnson claimed ineffective assistance of appellate counsel in a motion to recall the Court of Appeals' mandate. The Court of Appeals denied the motion without prejudice to the Superior Court's consideration of conflict issues in the pending section 23-110 motion.

In 2008, the D.C. Superior Court rejected Johnson's claims of ineffective trial counsel and *Brady* violations. Johnson appealed. He also filed another motion to recall the D.C. Court of Appeals' mandate. The Court of Appeals denied the motion on the ground that the conflict issue was already before it in the appeal from the Superior Court's decision. A few months later,

the Court of Appeals affirmed that decision but did not mention Johnson's claim of ineffective assistance of appellate counsel.

In 2010, Johnson filed a federal habeas action under 28 U.S.C. § 2254. The district court held that D.C. Code § 23-110(g) barred review of all claims other than ineffective assistance of appellate counsel. It further held that Johnson was barred from claiming ineffective assistance of appellate counsel because he had neither moved to recall the mandate nor claimed that doing so would have failed to protect his rights. *Johnson v. Stansberry*, No. 10-cv-178, 2010 WL 358521 (D.D.C. Jan. 29, 2010). We reversed that determination because Johnson had, in fact, moved to recall the mandate. *Johnson v. Stansberry*, No. 10-5346 (D.C. Cir. May 11, 2011). After further skirmishing, *Johnson v. Stansberry*, No. 10-cv-178 (D.D.C. June 30, 2011); *Johnson v. Wilson*, No. 10-5346 (D.C. Cir. Jan. 2, 2013), the district court referred to a magistrate judge the claim that Johnson's appellate counsel had been ineffective.

At an evidentiary hearing, the magistrate judge heard testimony from both Johnson and Sullivan. The magistrate judge credited Sullivan's testimony that, when Sullivan represented Johnson, he had forgotten his prior representation of Williams. The magistrate judge concluded that Sullivan had not been ineffective in the appeal, and he recommended rejecting Johnson's claim. The district court adopted the recommendation, denied the habeas petition, and issued a certificate of appealability. *Johnson v. Wilson*, No. 10-cv-178, 2018 WL 5297811 (D.D.C. Oct. 25, 2018); Minute Order, *Johnson v. Wilson*, No. 10-cv-178 (D.D.C. Dec. 4, 2018).

In 2020, while this appeal was pending, Johnson moved in Superior Court for a reduction of his sentence under D.C. Code § 24-403.03, which applies to certain sentences for crimes

committed by minors. The Superior Court granted Johnson's motion and ordered him released from custody. *United States v. Johnson*, No. 1994 FEL 004696 (D.C. Super. Ct. Feb. 7, 2020). Because Johnson remains on probation and subject to registration requirements because of his conviction, this appeal is not moot. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

II

A

Under 28 U.S.C. § 2254(a), a person in custody under the judgment of a D.C. court may petition for a writ of habeas corpus on the ground that he is being held "in violation of the Constitution or laws or treaties of the United States." *Id.*; *see Waters v. Lockett*, 896 F.3d 559, 566 (D.C. Cir. 2018). Johnson's petition alleges that he was held in violation of his Sixth Amendment right to the effective assistance of appellate counsel.

Johnson raises two theories. First, under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), he contends that Sullivan's performance on appeal was adversely affected by two conflicts of interest. Second, under *Strickland v. Washington*, 466 U.S. 668 (1984), Johnson argues that Sullivan was ineffective on appeal based on his failure to raise *Brady* claims and his failure to argue that he had been ineffective at trial.

In habeas appeals, we review the district court's legal determinations de novo and its factual findings for clear error. *See Waters*, 896 F.3d at 566. It is unclear whether the Superior Court or the D.C. Court of Appeals resolved the claims before us on the merits, which would trigger deferential review of their decisions. *See* 28 U.S.C. § 2254(d). We may assume that

this rule of deference does not apply here, because Johnson's claims fail even without it.

B

We begin with Johnson's *Cuyler* claims. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." It encompasses the right to "effective assistance of counsel," *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), both at trial and in a first direct appeal as of right, *see Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

In general, a defendant claiming ineffective assistance must prove both that his lawyer performed deficiently and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. But when a defendant establishes that his counsel was burdened with an "actual conflict" of interest, prejudice is presumed, *United States v. Gantt*, 140 F.3d 249, 254 (D.C. Cir. 1998), and the defendant need only show that the conflict "adversely affected his lawyer's performance," *Cuyler*, 446 U.S. at 348. An "actual conflict" means that the attorney "actively represented conflicting interests." *Id.* at 350. If the attorney does not know about the conflict of interest, there can be no actual conflict. *See United States v. McGill*, 815 F.3d 846, 943 (D.C. Cir. 2016) (per curiam).

Johnson argues that two different conflicts of interest impaired Sullivan's performance in the appeal. The first conflict arose from Sullivan's prior representation of Williams.[1] The second arose from Sullivan's own self-interest

[1] Neither the Supreme Court nor our Court has decided whether *Cuyler* applies to successive as opposed to concurrent

in not arguing that he had been ineffective at trial. Both arguments fall short.

1

Johnson's first *Cuyler* claim founders because Sullivan had forgotten his prior representation of Williams and thus lacked an actual conflict. The district court found that Sullivan, while representing Johnson, did not remember that he had represented Williams years earlier. We review that finding only for clear error, bearing in mind that a finding based on the credibility of coherent, internally consistent, and facially plausible witness testimony that is not contradicted by extrinsic evidence "can virtually never be clear error." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Here, the district court's credibility finding was well supported.[2]

At the evidentiary hearing, Sullivan presented a coherent and believable account of his state of mind while representing Johnson. From 1985 to 1987, Sullivan represented Williams, who was charged with first-degree burglary and pleaded guilty to second-degree theft and unlawful entry. Sullivan testified that at no time during his representation of Johnson, from 1994 to 1996, did he remember that he previously had represented Williams. Sullivan explained that he had no system in place to run conflicts checks and, in particular, to make sure that he had not previously represented government witnesses. And

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representations. *See Mickens v. Taylor*, 535 U.S. 162, 176 (2002); *United States v. Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014). Because Johnson loses either way, we need not decide that issue.

[2] In ruling on Johnson's claim for ineffective assistance of trial counsel, the Superior Court did not determine whether Sullivan remembered having represented Williams. Consequently, we review only the district court's findings of fact.

Sullivan repeatedly testified that he did not recognize Williams at Johnson's trial. According to Sullivan, he did not recall his past representation of Williams until Johnson filed a bar complaint against him in 2007.

Sullivan's testimony was definitive, consistent, and plausible given the seven years and hundreds of cases that passed between his representations of Williams and Johnson. To be sure, Sullivan's failure to have and to use a reliable system for vetting potential conflicts was hardly ideal. But the only question in this appeal is one of fact concerning Sullivan's awareness of the conflict. In crediting Sullivan's testimony, the district court did not clearly err.

Johnson offers two main responses, but neither persuades. *First*, Johnson argues that Sullivan must have learned about the prior representation because he used an investigator to find government witnesses and generally ran public-record searches on them. But Sullivan testified that, in this case, his investigator had been unable to find Williams and that he conducted no background search after receiving from the government material detailing Williams's past criminal history. *Second*, Johnson notes that Sullivan apparently believed that he would have to disclose any conflict of interest to the government, not to Johnson. But even if Sullivan misunderstood the governing rules, he made no disclosure at all, which reinforces the district court's finding that he was unaware of the conflict.

The district court did not clearly err in finding that Sullivan, while representing Johnson, had forgotten his prior representation of Williams. Because an unknown conflict is not an actual conflict, Johnson's first *Cuyler* claim fails.

2

Johnson's second *Cuyler* claim arises from Sullivan's allegedly conflicting loyalty to Johnson and to himself. According to Johnson, Sullivan should have argued on appeal his own ineffectiveness at trial. And given the supposed conflict of interest, Sullivan's failure to make the argument should be analyzed under *Cuyler* rather than *Strickland*.

We conclude that there was no conflict, so we need not decide whether the kind of first-person conflict alleged by Johnson, if it existed, would trigger *Cuyler*. The district court credited Sullivan's testimony that, while handling the direct appeal, Sullivan did not believe that he had been ineffective at trial. This finding was not clearly erroneous—particularly because, as explained below, Sullivan's representation at trial was not constitutionally ineffective. And because Sullivan did not believe that he had been ineffective, he had no conflict with Johnson. Johnson's second *Cuyler* claim thus fares no better than his first.

C

We turn now to *Strickland*. Johnson argues that, even assuming no conflicts, Sullivan still provided ineffective appellate assistance. To establish this claim, Johnson must show that Sullivan performed deficiently and thereby prejudiced the appeal. *Strickland*, 466 U.S. at 687. A counsel's performance is deficient if it "fell below an objective standard of reasonableness," *id.* at 688, and prejudicial if there is at least a "reasonable probability" that it affected the outcome of the proceeding, *id.* at 694.

We have noted that "when it comes to ineffective-assistance claims leveled against *appellate* counsel, there is not

much daylight between *Strickland*'s deficiency prong and its prejudice prong." *Waters*, 896 F.3d at 570. That is because "[i]f appellate counsel reasonably opts not to raise an issue with little or no likelihood of success, then there is usually no reasonable probability that raising the issue would have changed the result of a defendant's appeal." *Id.* (quotation marks omitted).

Johnson rests his *Strickland* claims on Sullivan's failure to raise two arguments in the direct appeal: first, that the government concealed exculpatory and impeachment evidence in violation of *Brady*; and second, that Sullivan failed to provide effective assistance at trial.

1

The government violates *Brady* when it "(i) fails to disclose to the defense, whether willfully or inadvertently, (ii) exculpatory or impeachment evidence that is favorable to the accused, and (iii) the withholding of that information prejudices the defense." *United States v. Straker*, 800 F.3d 570, 603 (D.C. Cir. 2015) (per curiam). Prejudice exists if the withheld evidence is material, which requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Johnson*, 519 F.3d 478, 488 (D.C. Cir. 2008) (quotation marks omitted). When the government withholds multiple pieces of evidence, we consider their materiality cumulatively. *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995).

Johnson contends that Sullivan should have raised *Brady* claims based on the government's failure to timely disclose various pieces of evidence: first, shortly before Johnson's indictment, Williams was arrested on robbery charges that the government declined to prosecute; second, Williams and Keith

Nash both had extensive criminal backgrounds; third, Gary was a paid government informant, carried a gun on the night of the shootings, and had a case against her dismissed based on the intervention of a detective who testified at trial; fourth, Rowel agreed to speak to the police only after Gary assaulted her. Johnson contends that this evidence would have bolstered his claim that Williams pulled the gun used to kill Nash and would have helped him to impeach the government's witnesses.

Contrary to Johnson's arguments, there is almost no chance that this evidence, much of which was presented to the jury, would have changed the outcome of the trial if all of it had been timely disclosed to the defense. All four of the surviving witnesses other than Johnson agreed on the essential events of the shootings. Moreover, none of the *Brady* evidence would have undercut the testimony of Sharon Nash. And it is especially unlikely that she would have perjured herself to protect Williams if it was Williams—rather than Johnson—who was responsible for killing her brother and seriously wounding her as well.

Finally, and critically, undisputed forensic evidence showed that Johnson was the killer. First, recall the seating arrangements in the car at the time of the shootings. Everyone agreed that Keith Nash was driving, Johnson was seated in the far-left rear seat, and Williams was in the far-right rear seat. Sharon Nash, Williams, Gary, and Rowel all testified that Sharon was in the front passenger seat, while Johnson testified that she was in the rear passenger seat to the left of Williams. Next, consider the evidence about the Nashes' injuries. A medical examiner testified that Keith was shot twice on the left side of his neck, with one of the shots passing through his right lower cheek. Based on the soot rings on Keith's neck, he concluded that the shots were fired from three to four inches away. Sharon was shot just beneath her left breast.

Now compare that evidence with the two accounts offered at trial. Everyone but Johnson testified that Johnson, while sitting behind Keith or partially out of the driver's side rear door, put a gun to the back of Keith's neck while he was in the driver's seat. Then Johnson shot Keith twice and fired another shot into the car, which struck Sharon as she sat in the front passenger seat. That testimony was entirely consistent with the evidence that Keith was shot twice on the left side of his neck from very close range and that Sharon was shot in her left side.

Johnson's testimony was that Williams, from the far-right rear seat, pulled a gun on him. In response, Johnson reached over two other passengers, to Williams on the right side of the car, and tried to push the gun away. Then, during the ensuing struggle between Johnson and Williams, bullets from Williams's gun hit Keith in the driver's seat and Sharon, who Johnson says was sitting to the left of Williams. This testimony is inconsistent with the forensic evidence. Most damningly, it cannot explain how Keith was shot in the left side of his neck from a three- to four-inch distance. Nor, if Sharon was seated to the left of Williams in the crowded back seat, can it account for how a bullet struck her left side. None of the *Brady* material could alter these basic physical realities.

For these reasons, the disputed evidence was immaterial, so a *Brady* claim would have lost on appeal. And Sullivan was not ineffective "by declining to pursue a losing argument." *United States v. Watson*, 717 F.3d 196, 198 (D.C. Cir. 2013).

2

Johnson's final argument is that Sullivan was ineffective on appeal in failing to argue that he had been ineffective at trial. The supposed ineffectiveness at trial involved Sullivan's failure to pursue the *Brady* material discussed above. This

point simply repackages the losing *Brady* argument. Because the disputed evidence was immaterial, Sullivan's failure to pursue it did not prejudice Johnson. And because a claim of ineffective trial counsel thus would have been unsuccessful, Sullivan was not ineffective in omitting it from the appeal.

* * * *

Because Johnson was not denied the effective assistance of appellate counsel, we affirm the district court's judgment.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DUANE JOSEPH JOHNSON,

Petitioner,

v.

E.D. WILSON,

Respondent.

Civil Action No. 10-178 (JEB)

MEMORANDUM OPINION

Petitioner Duane Joseph Johnson was convicted over twenty years ago in D.C. Superior Court. The charges stemmed from a drug-deal-turned-robbery and included murder, assault, robbery, and firearms offenses. Following an unsuccessful direct appeal, Petitioner has spent the intervening decades attempting to obtain collateral relief, first from D.C. courts and now from federal. At this point, his claims have narrowed to a single, fundamental contention: his appellate (and trial) counsel, Frederick J. Sullivan — who subsequently became a Superior Court Magistrate Judge and has now retired — was ineffective.

U.S. Magistrate Judge G. Michael Harvey, to whom the case was referred, has considered Johnson's claims in a comprehensive Report and recommends that his Petition be denied. See ECF No. 115 (Report and Recommendation). Although Johnson now raises several objections to that Report, the Court agrees with Judge Harvey's careful analysis. It will thus adopt the Report and Recommendation in full and grant judgment to Respondent.

I. Background

A. Conviction and Direct Appeal

The full factual background of this case is set out in detail in the 68-page Report. To recap briefly here, in 1995, Petitioner, who was represented by Judge Sullivan, was convicted in D.C. Superior Court of murder, assault, robbery, and firearms offenses arising from events in the early morning of April 26, 1994. See R&R at 1–2.

The Government's evidence at trial demonstrated how the murders resulted from an attempted robbery of drug proceeds. Sharon Nash testified that she, Keith Nash, Victor Williams, and Latina Gary went out in Keith Nash's car to buy cocaine. Id. Having made their purchase, they were getting ready to leave when Petitioner, accompanied by Damitra Rowell, ran up to them and asked for a ride. Id. at 3. After Johnson and Rowell entered the car, Petitioner directed the driver to a dead end and told Keith Nash to turn off the engine. Id. Johnson then got out of the car and stood at its rear left side. Id. Sharon Nash saw him point a gun at Keith Nash's head and demand the money the group had used to buy drugs. Id. Informed that the money had already been spent, Johnson fired three shots, two of which fatally struck Keith Nash and one of which wounded Sharon Nash. Id.

The Government's remaining three eyewitnesses — Gary, Rowell, and Williams — largely corroborated Sharon Nash's description of the evening up to the purchase of the drugs and the agreement to give Petitioner and Rowell a ride. Id. at 3–4. Their accounts diverged slightly as to the shooting and its aftermath. Rowell testified that the day after the shooting, Petitioner approached her, "gave [her] a story to tell" — although she never specified what that story was — and threatened to kill her if she did not comply. Id. at 5. Williams testified that, when Petitioner pulled out the gun, he threatened to kill everyone in the car, and, after musing

about whom to kill first, shot Keith Nash in the head and then aimed the gun at the backseat. Id. Williams struggled with Petitioner, who then fled. Id. Gary also testified to Johnson's struggle with Williams and further explained that, after Petitioner fled, Rowell followed, shouting at him. Id. at 6.

A medical examiner offered testimony corroborating the Government's version of events. He testified that Keith Nash was killed from a close-range shot that struck the left rear of his neck and exited through his lower cheek. Id. at 7. A second bullet struck near the first but did not exit. Id. Sharon Nash was wounded by a shot to the left side of her abdomen. Id. Those three wounds are consistent with the theory that both were sitting in the front seat when they were shot by a person standing at the left rear side of the car. Id.

Johnson was the only defense witness. Id. He testified that he was selling drugs when he was approached by Williams, who discussed the purchase of some cocaine. Id. When Williams said he had a customer for Johnson around the corner, they went to Keith Nash's car. Id. at 8. Johnson asked Rowell to accompany him because he was feeling uncomfortable about the transaction. Id. After they all got into the car, Williams directed Keith Nash into the alley. Id. When the car stopped, Williams pulled a gun on Petitioner and demanded drugs and money. Id. The two struggled for the gun inside the car, and during the struggle, it fired several times. Id. Eventually Johnson got free and fled the car, with Williams shooting after him. Id.

On January 19, 1995, a D.C. Superior Court jury found Petitioner guilty of first-degree felony murder while armed, second-degree murder while armed, assault with intent to kill while armed, assault with a deadly weapon, attempt to commit robbery while armed, possession of a firearm during a crime of violence, and carrying a pistol without a license. Id. at 9.

Cumulatively, Johnson was sentenced to an indeterminate term of imprisonment of 77 years to life. Id.

On February 12, 1996, he appealed his conviction and sentence to the D.C. Court of Appeals. Id. Judge Sullivan again represented him. Id. The Court of Appeals held that Johnson's appeal lacked merit but, as is typical in such circumstances, remanded the case for re-sentencing because the second-degree murder and attempted-robbery convictions merged with the felony-murder conviction. Id. at 9–10. Johnson was then resentenced to 46 years to life. Id. at 10.

B. Collateral Review

Petitioner's collateral-review efforts have been lengthy. In brief, after his unsuccessful direct appeal, Johnson filed letters in D.C. Superior Court asserting ineffective assistance of trial counsel. Id. Following an evidentiary hearing before Judge Russell Canan, Johnson's motion was denied. Id. at 11. He appealed that decision as well, but the D.C. Court of Appeals affirmed in a five-page Memorandum Opinion and Judgment on August 17, 2001. See Johnson v. United States, No. 99-CO-978 (D.C. Aug. 17, 2001) (attached to this Opinion as Appendix A). He filed a motion in late 2005 again alleging ineffective assistance at trial, and then in early 2006 he filed another motion alleging Brady violations and ineffective assistance of both trial and appellate counsel. Id. at 12.

While these motions were pending, Petitioner discovered that Judge Sullivan had previously represented Williams in a criminal trial in 1985. Id. at 12–13 & n.8. In April 2007, he thus filed another motion in Superior Court to amend his 2006 motion based on his counsel's alleged conflict of interest. Id. at 13. While the conflict claim was pending in Superior Court, Johnson also filed in the D.C. Court of Appeals, seeking relief for ineffective assistance of

appellate counsel based on the conflict during the direct appeal. Id. at 14. The Court of Appeals denied Johnson's motion to recall the mandate "without prejudice to the trial court's consideration of the alleged conflict of interest of [Petitioner's] trial counsel (who was also appellate counsel)." Id. at 15 (citation omitted).

Back in Superior Court, Judge Canan denied Johnson's motions in a thorough and detailed 34-page opinion. See ECF No. 63-10 (Judge Canan Opinion). Treating extensively many of the specific claims Petitioner now reiterates here, he concluded that Judge Sullivan's representation had been effective and not hampered by conflict. Id. at 23–26. Judge Canan also found the Brady claims unpersuasive. Id. at 31. Petitioner subsequently filed four additional motions between October 2008 and June 2010 in Superior Court and the D.C. Court of Appeals. See R&R at 17–18. All four were denied. Id.

Hoping for better luck in a change of venue, on January 29, 2010, Johnson filed his first petition in federal court, raising a variety of claims. Id. at 19. All except the claim for ineffective assistance of appellate counsel (IAAC) were dismissed because the petition was not the proper method of redress. Id. Petitioner therefore in February 2013 filed the operative Petition alleging IAAC, which was originally assigned to Judge Amy Berman Jackson. Id. at 20. Once counsel appeared on Petitioner's behalf in February 2014, Judge Jackson referred the matter to Judge Harvey for a Report and Recommendation. Id. at 22.

Judge Harvey, before penning a remarkably thorough 68-page Report, held an evidentiary hearing, at which he took testimony from Judge Sullivan, CJA Investigator Brendan Andrew Wells, and Petitioner. Id. at 22–25. Judge Harvey then carefully analyzed the testimony and made a series of credibility findings. He determined that Judge Sullivan was credible, "candid[,] and non-evasive," and that he was not ineffective as appellate counsel. Id. at 1, 36.

On August 14, 2018, the case was randomly transferred from Judge Jackson to this Court, which now issues its Opinion.

II. Legal Standard

Under Federal Rule of Civil Procedure 72(b), once a magistrate judge has entered her recommended disposition, a party may file specific written objections. The district court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); see, e.g., Winston & Strawn LLP v. FDIC, 841 F. Supp. 2d 225, 228 (D.D.C. 2012) (stating that court must conduct *de novo* review of objections to magistrate judge's report and recommendation). The district court may then "accept, reject, or modify the recommended disposition." Fed. R. Civ. P. 72(b)(3).

III. Analysis

Petitioner raises three sets of objections to the Report, targeting Section III.A on Antiterrorism and Effective Death Penalty Act deference, Section III.C on the alleged conflict of appellate counsel, and Section III.D on other ineffective-assistance-of-appellate-counsel claims. The Court addresses each in turn.

A. Section III.A: AEDPA Deference

As AEDPA governs federal courts' habeas jurisdiction over state-court decisions, there are two questions of AEDPA deference here — legal and factual — which the Court will take in order. Federal courts addressing exhausted habeas claims must generally defer to a state court's legal conclusions. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 101–03 (2011). Petitioner nevertheless contends that no deference is appropriate in his case because D.C. courts did not pass on his IAAC claims; as a result, he believes that the Report erred to the extent it "suggests that deference is owed to [D.C. courts'] prior legal conclusions." ECF No. 120

(Petitioner's Objections) at 11. Judge Harvey, however, neither concluded that such deference was owed, nor at any point did he defer to state-court conclusions. This is because he determined — and this Court agrees — that it was unnecessary to resolve the appropriate scope of deference where Petitioner could not prevail even if no deference were given. Id. at 32–33. Petitioner elaborates that, even if the R&R "did not arrive at a firm conclusion," this Court should find error because "Judge Harvey appears to have partially relied on D.C. courts' prior decisions" on pages 51 and 53 of the Report. Id. at 11 n.8. Although the Report recites those rulings, it does not rely on them. See R&R at 51, 53. As no legal deference appears in the Report, the Court need not further discuss this point.

As to deference to factual conclusions, conversely, Judge Harvey concluded — and this Court agrees — that "factual findings of the D.C. Courts are entitled to deference," as mandated by 28 U.S.C. § 2254(e)(1), which "stat[es] that 'determination of a factual issue made by a State court shall be presumed to be correct.'" Id. at 31 n.15. Johnson asserts that "presumption may be rebutted with 'clear and convincing evidence.'" Pet. Obj. at 12. Petitioner, however, does not point to such evidence, nor does he elaborate on his assertion that the D.C. courts' "determinations were made on materially incomplete records and were grounded in incorrect legal principles, and thus are not entitled to AEDPA's presumption of correctness." Id. Absent a reasoned explanation of why no deference is owed, this Court is compelled to conclude that AEDPA mandates deference to factual findings.

B. Section III.C: Conflict Claims

Petitioner next raises a series of challenges to Section III.C of the Report, which addresses his IAAC claim based on an alleged conflict of interest. Specifically, Johnson objects to Judge Harvey's findings that Judge Sullivan was credible; that no adverse inference was

appropriate based on Judge Sullivan's treatment of Petitioner's case files; and that his claims had to satisfy the Strickland standard, as opposed to the more lenient Cuyler standard, to warrant relief. See Pet. Obj. at 13, 16, 20. If Judge Harvey had decided these questions differently, that could have led to a different outcome on the conflict issue.

1. *Credibility*

Beginning with the first of these, Johnson furnishes an array of putative inconsistencies in Judge Sullivan's testimony. Id. at 13–16. Judge Harvey took that testimony at an evidentiary hearing, and, having done so, determined that Judge Sullivan's "demeanor was open and his answers . . . candid and non-evasive." R&R at 36. Johnson does not challenge that finding. Each of the challenges he does raise to Judge Sullivan's credibility based on the substance of his testimony, moreover, was squarely and persuasively addressed by Judge Harvey. Upon its own examination of the transcript, the Court agrees and has little to add.

Petitioner first argues that Judge Sullivan was inconsistent in his explanations for failing to recognize that he had previously represented one of the Government's witnesses — Victor Williams — in a prior criminal trial, alternately citing a misspelling in his database of clients and asserting that he did not run conflict checks through the database or otherwise. See Pet. Obj. at 13–14. Judge Harvey carefully reviewed and extensively quoted Judge Sullivan's relevant statements in D.C. Superior Court and in the response to a D.C. Bar Complaint filed by Petitioner and came to the conclusion — shared by this Court — that Judge Sullivan had not been inconsistent. See R&R at 36–38. In neither case did he assert that the misspelling caused him to overlook his prior representation at Williams; he merely stated that the name was misspelled. At the evidentiary hearing, Judge Sullivan said directly that the misspelling "really

had nothing to do with [not realizing the prior representation,]" and it was that neither of them "recognize[d]" each other at trial. See ECF No. 102 (Transcript) at 89:2-5.

Johnson also maintains that Judge Sullivan was inconsistent in describing the extent to which he investigated Williams before trial and that a reasonable pretrial investigation would have uncovered the prior Williams representation. See Pet. Obj. at 14, 15–16. Again, Petitioner misses the mark. As the Report explains, Judge Sullivan was consistent in explaining he would have tried to find and interview government witnesses for trial, although not for the appeal. See R&R at 38–39. Petitioner's objection centers on a statement that before trial Judge Sullivan "did nothing to investigate Victor Williams's criminal history . . . because he didn't feel it was necessary." Pet. Obj. at 14 (internal quotations and citation omitted). There, Johnson is citing to a portion of Judge Sullivan's testimony where he explains that he would not necessarily have investigated Williams's past convictions, see Tr. at 55:12, a statement not inconsistent with his explanation that he tried to "find" and "get a statement from [Williams]" as part of a more general pretrial investigation. Id. at 52:6.

Nor was Judge Sullivan's account of his pretrial investigative process generally inconsistent. Contrary to Petitioner's representation, Judge Sullivan did not indicate that "he could not think of a situation in which he would not have conducted the required research with respect to a government witness." Pet. Obj. at 16 (citing Tr. at 44:18-23). Rather, he testified that "there were" circumstances in which he would not run a government witness in the database, "but what they were, [he did not] know." Tr. 44:20-21. His testimony, read fairly, explains his general practices but acknowledges some uncertainty about specifics and exceptions given the amount of time that has now passed. Even if Williams had been run in the database in this case, as Judge Harvey explained in the Report, see R&R at 39–40, that research would not necessarily

have uncovered the prior representation because of the way the case database was structured and the amount of time required to obtain case jackets. See ECF No. 103 (Evidentiary Hearing Continued Transcript) at 51:1-18, 54:3-25, 55–57.

Finally, Petitioner urges that Judge Sullivan was not consistent in his description of his file-retention policies. See Pet. Obj. at 15 & n.10. The only putative inconsistency that Johnson highlights is that between Judge Sullivan's testimony that he generally kept Bar complaints as part of a "complete file"; that he discarded files from before his judgeship when he joined the bench in September 2005; but that he nevertheless had disposed of Petitioner's April 13, 2007, complaint to Bar Counsel. Id. at 15 n.10. Even assuming Judge Sullivan had not testified clearly as to his practice with complaints after he joined the bench, he was clear in May 2007, in a letter replying to Bar Counsel, that he could not respond fully to the complaint without seeing Johnson's file, which he had, years earlier, returned to him. See ECF No. 78-24 (Letter to Bar Counsel) at 1; see also R&R at 41. That returning a file to a client might have caused Judge Sullivan to depart from his file-retention policies in one instance does not cast doubt on the credibility of his testimony generally or even as to the essentials of his retention policy.

2. *Adverse Inference*

Petitioner also objects to the Report's determination that no adverse evidentiary inference was warranted based on Judge Sullivan's "improper disposal of Petitioner's client files." Pet. Obj. at 16. As an initial matter, Judge Harvey found that Judge Sullivan was credible in testifying that he never disposed of Johnson's file but rather returned it to him. See R&R at 41. Examining the transcript and other evidence, this Court agrees. See Letter to Bar Counsel at 1; Tr. at 19, 30. As a result, although the Court appreciates Petitioner's difficulty in proving a negative, see Pet. Obj. at 18, it has no basis to doubt the determination that the file was returned

to Johnson. To the extent Johnson relies, as he did before Judge Harvey, on D.C. Bar Legal Ethics Opinion 206 to show that Judge Sullivan had an obligation to retain his files, Judge Sullivan discharged any such obligation by returning the files to Petitioner. See D.C. Bar Legal Ethics Opinion 206 at 339 (1989).

Even if the Court were not to credit that determination, moreover, it finds that Petitioner has not established at least two of the three requirements for adverse inference. As Judge Harvey noted, "[T]o merit imposition of an evidentiary sanction, the proponent must establish" three things: an obligation to preserve the evidence; a culpable state of mind in the destruction or loss of the evidence; and the relevance of the destroyed or altered evidence to the claims or defenses of the party seeking it. See R&R at 40 (citing Ashraf-Hassan v. Embassy of France in the United States, 130 F. Supp. 3d 337, 340 (D.D.C. 2015)).

Johnson has not adduced any evidence of a culpable state of mind. Petitioner relies on Elliott v. Acosta, 291 F. Supp. 3d 50 (D.D.C. 2018), for the proposition that he need not show bad faith, but only that Judge Sullivan's actions were "deliberate." ECF No. 122 (Pet. Reply) at 12. Elliott, in fact, holds that a claimant need not show purposefulness and that negligence will suffice. See 291 F. Supp. 3d at 68. In other words, the case does not stand for the proposition that any non-accidental disposal is culpable. And here, Johnson has not adduced any facts to show that any disposal was either purposeful or negligent.

Finally, Johnson has not shown that a "reasonable factfinder could conclude" that the files would have supported his claims here. See Ashraf-Hassan, 130 F. Supp. 3d at 340. Petitioner insists that "[w]hat Judge Sullivan's records could prove about what Judge Sullivan knew about his representation of Victor Williams and Williams's prior arrest records, would have been critical to Petitioner's habeas claims." Pet. Obj. at 19. What is not clear —

particularly given Judge Sullivan's repeated and credible testimony that had he recognized Williams at the time, he would have notified all parties and the court, see Tr. 76:24–25, 77:1–9, 77:25, 89:2–8, 94:1–15 — is what document or set of notes Johnson believes would prove useful.

3. Cuyler *Standard*

Next, Petitioner cites error in Judge Harvey's decision not to accord him relief for his ineffective-assistance claims under the Cuyler standard — *i.e.*, if a counsel's conflict of interest adversely affected her performance, prejudice is presumed. See Cuyler v. Sullivan, 446 U.S. 335 (1980). This standard is satisfied where "appellate counsel labored under an actual conflict of interest that adversely affected his performance." R&R at 43 (citing U.S. v. Gantt, 140 F.3d 249, 254 (D.C. Cir. 1998)). "The *sine qua non* of such a claim is that the attorney knew of the conflict during the challenged representation." Id. (citing U.S. v. Berkeley, 567 F.3d 703, 709 (D.C. Cir. 2009)). As Judge Harvey concluded, to the extent "Judge Sullivan's testimony concerning his failure to recall his representation of . . . Williams [is] credible[,] . . . Petitioner's conflict of interest claims under Cuyler . . . fail." Id.

Petitioner does not challenge that reasoning beyond reasserting his objections to the credibility findings addressed above. Instead, he principally presses an alternate theory — namely, that Judge Sullivan could be said to have been laboring under an actual conflict to the extent he had a "personal interest in avoiding ineffective assistance of trial counsel claims." Pet. Obj. at 20. In other words, since Judge Sullivan himself was the trial counsel, he did not want to press the theory on appeal that he had been ineffective at trial.

Here, the Court departs slightly from Judge Harvey's reasoning but reaches the same result — *i.e.*, that Johnson cannot prevail under the Cuyler standard pursuant to this theory

either. The Report concludes that the Circuit has foreclosed this argument because it has "rejected . . . 'attempts to force their ineffective assistance claims into the actual conflict of interest framework . . . and thereby supplant the strict Strickland standard with the far more lenient Cuyler test.'" R&R at 44 n.27 (quoting United States v. Bruce, 89 F.3d 886, 893 (D.C. Cir. 1996)). The Circuit did clarify, though, that "[i]f an attorney fails to make a legitimate argument because of the attorney's conflicting interest, . . . then the Cuyler standard has been met." Bruce, 89 F.3d at 896. It subsequently elaborated that counsel's interest in avoiding an advice-of-counsel defense where raising that defense would reveal counsel's inaccurate legal advice could qualify as a conflict under Cuyler. See U.S. v. Taylor, 139 F.3d 924, 932 (D.C. Cir. 1998). The court cautioned, however, that an attorney must actually "be forced to make a choice advancing his own interest at the expense of his client's," and that "a hypothetical conflict having no effect on . . . counsel's representation [is not] enough to come within Cuyler's reach." Id. at 930–31 (citations omitted).

The Court finds that Petitioner has raised only such a hypothetical conflict. As an initial matter, the Court is given some pause by the attempt to bootstrap the ineffective-assistance-of-trial-counsel claim into a proceeding where the Court lacks jurisdiction to adjudicate it. Even assuming this Court can address the substance of the claim, it lacks merit for two independent reasons. First, it is plain that Judge Sullivan at the time of appeal believed himself to have been effective trial counsel. See Tr. at 103:15–25, 104:1–24, 105:5–25, 106:1–20, 107:21–25, 108:1–21, 109:23–5; 110:1–16; Continued Tr. at 19:10–16. Such belief defeats any Cuyler claim because, for Cuyler to apply, an attorney must be aware of his conflict during the challenged representation. See Berkeley, 567 F.3d at 709.

Second, where, as here, the Court finds there was no colorable ineffective-assistance-of-trial-counsel claim, any conflict would be "hypothetical," as counsel was not "forced to make a choice advancing his own interest at the expense of his client's." Taylor, 139 F.3d at 930–31. Having reviewed the D.C. Court of Appeals's analysis of the ineffective-assistance-of-trial-counsel arguments, the Court agrees with — without deferring to — its conclusion that Judge Sullivan was an effective trial counsel. See Johnson, No. 99-CO-978. Although Petitioner now maintains that Judge Sullivan was ineffective because he did not reasonably research and prepare or develop a defense theory of the evidence, see Pet. Obj. at 21, the Superior Court, after a hearing at which both Petitioner and Judge Sullivan testified, found that "counsel understood [Petitioner's] version of events, . . . [he] reviewed the testimony, . . . [and he] sat down on more than one occasion to go over extensively what he perceived to be [Petitioner's] version of this particular event." Johnson, No. 99-CO-978 at 3 (internal quotation marks and citation omitted). This Court defers to those factual findings and independently concludes that Judge Sullivan's preparation and performance were reasonable. As to Petitioner's final argument — that Judge Sullivan was ineffective in failing to raise "numerous problems with the discovery at trial," Pet. Obj. at 21 — the Court assumes he is referring to the Brady issues addressed in the next section. In short, however, they likewise provide no basis on which to conclude Judge Sullivan was ineffective at trial.

C. Section III.D: Other IAAC Claims

Petitioner last argues that Section III.D of the Report — which addresses his ineffectiveness claims unrelated to conflict — suffers from essentially two legal errors, both having to do with his contention that Judge Sullivan was ineffective for failing to raise a variety of Brady claims. Judge Harvey found that Judge Sullivan could have been ineffective on that

basis only if the Brady claims "would likely have succeeded on appeal," R&R at 50 (citation omitted), and that none of the claims met that standard. Id. at 55–56. Taking Petitioner's two objections in turn, the Court agrees with the Report's analysis.

1. *Cumulative Effect*

Johnson first contends that the Report erred because it did not address the cumulative effect of the Brady claims, but rather assessed them in isolation. See Pet. Obj. at 22. Petitioner is correct that courts must cumulatively evaluate the materiality of wrongfully withheld evidence. See Wearry v. Cain, 136 S. Ct. 1002, 1007 (2016) (citing Kyles v. Whitney, 514 U.S. 419, 441 (1995)). Evidence is "material" if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." R&R at 49 (quoting Banks v. Dretke, 540 U.S. 668, 698–99 (2004)). The Report, however, does invoke those standards before concluding that "Petitioner fails here because he has not established a Brady violation in the first instance." Id. at 50.

Even assuming the Report could have more explicitly assessed the cumulative effect of the claims, it would not have made a difference because two of the three pieces of evidence Petitioner points to were not withheld, and the third is not material. Specifically, in his Objections, Petitioner highlights that: (1) Gary sought out Rowell to beat her before Rowell talked to the police; (2) Gary surrendered Keith Nash's gun to the police after the shooting; and (3) Williams's 1994 arrest for armed robbery was not papered by prosecutors. See Pet. Obj. at 24. The first two facts were disclosed at trial, see R&R at 51, and Petitioner has not even attempted to establish, as he must to succeed on this claim, prejudice from disclosure at — rather than preceding — trial. Id. at 51–52 (citing United States v. Clarke, 767 F. Supp. 12, 40–41 (D.D.C. 2011)). As to Williams's 1994 arrest, which Petitioner contends "would have been

admissible to show that Williams was biased or had motivation to curry favor with the [G]overnment," Pet. Obj. at 24, there is a closer question. Johnson, however, never explains why the particular circumstances of the Government's decision not to prosecute an earlier case would have led to bias here. More importantly, there were three other eyewitnesses to the murder with substantially similar testimony and corroborating forensics such that the Court cannot conclude that the admission of the Williams evidence would have undermined confidence in the verdict. See also R&R at 55–56. Even accumulated, then, this evidence would not give the Court pause to revisit the jury's decision.

2. Brady *Standard*

Next, and relatedly, Johnson contends that the Report applied the incorrect standard to his Brady claims, invoking sufficiency of the evidence to support his conviction rather than sufficiency of the withheld evidence to undermine confidence in the verdict, and that, more specifically, Judge Harvey incorrectly analyzed the 1994 arrest as though it had to be outcome determinative. See Pet. Obj. at 25–26. As should be clear from the previous analysis, the first argument is curious, as the Report did employ the standard that Petitioner maintains is proper. See R&R at 49–50. Likewise, as to the treatment of the arrest, Judge Harvey never concluded it had to be outcome determinative for the claim to succeed. Rather, he determined — and this Court cannot disagree — that because there was a great deal of corroborating evidence, the introduction of the arrest would not have undermined confidence in the verdict. To support that conclusion, in part, he cites to United States v. Lampkin, 159 F.3d 607 (D.C. Cir. 1998), to which Petitioner objects because Lampkin is not a Brady case. See Pet. Obj. at 26. That may be true, but Petitioner himself relied upon Lampkin, see R&R at 55, and the case nevertheless stands for the proposition that when evidence related to a no-papered arrest is wrongfully

withheld, that fact does not "undermine[] confidence in the conviction" where that witness's testimony was supported by ample other evidence. See Lampkin, 159 F.3d at 612, 613 (quoting United States v. Yunis, 924 F.2d 1086, 1096 (D.C. Cir. 1991)).

IV. Conclusion

For the foregoing reasons, pursuant to Local Civil Rule 72.3(c), the Court will adopt Magistrate Judge Harvey's April 11, 2018, Report and dismiss the case. A separate Order consistent with this Opinion will issue this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: October 25, 2018

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DUANE JOSEPH JOHNSON	)	
Petitioner,	)	
v.	)	**Case No. 1:10-cv-00178 (ABJ/GMH)**
ERIC D. WILSON,	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner Duane Joseph Johnson brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction in 1995 by a D.C. Superior Court jury of various murder, assault, robbery, and firearms offenses. Petitioner's primary argument charges his appellate counsel with ineffective assistance because counsel was purportedly laboring under a conflict of interest. Petitioner also advances a garden-variety ineffective assistance of appellate counsel claim, as well as attacking various alleged errors at the trial. After this action was referred to the undersigned for a Report and Recommendation, the Court held an evidentiary hearing regarding the ineffective assistance claims. The operative Third Amended Petition ("Petition") is now ripe for adjudication.[1] Upon consideration of the entire record, and for the reasons that follow, the undersigned recommends that the Petition be denied.

[1] The most relevant docket entries for purposes of this Report and Recommendation are Petitioner's Third Verified Amended Petition for Writ of Habeas Corpus [Dkt. 42]; United States' Opposition to Petitioner's Third Verified Amended Petition for Writ of Habeas Corpus [Dkt. 63] and Exhibits [Dkts. 63-1 through 63-16]; Petitioner's Reply to Respondent's Supplemental Response to the Court's Order to Show Cause [Dkt. 69] and Exhibits [Dkts. 69-1 through 69-16]; Petitioner's Praecipe [Dkt. 73] and Exhibits [Dkts. 73-1 through 73-11]; Petitioner's Supplemental Brief in Support of His Petition for Writ of Habeas Corpus [Dkt. 78] and Exhibits [78-1 through 78-42]; (4) United States' Opposition to Petitioner's Supplemental Brief in Support of His Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [Dkt. 79] and Exhibits [Dkts. 79-1 through 79-6]; Petitioner's Reply in Support of His Petition for Writ of Habeas Corpus [Dkt. 81]; Order dated October 7, 2016 [Dkt. 84]; Transcript of Proceedings of July 20,

I. BACKGROUND

A. The Trial

Petitioner was charged with crimes committed in the early morning of April 26, 1994, while Petitioner was in a parked car with five other people—Victor Williams, Keith Nash, Sharon Nash, Damitra Rowell, and Latina Gary. During an attempted robbery following a drug deal, shots were fired from the left rear side of the car, killing Keith Nash and wounding Sharon Nash, both of whom were sitting in the front seat. The following evidence was adduced at trial, where Petitioner was represented by Frederick J. Sullivan, who later became a Magistrate Judge on the D.C. Superior Court.[2]

Sharon Nash testified that, during the evening of April 25 through the early morning of April 26, 1994, she was at home with various family members, including her brother Keith Nash, getting high on cocaine and heroin and drinking. [Ex. P-22 at 18; Dkt. 63-7 at 13; Dkt. 78-18 at 6]. At approximately 3:00 a.m., her friends Victor Williams and his girlfriend, Latina Gary, joined them. [Ex. P-22 at 18; Dkt. 63-7 at 13; Dkt. 78-18 at 6]. Thirty minutes later, Ms. Nash, Mr. Nash, Mr. Williams, and Ms. Gary left in Mr. Nash's car and eventually ended up at 21st Street and Maryland Avenue in the Northeast quadrant of Washington, D.C., to buy more cocaine. [Ex. P-22 at 18-20; Dkt. 63-7 at 13; Dkt 78-18 at 6–7]. Mr. Williams, and then Mr. Nash, left the car and returned with two dime bags of cocaine, which they gave to Ms. Nash. [Ex. P-22 at 21; Dkt. 78-

2017 [Dkts. 102 and 103]; Petitioner's Post-Hearing Memorandum in Further Support of his Petition for a Writ of Habeas Corpus [Dkt. 104] and Exhibits [Dkts. 104-1 through 104-4]; United States' Post-Hearing Memorandum in Opposition to Petitioner's Petition for a Writ of Habeas Corpus [Dkt. 108]; Petitioner's Post-Hearing Reply Memorandum in Further Support of his Petition for a Writ of Habeas Corpus [Dkt. 109]; Petitioner's Notice of Supplemental Authority in Response to Order of Court Entered January 16, 2018 [Dkt. 112]; United States' Post-Hearing Citation List [Dkt. 113]; and Transcript of Proceedings of January 16, 2018 [Dkt. 114]. In addition, the transcript from Petitioner's trial was included as exhibits P-22 through P-25 at the evidentiary hearing held on July 20, 2017. These will be designated "Ex. P-[number]."

[2] Although Judge Sullivan was not a judge at the time of his representation of Petitioner, the undersigned will refer to him as Judge Sullivan throughout this Report and Recommendation.

18 at 7]. As they were about to leave, Petitioner, whom Ms. Nash knew as "Key Bo," ran to her side of the car and asked for a ride. [Ex. P-22 at 21–22; Dkt. 73-1 at 21; Dkt. 78-18 at 7]. Mr. Nash agreed to give him a ride, and Petitioner and Ms. Rowell got into the car. [Ex. P-22 at 22–23; Dkt. 73-1 at 21; Dkt. 78-18 at 7]. Mr. Nash was driving, and Ms. Nash sat in the front passenger seat; Petitioner sat in the back left seat behind Mr. Nash, with Ms. Gary, then Ms. Rowell, then Mr. Williams arranged next to him to his right. [Ex. P-22 at 26–28; Dkt. 73-1 at 21; Dkt. 78-18 at 7]. Petitioner directed Mr. Nash to a dead end, and told him to turn off the car. [Ex. P-22 at 28–29; Dkt. 73-1 at 21; Dkt. 78-18 at 7]. Petitioner got out of the car, standing on the back left side of the vehicle, and Ms. Nash then saw a gun in Petitioner's hands, pointed at Mr. Nash's head. [Ex. P-22 at 29–30, 37, 52; Dkt. 73-1 at 21; Dkt. 78-18 at 7]. Petitioner demanded the $20 that the party had brought to buy drugs, and was told that it had already been used to purchase drugs. [Ex. P-22 at 29–30; Dkt. 73-1 at 21; Dkt. 78-18 at 7]. Meanwhile, Ms. Nash was trying to give Mr. Nash a gun that she had taken from him earlier. [Ex. P-22 at 31–32; Dkt. 73-1 at 21; Dkt. 78-18 at 7]. She was not clear whether she gave him the gun before or after Petitioner fired three shots, two of which hit Mr. Nash and one of which hit her. [Ex. P-22 at 32–33, 34–35, 51]. Ms. Nash then got out of the front seat and into the back seat. [Ex. P-22 at 33; Dkt. 78-18 at 8]. On cross-examination, she stated that Mr. Williams had a gun in his possession earlier that night and that he and Petitioner had struggled in the back seat prior to the shooting. [Ex. P-22 at 44–45, 60, 65–66; Dkt. 63-7 at 13; Dkt. 78-18 at 8].

The government's remaining three eyewitnesses largely corroborated Ms. Nash's version of the events. For example, Mr. Williams and Ms. Gary related that they arrived at Ms. Nash's house in the early morning of April 26, 1994, to take drugs, after which the group left to replenish their supply, ending up in the area round 21st Street and Maryland Avenue, NE, searching for

crack. [Exh P-22 at 212–13, 294; Dkt. 63-7 at 13–14; Dkt. 78-18 at 9, 11]. Ms. Rowell—who had been sitting in front of a residence at 1118 24th Street, NE, speaking with Petitioner, whom she also knew as Key Bo—reported seeing the group enter the area in Mr. Nash's car. [Ex. P-22 at 75]. Like Mr. Williams and Ms. Gary, she testified that Mr. Williams got out of the car to talk to Petitioner. [Ex. P-22 at 76–77, 215, 296–97; Dkt. 78-18 at 8–9, 11]. Each of those three witnesses asserted that the group sought to purchase cocaine from Petitioner, who refused to sell at the price offered; Mr. Williams and Ms. Gary specified that the group in the car sought to buy two dime bags for $15, rather than the $20 Petitioner was charging. [Ex. P-22 at 78, 115–16, 215, 296–98; Dkt. 78-18 at 8–9, 11]. They ended up purchasing the drugs elsewhere. [Ex. P-22 at 216, 296–98; Dkt. 78-18 at 9, 11]. Ms. Rowell, Mr. Williams, and Ms. Gary agreed with Ms. Nash that Mr. Nash ended up driving them all to an alley in the area, with Petitioner sitting behind Mr. Nash in the back left seat, Mr. Williams behind Ms. Nash, who was in the front passenger seat, and Ms. Gary and Ms. Rowell between them. [Ex. P-22 at 81, 217, 222, 300; Dkt. 73-1 at 21–22, 27; 78-18 at 8–9, 11].

The other three eyewitnesses' descriptions of the shooting and its aftermath diverge slightly in some of the details. Ms. Rowell testified that, after they reached the alley, Petitioner got out of the car,[3] put a gun to Mr. Nash's head, and shot him. [Ex. P-22 at 83–84, 120–21; Dkt. 78-18 at 8]. Meanwhile, Mr. Williams and Ms. Gary were holding her in the back seat of the car, using her as a shield. [Ex. P-22 at 84; Dkt. 78-18 at 8]. When she broke free and ran away, she heard Mr. Williams instructing Ms. Gary to find her and beat her, because he thought she had helped to orchestrate the incident. [Ex. P-22 at 85–87; Dkt. 78-18 at 8]. Ms. Rowell further testified that

[3] The District of Columbia Court of Appeals' opinion on Petitioner's appeal of the denial of his first motion under D.C. Code § 23-110 states that Petitioner "was either halfway outside the car or already outside and leaning back into the driver's side of the car[] when he fired three gunshots and fled." [Dkt. 63-3 at 2].

Petitioner was the only person in the car that she saw with a gun. [Ex. P-22 at 87; Dkt. 73-1 at 37]. The day after the shooting, Petitioner approached Ms. Rowell to ask her to testify on his behalf should he be arrested and prosecuted. [Ex. P-22 at 86; Dkt. 78-18 at 8–9]. She testified that Petitioner "gave [her] a story to tell," although she did not specify what that story was, and that if she did not tell it, "there would be no problem with doing it again," which Ms. Rowell understood meant that she might be killed if she did not comply. [Ex. P-22 at 86]. Approximately two weeks later, Ms. Gary complied with Mr. Williams' request, finding and beating Ms. Rowell for her perceived role in the shooting and because Ms. Rowell would not give a statement to the police. [Ex. P-22 at 86, 129, 133; Dkt. 63-7 at 15; Dkt. 78-18 at 8].

Mr. Williams stated that once they reached the alley, which was located at 18th Place, NE, Petitioner instructed Mr. Nash to stop the car and turn off the lights. [Ex. P-22 at 225; Dkt. 78-18 at 10]. When Mr. Nash asked why, Petitioner held a gun to his head, said, "This is why," and demanded $20. [Ex. P-22 at 225–26; Dkt. 78-18 at 10]. When told that the money had been spent, Petitioner threatened to kill everyone in the car. [Ex. P-22 at 227; Dkt. 78-18 at 10].He looked around the car, musing about whom he should kill first, and then shot Mr. Nash in the head. [Ex. P-22 at 227; Dkt. 78-18 at 10]. Petitioner then aimed the gun at the back seat passengers, and when Mr. Williams tried to grab it from him, struck Mr. Williams in the hand with the gun. [Ex. P-22 at 228; Dkt. 78-18 at 10]. As Petitioner fled, Mr. Williams saw and retrieved a gun from Mr. Nash's hand and shot at Petitioner as he ran from the scene. [Ex. P-22 at 234; Dkt. 63-7 at 14; Dkt. 78-18 at 10]. Mr. Williams then took Mr. Nash's gun home and called 911. [Ex. P-22 at 235–36, 238; Dkt. 63-7 at 14; Dkt. 78-18 at 10]. Mr. Williams admitted on cross-examination that he did not tell police about Mr. Nash's gun, nor did he tell them that he had fired a gun. [Ex. P-22 at 263–64; Dkt. 63-7 at 14; Dkt. 78-18 at 11].

According to Ms. Gary, Petitioner shot Mr. Nash twice and wounded Ms. Nash with a third shot. [Ex. P-22 at 303–04; Dkt. 63-7 at 16]. When the shots were fired, Mr. Williams reached over Ms. Rowell, pushed Ms. Gray down, and grabbed for Petitioner's hand. [Ex. P-22 at 304; Dkt. 63-7 at 16]. Petitioner struggled with Mr. Williams, then exited the car and ran down the alley. *Id.* Ms. Rowell followed, shouting after him. [Ex. P-22 at 304; Dkt. 63-7 at 16]. Ms. Gary admitted to having a pistol that night, which she discarded before the police arrived at the scene. [Ex. P-22 at 305–06; Dkt. 63-7 at 16; Dkt. 78-18 at 11]. She also testified that she was a police informant. [Ex. P-22 at 306–07; Dkt. 78-18 at 11]. Ms. Gary admitted that she later beat Ms. Rowell because she believed Ms. Rowell had set up the attempted robbery by getting Mr. Nash to give Petitioner a ride. [Ex. P-22 at 308–09; Dkt. 63-7 at 16; Dkt. 73-1 at 20–21; Dkt. 78-18 at 11]. Further, she stated that, two days after the shooting, she surrendered Mr. Nash's gun, with which Mr. Williams had shot at Petitioner, to the police. [Ex. P-22 at 310–11; Dkt. 63-7 at 16; Dkt. 73-1 at 31; Dkt. 78-18 at 11].

Homicide Detective Pamela Reed confirmed at trial that Ms. Gary had long been her paid informant, and Detective Reed had intervened to get a criminal case against Ms. Gary dropped. [Ex. P-22 at 360–61, 363; Dkt. 63-7 at 17; Dkt. 78-18 at 12]. It was Detective Reed who took Ms. Gary's statement the day after the shooting and who, later that day, recovered the gun from Ms. Gary. [Ex. P-22 at 364–65; Dkt. 63-7 at 17; Dkt. 78-18 at 12]. Detective Reed also testified that Ms. Gary told her that she was carrying an inoperative pistol the night of the shooting. The detective later searched, unsuccessfully, for that gun in the area where Ms. Gary had discarded it. [Ex. P-22 at 366–67, 369–70; Dkt. 63-7 at 17–18]. However, Detective Reed did not include Ms. Gary's statement in her report. [Ex. P-22 at 367; Dkt. 63-7 at 18].

A police evidence technician who searched the crime scene to recover evidence testified that he recovered a shell casing from the front floorboard of Mr. Nash's vehicle, and he took custody of a bullet from Mr. Nash's body. [Ex. P-22 at 379–82; Dkt. 78-18 at 12]. A firearms examiner with the Metropolitan Police Department, having examined the bullets and the firearms recovered, opined that neither the bullet in Mr. Nash's body nor the casing retrieved from the car had been shot from the weapon turned in by Ms. Gary. [Ex. P-22 at 386–90; Dkt. 63-2 at 6; Dkt. 78-18 at 12]. He further reported that the shell casing was the same brand as some unspent cartridges found in a bag that was in Ms. Gray's possession at the time of the shooting. [Ex. P-22 at 394; Dkt. 78-18 at 12–13]. A medical examiner testified the Mr. Nash was killed from a close-range shot that struck the left rear of his neck and exited on the right side of his lower cheek. [Ex. P-22 at 159–61; Dkt. 63-2 at 6; Dkt. 73-1 at 27; Dkt. 73-3 at 8; Dkt. 78-18 at 9]. Another bullet struck Mr. Nash near the first wound but did not exit. [Ex. P-22 at 159–61; Dkt. 63-2 at 6; Dkt. 73-3 at 8]. Ms. Nash was wounded by a gunshot to the left side of her abdomen. [Ex. P-22 at 32–33; Dkt. 63-2 at 9]. All three wounds are consistent with the theory that Mr. and Ms. Nash were in the front seat of the car when they were shot by a person positioned on the left rear side of the car. [Ex. P-22 at 178–80].

Petitioner was the sole defense witness. [Dkt. 63-2 at 7; Dkt. 73-3 at 9]. He testified that he was selling drugs around the time of the shooting, when he was approached by Mr. Williams, a person to whom he had previously sold drugs. [Ex. P-22 at 415–16; Dkt. 63-3 at 7; Dkt. 73-3 at 9; Dkt. 78-18 at 14]. The two entered the hallway of a building, smoked marijuana and PCP, and discussed the purchase and sale of some cocaine. [Ex. P-22 at 417; Dkt. 78-18 at 14–15]. According to Petitioner, Mr. Williams stated that he had a drug customer for Petitioner around the corner. [Ex. P-22 at 417; Dkt. 63-2 at 7; Dkt. 73-3 at 9]. Petitioner and Mr. Williams went to Mr.

Nash's car, and Petitioner asked Ms. Rowell to accompany him because he was feeling uncomfortable about the transaction. [Ex. P-22 at 418–19; Dkt. 63-2 at 7; Dkt. 73-3 at 9; Dkt. 78-18 at 15]. Petitioner testified, as did each of the eyewitnesses who testified for the prosecution, that Mr. Nash was driving and Petitioner sat behind him in the back left seat. [Ex. P-22 at 431; Dkt. 63-2 at 7–8; Dkt. 73-1 at 27; Dkt. 78-18 at 15]. However, his testimony as to the position of Ms. Nash and Ms. Gary differed from that presented by the prosecution witnesses. According to Petitioner, Ms. Rowell sat next to him, Ms. Nash next to her, and Mr. Williams behind Ms. Gary, who occupied the front passenger seat. [Ex. P-22 at 432; Dkt. 63-2 at 7–8; Dkt. 73-1 at 27; Dkt. 78-18 at 15]. Mr. Williams directed Mr. Nash into the alley. [Ex. P-22 at 420; Dkt. 63-2 at 8; Dkt. 73-3 at 9]. When the car stopped and Mr. Nash turned off the headlights, Mr. Williams pulled a gun with his right hand, pointed it at Petitioner (who was busy getting the drugs together for the purported sale), and demanded the drugs and money. [Ex. P-22 at 420; Dkt. 63-2 at 8; Dkt. 73-3 at 9; Dkt. 78-18 at 15]. Petitioner and Mr. Williams struggled over the gun inside the car, with Petitioner trying to bang the gun out of Mr. Williams hand on the car's rear window. [Ex. P-22 at 420; Dkt. 63-2 at 8; Dkt. 73-3 at 9; Dkt. 78-18 at 15]. During the struggle, the gun fired several times. [Ex. P-22 at 420; Dkt. 63-2 at 8; Dkt. 73-3 at 9; Dkt. 78-18 at 15]. Eventually, Petitioner was able to get free and fled the car, with Mr. Williams shooting after him. [Ex. P-22 at 420–21; Dkt. 63-2 at 8; Dkt. 73-3 at 10; Dkt. 78-18 at 15–16]. Petitioner testified that he was not carrying a gun and did not know that anyone had been shot. [Ex. P-22 at 419–22; Dkt. 63-2 at 8; Dkt. 73-3 at 10; Dkt. 78-18 at 15–16].

The prosecution's theory was that Petitioner attempted a robbery, shot Mr. and Ms. Nash from the left side of the car—consistent with the forensic evidence about the gunshot wounds—and then fled with the murder weapon. [Ex. P-24 at 18–29; Dkt. 73-1 at 26–27, 30–31]. Petitioner

argued self-defense. Specifically, the defense theory was that Mr. Williams, who was sitting on the right side of the back seat of the car (and thus to the right of both Mr. and Ms. Nash) pulled a gun on Petitioner while trying to rob him and, in the chaotic situation afterward, in which the passengers of the car were moving around, the gun was fired and Mr. and Ms. Nash were shot. [Ex. P-23 at 36–43; Ex. Pl-24 at 45–46; Dkt. 73-3 at 16–17].

On January 19, 1995, a D.C. Superior Court jury found Petitioner guilty of first degree felony murder while armed, second degree murder while armed, assault with intent to kill while armed, assault with a deadly weapon, attempt to commit robbery while armed, possession of a firearm during a crime of violence, and carrying a pistol without a license. [Dkt 63-3 at 2–3]. On March 15, 1995, Petitioner was sentenced to thirty years to life imprisonment for the first-degree felony murder while armed offense; fifteen years to life imprisonment for the second-degree murder offense; fifteen to forty-five years for the assault with intent to kill while armed offense; one to three years for the assault with a deadly weapon offense; ten to thirty years for the attempt to commit robbery while armed offense; five to fifteen years for the possession of a firearm during a crime of violence offense; and one year for the carrying a pistol without a license offense. [Dkt. 63-10 at 3].

B. The Direct Appeal

On February 12, 1996, Petitioner timely appealed his conviction and sentence to the D.C. Court of Appeals, retaining his trial counsel, Judge Sullivan, for the direct appeal. On appeal, Petitioner argued that there was insufficient evidence to justify his guilty verdict and that the trial court erred in not providing a jury instruction that manslaughter was a lesser included offense of felony murder. [Dkt. 63-1 at 3–4; Dkt. 78-18 at 21–32]. On June 25, 1996, the D.C. Court of Appeals held that Petitioner's appeal was without merit but remanded the case for re-sentencing

because the second degree murder and attempted robbery convictions merged with the felony murder convictions. [Dkt. 63-1 at 4].

Thereafter, the trial court vacated Petitioner's second degree murder and attempted robbery convictions and resentenced Petitioner to a term of incarceration of forty-six years to life. [Dkt. 63 at 3; Dkt. 63-2 at 3]. Petitioner then filed a motion to reduce his sentence, which the trial court denied on October 2, 1996. [Dkt. 63 at 3]. On March 3, 1997, Petitioner filed a petition for writ of certiorari which was denied by the U.S. Supreme Court. *Johnson v. United States*, 520 U.S. 1110 (1997).

C. Collateral Review in the D.C. Courts

1. Petitioner's Initial Efforts to Collaterally Review His Convictions

On August 19, 1996, the D.C. Court of Appeals issued an Order construing two of Petitioner's *pro se* letters to that court as a motion to recall the appellate court's mandate affirming Petitioner's convictions. [Dkt. 63 at 4]. On April 8, 1997, the Court of Appeals denied the motion to recall the mandate without prejudice to Petitioner's first filing for relief in the trial court pursuant to D.C. Code § 23-110(a), which establishes a procedure for collateral review of convictions in the D.C. Superior Court. [Dkt. 63 at 4]. The statute creates exclusive jurisdiction in that court unless the remedy provided by that section is "inadequate or ineffective." D.C. Code § 23-110(g).[4]

Thereafter, Petitioner filed letters with the D.C. Superior Court asserting ineffective assistance of his trial counsel. [Dkt. 63 at 4]. He alleged that Judge Sullivan's performance was

[4] Specifically, Section 23-110(g) provides:

> An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

deficient because he failed to prepare Petitioner to testify at trial, failed to present to the jury with evidence that Mr. Nash had been convicted of a crime fifteen years before the trial, failed to impeach Ms. Gary and Ms. Rowell by questioning them about their fight, and failed to raise doubt as to the source of the shell casing found on the floor of Mr. Nash's vehicle. [Dkt. 73-1 at 47]. In March 1998, D.C. Superior Court Judge Russell F. Canan appointed new counsel to represent Petitioner in his collateral attack on his convictions. [Dkt. 63 at 4]. On October 1, 1998, Petitioner filed a motion for a new trial in the Superior Court under D.C. Code § 23-110. [Dkt. 63-2]. In it, Petitioner argued that his trial counsel was ineffective because he "failed to prepare him to testify at the trial, and failed to present, argue, and develop other evidence which would have supported the defense theory of the case." *Id.* at 8. Specifically, he complained that trial counsel failed to "br[ing] the evidence regarding the placement of [Mr. and Ms. Nash's] wounds to [his] attention and pointed out that he would need to reconcile his version of events with this evidence," which resulted in his failure to testify more fully as to the positions of the two shooting victims at the time of the incident, and that trial counsel failed to bring forth evidence of Mr. Nash's violent past, of the relationship between Ms. Gary and Mr. Williams, and of the reason for the fight between Ms. Gary and Ms. Rowell. *Id.* at 9–11.

Following an evidentiary hearing at which both Petitioner and Judge Sullivan testified, the Superior Court denied Petitioner's first Section 23-110 motion from the bench. [Dkt. 63-10 at 5; Dkt. 73-1 at 38–50]. The D.C. Court of Appeals affirmed the trial court's ruling on August 17, 2001. [Dkt. 63-3 at 2].

Petitioner subsequently filed a second Section 23-110 motion alleging that the trial court erred by instructing the jury that if it found Petitioner was the aggressor, it could not find that he acted in self-defense. [Dkt. 63-10 at 5]. Petitioner later withdrew the motion and the court denied

it without prejudice. *Id.* at 6. Petitioner filed a third Section 23-110 motion in late 2005 alleging that his "trial counsel's promise during opening statements to call two witnesses to corroborate [Petitioner's] version of events induced [him] to plead not guilty rather than enter an Alford plea[5] and that counsel's subsequent failure to call those witnesses constituted ineffective assistance of counsel."[6] *Id.* at 7.

Petitioner filed a fourth Section 23-110 motion in early 2006 raising alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963),[7] and ineffective assistance of trial counsel, appellate counsel, and counsel appointed for his first Section 23-110 motion. [Dkt. 73-2]. Specifically, Petitioner alleged that the prosecution failed to turn over evidence that Mr. Williams was in possession of a gun on the night of the incident, evidence that Mr. Williams had been arrested for a similar robbery in July 1994, and evidence of the relationship among Mr. Williams, Ms. Gary, and Detective Reed. *Id.* at 13–20. The ineffective assistance claims related again to trial counsel's asserted promise and subsequent failure to call two corroborating witnesses. *Id.* at 30–31.

While his third and fourth Section 23-110 motions were pending, Petitioner discovered that Judge Sullivan had previously represented Mr. Williams in a criminal trial.

2. Petitioner's Collateral Attack Based on His Counsel's Alleged Conflict of Interest

According to Petitioner, on February 13, 2007, he reviewed for the first time the government's case jacket from a 1985 prosecution of Mr. Williams, and discovered that Judge

[5] "An *Alford* plea is one where the defendant enters a guilty plea while maintaining his innocence." *Corley v. U.S. Parole Comm'n*, 709 F. Supp. 2d 1, 3 n.3 (D.D.C. 2009) (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)).

[6] Petitioner's third Section 23-110 Motion was denied on May 8, 2007. [Dkt. 63-6 at 4].

[7] "Generally speaking, the Supreme Court's holding in *Brady v. Maryland* requires the government to disclose, upon request, material evidence favorable to a criminal defendant, including evidence held by law enforcement officials." *United States v. Oruche*, 484 F.3d 590, 596 (D.C. Cir. 2007).

Sullivan had represented Mr. Williams in a criminal matter approximately eight years before beginning his representation of Petitioner. [Dkt. 78 at 8; Dkt. 78-2; Dkt. 78-6 at 2]. At the time of the prior representation, Mr. Williams had been charged with first degree burglary while armed and armed robbery. [Dkt. 63-10 at 12–13]. Mr. Williams' ultimately pleaded guilty to unlawful entry and second degree theft in 1987.[8] [Dkt. 63-10 at 12–13; Dkt. 78 at 8].

Upon discovering his trial counsel's prior representation of Mr. Williams, Petitioner pursued claims in both the D.C. Superior Court and the D.C. Court of Appeals to overturn his conviction based on the alleged conflict of interest. In the Superior Court, Petitioner filed a motion in April 2007 to amend his fourth Section 23-110 motion based on the alleged conflict of interest of his trial counsel (the "Trial IAC claim"). [Dkt. 63-10 at 8; Dkt. 78-8 at 11–22]. Specifically, Petitioner argued that the conflict of interest caused his trial counsel to fail to investigate and pursue a defense theory that Mr. Williams was the shooter, to impeach Mr. Williams with his prior convictions for unlawful entry and second degree theft, to introduce evidence of other crimes of violence committed by Mr. Williams, and to advise Petitioner of his right to note an appeal from his re-sentencing upon remand. [Dkt. 63-10 at 9–10; Dkt. 78-8 at 11–22].

At approximately the same time, Petitioner filed a complaint against Judge Sullivan with the District of Columbia Bar regarding that same alleged conflict of interest. [Dkt. 78-19 at 2]. Judge Sullivan responded that he had no recollection of his prior representation of Mr. Williams at the time of his representation of Petitioner. [Dkt. 78-24 at 2]. Petitioner's complaint was dismissed in July 2007 because the Office of Bar Counsel could not "prove that Judge Sullivan

[8] There is some confusion in the record about this prosecution, as the submissions sometimes assert that Mr. Williams was convicted in 1985 and sometimes in 1987. [Dkt. 102 at 49; Dkt. 104 at 14, 43]. It appears that Mr. Williams was arrested on a felony charge of armed robbery in 1985, was indicted in 1986 for armed burglary and armed robbery, and in 1987 pleaded guilty and was sentenced for two misdemeanors—theft and unlawful entry. [Dkt. 73-6 at 3, 13, 19, 21–23].

was aware of his prior representation or the charges that had been pending against [Mr. Williams]." [Dkt. 78-25 at 2].

The government's opposition to Petitioner's Trial IAC claim included an affidavit from Judge Sullivan. In it, Judge Sullivan again averred that he had not realized when he represented Petitioner that he had previously represented Williams. [Dkt. 63-9, ¶¶ 2–7]. He noted that a database he maintained of information on his former clients listed Mr. Williams' last name as "William," which is how it was spelled on his bail report. *Id.*, ¶ 4. For that reason, a check of the database would not have revealed the prior representation. *Id.* According to Judge Sullivan, he "had no division of loyalty during [Petitioner's] trial because [he] did not recognize Mr. Williams as someone whom [he] knew or had ever represented, nor did Mr. Williams ever communicate to [him] in any manner that [Mr. Williams] recognized [him]." *Id.* ¶ 8.

While his Trial IAC claim was pending in the Superior Court, Petitioner also sought relief from the D.C. Court of Appeals for the ineffective assistance of his counsel based on his alleged conflict of interest during Petitioner's direct appeal (the "Appellate IAC claim"). Petitioner asserted his Appellate IAC claim for the first time on May 14, 2007, through a second motion to recall the mandate filed on the 95-CF-364 docket in the Court of Appeals (the "364 Docket"). [Dkt. 63-7]. Therein, Petitioner contended that the alleged conflict of interest caused his counsel to fail to raise issues on appeal related to alleged *Brady* violations at trial and ineffective assistance at trial. *Id.* at 12–20. Petitioner also requested that the Court of Appeals remand the matter to the Superior Court for an "emergency evidentiary hearing" to develop the record regarding the alleged conflict of interest during his direct appeal. *Id.* at 23.

On June 6, 2007, the Court of Appeals denied Petitioner's motion to recall the mandate, without explanation, on the 364 Docket. [Dkt. 78-9]. Petitioner thereafter filed a motion for

extension of time and appointment of counsel, which the Court of Appeals construed together as a motion for reconsideration of its June 6, 2007 order. [Dkt. 69-3]. On August 30, 2007, the Court of Appeals granted the motion for reconsideration on the 364 Docket and vacated its June 6, 2007 order, holding that

> [t]he motion to recall the mandate is denied, but without prejudice to the trial court's consideration of the alleged conflict of interest of [Petitioner's] trial counsel (who was also appellate counsel) pursuant to a D.C. Code § 23-110 motion.

Id.

3. Judge Canan's Decision on Petitioner's Fourth Section 23-110 Motion

Without holding an evidentiary hearing, Judge Canan denied Petitioner's fourth Section 23-110 motion both as a successive motion and on the merits on August 19, 2008. [Dkt. 63-10 at 16–27, 34]. Judge Canan characterized Petitioner's Trial IAC claim as contending that Judge Sullivan's prior representation of Mr. Williams created an actual conflict of interest that precluded him from "effectively representing [Petitioner] and from protecting the interests of his former client," because his "failure to pursue any of [Petitioner's] suggested strategies was motivated by a desire to protect the interests [Mr. Williams]." *Id.* at 24. Judge Canan did not make a finding about whether Judge Sullivan knew that he had previously represented Mr. Williams,[9] but held that Petitioner had failed to identify "specific instances where his interests had been impaired or shown any trial strategies that but for the prior representation, trial counsel would have taken." *Id.* at 27. Specifically, he found that Mr. Williams' prior second-degree theft and unlawful entry convictions from 1985 were neither "substantially related to the subject matter tried in [Petitioner's] case" nor likely to "have had a significant impact on Mr. Williams' credibility,

[9] At one point in his decision, Judge Canan states, "No conflict is alleged because both Magistrate Judge Sullivan and defendant agree that defendant was not advised of the prior representation of Mr. Williams." [Dkt. 63-10 at 34]. That statement, however, was made in the context of Judge Canan's decision not to hold an evidentiary hearing because the affidavits that Judge Sullivan and Petitioner filed in that action "do not conflict at all." *Id.*

especially in light of the corroborative testimony of other eyewitnesses." *Id.* at 25. Further, because the prior convictions "involved an incident that had nothing in common" with the incident at issue, "extrinsic evidence of the conviction would not have been admissible because it lacks probative value." *Id.* at 27. Judge Canan also found that Judge Sullivan's decision not to impeach Mr. Williams with evidence of prior convictions or to request an impeachment instruction "reflect[ed] a realistic course" that was likely as effective as Petitioner's suggested strategy and was not calculated to protect Mr. Williams' interests. *Id.* at 26. Judge Canan noted that the government had already impeached Mr. Williams with his prior convictions and that an impeachment instruction was provided during final instructions. *Id.* at 25–26.

As to the merits of the *Brady* claims, Judge Canan found that Petitioner had not shown that the evidence at issue—of the relationship between Ms. Gary and Mr. Williams and between Ms. Gary and Detective Reed, of the fact that Mr. Williams possessed a gun, and of Mr. Williams' 1994 arrest—"if disclosed prior to trial, would have had a reasonable probability of affecting the outcome of the trial." *Id.* at 31. "Indeed, [those] facts were eventually disclosed in open court during witness testimony and were available for the jury to consider with regard to the credibility of each witness." *Id.* Moreover, Judge Canan found that there was no indication that prior knowledge of the facts would have changed Petitioner's trial strategy. *Id.*

As to Mr. Williams' 1994 arrest (which may have been admissible at trial to show Mr. Williams' potential motivation to curry favor with the prosecution), Judge Canan found that, because the case was "no papered"[10] with no evidence of a deal between the prosecution and Mr. Williams, any impact would have been "minimal." *Id.* at 32. Moreover, he found that the

[10] "In the parlance of the Superior Court, when a prosecutor decides not to proceed on a charge on which a person has been arrested, the charge is said to be 'no-papered,' i.e., dismissed." *District of Columbia v. Houston*, 842 A.2d 667, 669 n.1 (D.C. 2004).

circumstances of Mr. Williams' 1994 arrest for robbery and receiving stolen property did not significantly resemble the offence with which Petitioner was charged, and, if admitted, would have been "insufficient to establish a reasonable possibility that Mr. Williams was the shooter." *Id.* As to Petitioner's claim that trial counsel was ineffective for not advising him that he had a right to appeal his resentencing, the court denied the claim as meritless because none of the claims Petitioner sought to raise were relevant to the resentencing and thus would not have been allowed. *Id.* at 21–22. Judge Canan therefore dismissed the motion in its entirety.[11] *Id.* at 34.

4. Further Proceedings in the D.C. Superior Court and D.C. Court of Appeals

On September 3, 2008, Petitioner appealed the Superior Court's order denying his Trial IAC claim on the 08-CO-1180 docket in the D.C. Court of Appeals (the "1180 Docket"). [Dkt. 78-4 at 3]. At nearly the same time, on October 15, 2008, Petitioner filed in the Court of Appeals a motion to recall the mandate out of time on the 364 Docket raising again his Appellate IAC claim. [Dkt. 78-3 at 3; Dkt. 78-7]. On November 5, 2008, the Court of Appeals denied that motion in a one-line order, reasoning that "the alleged conflict of interest issue is before this court in *Duane Johnson v. United States*, No. 08-CO-118[0]."[12] [Dkt. 78-12].

Four months later, the D.C. Court of Appeals affirmed on the 1180 Docket the Superior Court's August 19, 2008 order denying Petitioner's Trial IAC claim. [Dkt. 63-11 at 2]. In so doing, the court cited two of its prior opinions which addressed alleged conflicts of interest by trial counsel. *See id.* (citing *McCrimmon v. United States*, 853 A.2d 154, 156 (D.C. 2004), and *Veney*

[11] The court also denied Petitioner's claim that appointed counsel on his first Section 23-110 motion—not Judge Sullivan—was ineffective. [Dkt. 69-10 at 14–16].

[12] A typographical error in the order misidentified the case number as 08-CO-1189. [Dkt. 84 at 8 n.4].

v. United States, 738 A.2d 1185, 1192 (D.C. 1999)). The Court of Appeals' decision made no mention of Petitioner's Appellate IAC claim.

On December 3, 2008, Petitioner filed a Motion for Relief from Judgment or Order arguing that his constitutional rights were violated because he was not present for his August 1996 resentencing and the Clerk of Court did not provide him with a copy of the order resentencing him. [Dkt. 73-7 at 3]. The D.C. Superior Court denied the motion as procedurally barred (because a similar claim had been addressed in Judge Canan's order on the fourth Section 23-110 motion) and as meritless because the resentencing was purely procedural and therefore did not require Petitioner's presence. [Dkt. 73-8 at 9–11].

In December 2009, Petitioner filed a Verified Motion to Correct Illegal Sentence, arguing that his constitutional rights were violated because he was not present at his sentencing in 1995. [Dkt. 73-9 at 2]. The D.C. Superior Court denied the motion without significant discussion. [Dkt. 63-12 at 2]. The D.C. Court of Appeals affirmed the denial, noting that Petitioner's claims regarding his 1995 sentence "appear moot." [Dkt. 63-13 at 2].

In June 2010, Petitioner filed a Motion to Vacate Conviction and Sentences alleging that the prosecutor at his criminal trial was not lawfully appointed as an Assistant U.S. Attorney. [Dkt. 73-10 at 4]. The D.C. Superior Court denied that motion in an omnibus order of May 2011, stating that the record "clearly shows that [the prosecutor] was [an] Assistant United States Attorney," and that the factual evidence Petitioner had presented "contradict[s] his wholly speculative claims." [Dkt. 63-14 at 4]. The D.C. Court of Appeals affirmed, stating, "[n]othing in the record indicates that [the prosecutor] was not lawfully appointed to act as a representative of the U.S. government in the prosecution of criminal offenses." [Dkt. 63-15 at 5].

D. Federal Habeas Petition

On January 29, 2010, Petitioner filed his first petition for habeas corpus relief in this Court, raising claims of "ineffective assistance of trial counsel, prosecutorial misconduct, misrepresentations by post-conviction counsel, an illegal sentence imposed by the Superior Court, fraud upon the court by trial counsel, and suppression of exculpatory and impeachment evidence," in addition to ineffective assistance of appellate counsel for his "failure to consult, failure to make three specific arguments on appeal, conflict of interest, [] failure to notice an appeal after re-sentencing," and failure to assist with a Section 23-110 motion. *Johnson v. Stansberry*, No. 10-cv-178, 2010 WL 358521, at *1 (D.D.C. Jan. 29, 2010). That same day, this Court dismissed the petition without prejudice. *Id.* The Court reasoned that, "with the exception of the ineffective assistance of appellate counsel claim," the exclusive remedy for such challenges is a Section 23-110 motion, unless the petitioner can show that such a motion is ineffective or inadequate. *Id.* ("This court does not have jurisdiction to entertain claims that were or could have been presented to the Superior Court on a § 23–110 motion, unless the petitioner can show that his remedy under § 23–110 is 'ineffective or inadequate to test the legality of his conviction.'" (quoting D.C. Code § 23–110(g))). Further, the Court held that the claim related to ineffective assistance of counsel in relation to Petitioner's first Section 23-110 motion was barred by the Supreme Court's ruling that "defendants lack a constitutional right to effective assistance of counsel in state collateral proceedings." *Id.* (citing *Williams v. Martinez*, 586 F.3d 995, 1001 (D.C. Cir. 2009)). Finally, the Court held that Petitioner's Appellate IAC claim could not proceed because Petitioner had not "allege[d] either that [he] moved to recall the mandate or that the available remedy was ineffective to protect his rights under the circumstances." *Id.* at *2.

On May 11, 2011, the Court of Appeals for the D.C. Circuit, on its own motion, reversed the District Court's dismissal with respect to Petitioner's Appellate IAC claim. [Dkt. 22]. The D.C. Circuit found that all claims not related to appellate counsel's performance on direct appeal were properly dismissed, but remanded the matter to this Court to "address the merits component of the certificate of appealability question" on the ineffective assistance of appellate counsel claim. *Id.* On June 30, 2011, the District Court issued a certificate of appealability on the Court's dismissal of Petitioner's Appellate IAC claim, finding that it could not "conclude without further development of the record that [P]etitioner has not made a substantial showing of the denial of a constitutional right." [Dkt. 30 at 2]. Upon consideration of the certificate of appealability, the D.C. Circuit remanded the case on January 2, 2013 to the district court to "consider the merits of [Petitioner's] claim of ineffective assistance of appellate counsel on direct appeal." [Dkt. 41 at 1].

Petitioner filed the operative Third Amended Petition in February 2013. [Dkt. 42]. The Petition alleges that Judge Sullivan was ineffective in his representation on appeal, identifying 32 alleged errors, including failure to raise appellate arguments regarding flaws at sentencing, *Brady* violations, double jeopardy, evidentiary errors, ineffective assistance of trial counsel, and the right to be represented by conflict-free counsel on appeal.[13] [Dkt. 42 at 9–15; Dkt. 78-14 at 2–16]. He further asserts claims unrelated to appellate counsel's performance, arguing that he is entitled to have his conviction and sentence vacated because (1) he was sentenced in absentia, (2) trial counsel was conflicted, (3) the prosecution committed *Brady* violations, (4) he was convicted of and sentenced for multiple counts of murder in a case where only one person died, and (5) the trial court erred by admitting a photograph of him with a visible police department identification

[13] These are sometimes referred to herein as Petitioner's "sub-claims."

number. [Dkt. 42 at 30; Dkt. 78-14 at 16–18]. He further requested an evidentiary hearing. [Dkt. 42 at 30].

Respondent filed a motion to dismiss the Petition as time-barred under the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). The Honorable Amy Berman Jackson, United States District Judge, denied that motion based on *Williams v. Martinez*, 586 F.3d 995 (D.C. Cir. 2009) (en banc). *Johnson v Wilson*, No. CV 10-178 (ABJ), 2013 WL 8179778 (D.D.C. Nov. 1, 2013). In that case, the D.C. Circuit addressed whether Section 23-110(g), which "divests jurisdiction to hear habeas petitions from federal courts by prisoners who could have raised viable claims pursuant to section 23-110(a)," bars a federal court from hearing claims of ineffective assistance of appellate counsel, which, under the law of the District of Columbia, cannot be raised in a Section 23-110(a) motion. *Williams*, 586 F.3d at 998. It then held that, "because the Superior Court lacks authority to entertain" such a motion, Section 23-110 "is, by definition, inadequate" to test the merits of such a claim, and therefore does not preclude a petitioner from bringing an ineffective assistance of counsel claim pursuant to 28 U.S.C. § 2254. *Id.* Accordingly, Judge Jackson held that because Petitioner here filed his habeas petition approximately one month after *Williams* announced a rule allowing a federal court to hear Appellate IAC claims from a D.C. prisoner, that claim (with its sub-claims) was timely.[14] *Johnson*, 2013 WL 8179778, at *2.

[14] In its memorandum filed after the evidentiary hearing, Respondent included a footnote stating that, in *Head v. Wilson*, 792 F.3d 102 (D.C. Cir. 2015), the D.C. Circuit held that "nothing in this Circuit's pre-*Williams* jurisprudence prevented [the petitioner] from pursuing his ineffective assistance of appellate counsel claim in a timely federal habeas petition, thus removing the *Martinez* date as the start of the limitations period." [Dkt. 108 at 9 n.5]. At oral argument after the evidentiary hearing, Respondent conceded that it is not arguing that the Petition is time-barred. [Dkt. 114 at 50]. The concession is well-taken, as even if Respondent had not explicitly waived this argument at that hearing, it would nevertheless have been deemed waived. First, it is raised in a footnote without meaningful argument. *See, e.g.*, *Animal Welfare Inst. v. Feld Entm't, Inc.*, 944 F. Supp. 2d 1, 23 (D.D.C. 2013) ("This Court 'need not consider cursory arguments made only in a footnote' . . . ." (quoting *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C.Cir.1999) (en banc))). Second, the teaching of *Head* is that *Williams* did not change the law at all; an Appellate IAC claim could always have been brought in federal court because Section 23-110(g), by its terms, did not divest

In February 2014, counsel appeared on Petitioner's behalf. Thereafter, this matter was referred to the undersigned for a Report and Recommendation.

E. Evidentiary Hearing

In response to Petitioner's request for an evidentiary hearing to develop the record on his Appellate IAC claim, the undersigned found that the D.C. Court of Appeals neither adjudicated that claim on the merits nor dismissed it on procedural grounds. [Dkt. 84 at 11]. In light of the fact that there was not a sufficient factual record to enable *de novo* review and adjudication of that claim, an evidentiary hearing was held on July 20, 2017. [Dkt. 84 at 11, 19; Dkt. 102; Dkt. 103].

At the hearing, Judge Sullivan testified that, at the time that he represented Petitioner, he had been practicing in the D.C. Superior Court for approximately fifteen years, and had handled "a couple of thousand" criminal cases during that time. [Dkt. 102 at 9–10]. He represented criminal defendants at approximately thirty trials per year, including homicide trials, and argued ten to fifteen criminal appeals per year. *Id.* at 11–12. He also kept abreast of developments in criminal law and procedure through continuing legal education. *Id.* at 13–14. He recalled Petitioner from reviewing certain documents provided by counsel for Respondent pertaining to the facts of the case and its aftermath, and because Petitioner had sued him "on many occasions." *Id.* at 16–18. He did not search for documents about the case in response to Petitioner's document requests in this action because everything in his possession had already been provided to Petitioner "years ago," most likely when Petitioner filed his first Section 23-110 motion (which was in late 1998). *Id.* at 19–20, 90–91. Judge Sullivan described that he kept case-related paper files in boxes,

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federal courts of jurisdiction over those claims. *Head*, 792 F.3d at 108–09. But, when Petitioner argued in his opposition to Respondent's motion to dismiss that *Williams* rendered his Petition timely [Dkt 56 at 3–5], Respondent failed to argue that the case did not, in fact support that argument. Indeed, Respondent declined to file any reply to Petitioner's opposition. Thus, Respondent has waived any argument the Petition is time-barred even after *Williams*.

and maintained a database including the client's name, case number, charges, and resolution, as well as the box number if the box was in storage. *Id.* at 22–23, 67. Generally, if he did not send a case file to the client, he kept it in his possession for five years after the case was closed and the sentence served. *Id.* at 29–31. In any case, he did not engage in further investigation or review of materials in preparation for the evidentiary hearing. *Id.* at 19, 23, 41.

In preparation for Petitioner's 1994 trial, Judge Sullivan visited the crime scene, spoke with his client about potential witnesses, reviewed the charging document for the eyewitnesses' names, and used an investigator (possibly one Sherman Hogue) to check into the witnesses, including Mr. Williams, and their backgrounds. [Dkt. 102 at 39–43, 75; Dkt 103 at 20]. He did not, however, interview Mr. Williams. [Dkt. 102 at 53]. Nor did he run a conflicts check to see whether he had previously represented Mr. Williams or any of the other eyewitnesses. [Dkt. 102 at 49–50; Dkt. 103 at 8–9]. Instead, his practice was to rely on his memory, and "[r]ecognizing them"—that is, former clients—"or them recognizing [him]." [Dkt. 103 at 9]. Although he had represented Mr. Williams for a period of approximately one year in 1985–86, Judge Sullivan testified that he did not recognize Mr. Williams before or during Petitioner's 1995 trial or during his appeal and did not, therefore, inform Petitioner of a potential conflict of interest. [Dkt. 102 at 68–69, 76; Dkt. 103 at 17].

Regarding Petitioner's direct appeal, Judge Sullivan did not perform any additional investigation, but only reviewed the trial transcripts. [Dkt. 102 at 99–102]. He did not perform a separate analysis regarding whether Petitioner's representation at trial was adequate, because he "was trial counsel" and "knew what [he] did." *Id.* at 103. He also testified that he was "sure" that he communicated with Petitioner and consulted with him about the arguments on appeal. [Dkt. 103 at 6–7]. Petitioner's opening brief on appeal primarily argued that there was insufficient

evidence to sustain the verdict because Judge Sullivan "[didn't] think there was anything else. There [weren't] a lot of objections to evidence or anything like that." *Id.* at 7–8. Judge Sullivan decided against filing a reply brief because "there was no reason to. . . . [I]t would have been frivolous." *Id.* at 22

Judge Sullivan stated that Petitioner's 2007 complaint to the D.C. Bar first alerted him to his prior representation of Mr. Williams. *Id.* at 17. In order to respond to that complaint, he looked at his database, which apparently contained a misspelling of Mr. Williams' last name as "William." [Dkt. 102 at 22, 38, 66]. He also may have reviewed Mr. Williams' trial testimony in connection with both his response to that complaint and with the affidavit he provided in response to Petitioner's Trial IAC claim raised as part of his fourth Section 23-110 Motion. *Id.* at 38.

Investigator Brendan Andrew Wells also testified at the evidentiary hearing. Mr. Wells worked as a Criminal Justice Act investigator in the D.C. Superior Court from 1987 until 1996, at which point he became an investigator with the D.C. Public Defender Service, where he worked until 2014. [Dkt. 103 at 40–41]. He testified as to the investigative tools he used around the time of Petitioner's trial in 1994. According to Mr. Wells, he would typically develop a list of known witnesses, and then utilize a database at D.C. Superior Court known as "CIS." *Id.* at 46–48. When a name was entered (along with other identifying information, like a police department identification number, if available), the database would provide a list of all of the cases in which an individual was a defendant. *Id.* at 49, 51, 54. Each case name allowed the user to link to the case summary, which would include information such as the charges from the case and the individual's attorney. *Id.* at 51. The investigator would then fill out a form in order to access the hard-copy case file. *Id.* at 55. A clerk would provide the case file, as long as it was still housed at the D.C. Superior Court, which kept files for approximately five years. *Id.* at 55–56. The case file

would include such things as the docket sheet, attorneys' notices of appearance, the charging document, and a narrative of the alleged crime. *Id.* at 57. Mr. Wells would also investigate the crime scene and attempt to interview the witnesses. *Id.* at 47, 60. Mr. Wells asserted that he had seen Sherman Hogue using CIS and pulling case files at D.C. Superior Court. *Id.* at 63.

When Petitioner testified, he recalled that he had met with Judge Sullivan's investigator, Sherman Hogue, several times while he was represented by Judge Sullivan. *Id.* at 84. He testified that after he was convicted, although he tried to contact his attorney by phone and by letter, neither Judge Sullivan nor anyone from his firm contacted the Petitioner during the pendency of his appeal. *Id.* at 79–81. He was not advised that he could appeal based on ineffective assistance of trial counsel or that, if he did so, he should consider getting a different attorney. *Id.* at 82. Indeed, Petitioner stated that he learned that an appeal had been filed only when he received the opinion from the D.C. Court of Appeals affirming his conviction and remanding for resentencing. *Id.* at 82.

Petitioner testified that he learned of Judge Sullivan's representation of Mr. Williams in February 2007, when an inmate whom Petitioner had helped with some legal work asked his counsel to perform a background check on Mr. Williams. *Id.* at 86. When Petitioner received the information about Mr. Williams' former convictions, he requested the case jackets, upon examination of which he learned of the prior representation. *Id.* at 87–88. He then raised the potential conflict of interest with the D.C. Superior Court (in his fourth Section 23-110 motion) and the D.C. Court of Appeals. *Id.* at 89.

II. LEGAL STANDARDS

A. AEDPA

AEDPA authorizes federal courts to entertain a habeas corpus petition from a prisoner in state custody "on the ground that he is in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a). If a state court has adjudicated a particular claim on the merits, habeas relief may be granted only where the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary" to clearly established federal law when the state court "applies a rule that contradicts the governing law set forth" in a Supreme Court opinion, or when it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A decision is an unreasonable application of clearly established law when "the state court correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694 (2002). Habeas relief should be granted on this prong only where there is "no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). When reviewing a habeas petition that a state court adjudicated on the merits, the federal court is similarly deferential to the state court's factual determinations, which are presumed correct and are rebutted only upon presentation of clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1).

However, this highly deferential standard is employed only when the state court has in fact adjudicated the merits of a petitioner's habeas claim—that is, the state court has issued a judgment upon "hear[ing] and evaluat[ing] the evidence and the parties' substantive arguments." *See Johnson v. Williams*, 568 U.S. 289, 302 (2013) (emphasis omitted) (quoting Black's Law Dictionary 1199 (9th ed. 2009)). If the state court has not done so, the federal court's review of the habeas petition is *de novo*, and the principles that ordinarily animate AEDPA deference to a state court's judgment—comity, finality, and federalism—dissipate. *See Winston v. Kelly*, 592 F.3d 535, 555 (4th Cir. 2010). This Court has previously found that Petitioner's Appellate IAC claim was not adjudicated by the local courts, and that review should therefore be non-deferential. [Dkt. 84 at 1–2]. Still, to obtain habeas relief Petitioner must show by a preponderance of the evidence that his federal constitutional rights were violated. *See, e.g.*, *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002); *Gaines v. Kelly*, 202 F.3d 598, 601 (2d Cir. 2000); *Freund v. Butterworth*, 165 F.3d 839, 869 (11th Cir. 1999) (en banc).

B. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, a court applies the familiar standard from *Strickland v. Washington*, 466 U.S. 668 (1984). A petitioner must show (1) that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" and (2) that "the deficient performance prejudiced the defense." *Id.* at 687.

Counsel's performance was deficient if it "fell below an objective standard of reasonableness." *Id.* at 687–88; *see also Peete v. United States*, 942 F. Supp. 2d 51, 54 (D.D.C. 2013). But, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; that is, the petitioner must overcome the

presumption that, under the circumstances, the challenged action "might be considered sound . . . strategy." *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also United States v. Agramonte*, 366 F. Supp. 2d 83, 86 (D.D.C. 2005) ("In evaluating counsel's performance, the Court begins with a rebuttable presumption that counsel provided effective assistance because there is a wide range of sound strategy that a constitutionally effective attorney might choose."), *aff'd*, 304 F. App'x 877 (D.C. Cir. 2008). "It is up to the [petitioner] to overcome this presumption and show that the challenged action was not the result of sound strategy." *Agramonte*, 366 F. Supp. 2d at 86. In a claim charging appellate counsel with failing to raise certain issues on appeal, the petitioner must demonstrate that the omitted arguments were "clearly stronger than [the arguments actually] presented." *Id.* at 87 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

To show *Strickland*'s second prong—that the deficient performance prejudiced the outcome—the petitioner must establish that the "likelihood of a different result [is] substantial, not just conceivable." *Harrington*, 562 U.S. at 112. For a challenge to appellate counsel's performance, that means the petitioner must establish that "but for his counsel's unreasonable failure . . . he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. It is not, however, necessary for a court to address both prongs of the *Strickland* test. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Smith*, 528 U.S. at 286 (quoting *Strickland,* 466 U.S. at 697); *see also United States v. Palmer*, 902 F. Supp. 2d 1, 19 (D.D.C. 2012) ("This Court need not decide whether these failures fell below an 'objective standard of reasonableness' because petitioner has

failed to show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (quoting *Strickland*, 466 U.S. at 694)). Likewise, if the more efficient course is to deny the claim based only on a failure to show deficient performance, that strategy is also acceptable. *See, e.g.*, *Agramonte*, 366 F. Supp. 2d at 86 ("The Court need not address the second prong here, as defendant has failed to meet his initial burden [regarding deficient performance] in this case.").

C. *Cuyler v. Sullivan*

"[T]he Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties" to other participants in a criminal trial. *Cuyler v. Sullivan*, 446 U.S. 335, 351 (1980) (Brennan, J., concurring in part and concurring in the judgment). That is, "[c]onflict of interest claims . . . are a 'specific genre' of ineffective assistance of counsel claim." *United States v. Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014) (quoting *United States v. Bruce*, 89 F.3d 886, 893 (D.C. Cir. 1996)). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 348 & n.14. However, the petitioner "typically need not demonstrate the second prong of the *Strickland* test—that the lawyer's deficient performance affected the outcome of the case." *Wright*, 745 F.3d at 1233.

An attorney "has an 'actual conflict' when he is 'required to make a choice advancing [another client's] interests to the detriment of his client's interest.'" *United States v. Gantt*, 140 F.3d 249, 254 (D.C. Cir. 1998) (quoting *Bruce*, 89 F.3d at 893). Therefore, "[i]f an attorney's . . . representation of conflicting interests was unknowing, it does not give rise to a claim." *United States v. McGill*, 815 F.3d 846, 943 (D.C. Cir. 2016), *cert. denied sub nom. Oliver v. United States*,

138 S. Ct. 57 (2017), and *cert. denied sub nom. Seegers v. United States*, 138 S. Ct. 58 (2017), and *cert. denied sub nom. Alfred v. United States*, 138 S. Ct. 58 (2017); *see also United States v. Berkeley*, 567 F.3d 703, 709 (D.C. Cir. 2009) ("[B]ecause an unknown conflict could not have 'adversely affected [the attorney's] performance,' the *Cuyler* standard cannot be met." (quoting *Cuyler*, 446 U.S. at 348)); *Gantt*, 140 F.3d at 254 (where attorney unaware of "any possible connection" between clients, he "did not face an 'actual conflict,' [and] so he did not render ineffective assistance on that ground").

The D.C. Circuit "has . . . not decided whether the *Cuyler* . . . standard applies to cases involving successive representation." *Wright*, 745 F.3d at 1233; *see also Mickens v. Taylor*, 535 U.S. 162, 176 (2002) ("Whether [*Cuyler*] should be extended to . . . cases [of successive representation] remains, as far as the jurisprudence of this Court is concerned, an open question."). However, another court in this District has stated that "[d]eficient performance resulting from an 'actual conflict' exists where a defense attorney previously represented a witness for the prosecution and as a result cannot cross-examine that witness aggressively or must guard against the disclosure of confidential information during the cross-examination." *Sams v. United States*, No. CR 95-012 (RMU), 1999 WL 680008, at *2 (D.D.C. July 29, 1999); *cf. Nix v. Whiteside*, 475 U.S. 157, 188 n.7 (1986) (Blackmun, J., concurring in the judgment) ("[A]n attorney who has previously represented one of the State's witnesses has a continuing obligation to that former client not to reveal confidential information received during the course of the prior representation. That continuing duty could conflict with his obligation to his present client, the defendant, to cross-examine the State's witnesses zealously."). Here, because Petitioner has not established that there was a conflict of interest in the first instance, it is unnecessary to determine whether *Cuyler* should apply to allegations of successive representation.

III. DISCUSSION

A. AEDPA Deference

The peculiar procedural posture of this Petition raises a somewhat complex question of AEDPA deference. As noted above, a federal court addressing an exhausted habeas claim must generally defer to a state court's legal conclusions and findings of fact. 28 U.S.C. § 2254(d). Here, no D.C. court has passed on Petitioner's ineffective assistance of appellate counsel claims; however, most of the issues underlying the ineffective assistance claims presented here have been adjudicated by D.C. courts within the context of Petitioner's challenges to the effectiveness of his counsel at trial. The parties disagree on whether the D.C. courts' legal conclusions on these underlying issues are entitled to deference.[15]

Petitioner cites *Ceasor v. Ocweija*, 655 F. App'x 263 (6th Cir. 2016), an unpublished decision from the Sixth Circuit, to argue that no deference is due to the reasoning of the D.C. courts because they have not adjudicated the specific Appellate IAC claim at issue. In that case, like this one, the state courts had adjudicated the petitioner's ineffective assistance of trial counsel claims, but overlooked his ineffective assistance of appellate counsel claims. *Id.* at 277. Although the respondent argued that the ineffective assistance of appellate counsel claims were "connected, overlapping, and derivative" of the ineffective assistance of trial counsel claims, the court held that it would review those claims *de novo* because the claims had not actually been adjudicated. *Id.* at 277 & n.11. That is, while recognizing that "the adjudication of an ineffective assistance of appellate counsel claim invariably requires . . . evaluat[ion] of the underlying ineffective assistance of trial counsel claim," *id.* at 277 n.11, the court did not defer to the state court's legal conclusions

[15] The parties appear to agree that the factual findings of the D.C. Courts are entitled to deference [Dkt. 112 at 3–4 & n.2], and, indeed, 28 U.S.C. 2254(e)(1) appears to mandate this, stating that "determination of a factual issue made by a State court shall be presumed to be correct."

on the trial counsel claims in deciding the appellate counsel claims, *see id.* at 282–86. There is some support for this position in the Supreme Court's *Harrington* decision which (in a different context)[16] notes that "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." 562 U.S. at 98.

However, as the Fourth Circuit recognized in *Winston*, "[t]he requirement that § 2254(d) be applied . . . to claims 'adjudicated on the merits' exists because comity, finality, and federalism counsel deference to the judgments of state courts when they are made on a complete record." 592 F.3d at 555. While those concerns dissipate when a state court does not adjudicate a claim on the merits (or does so on an incomplete record), they would still seem relevant to legal determinations made on underlying issues, even if the specific, ultimate claim presented to a federal habeas court is not addressed. And, of course, the cases in which the Supreme Court has cautioned lower federal habeas courts about the deference due to state court decisions are legion—and many are cited by Respondent. [Dkt. 113 at 3–5]. Thus, as a matter of first principles—that is, respect for comity, finality, and federalism—deference to the subsidiary legal conclusions of the D.C. Courts would appear to be appropriate. However, principles of statutory interpretation counsel against such deference. After all, as *Harrington* points out, Section 2254(d) pegs deference to legal conclusions to "*claim[s]* . . . adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d)(1) (emphasis added). When Congress wanted to unlink deference from "claims," it knew how to do so: for example, Section 2254(e)(1)'s deference applies to any "determination[s]" of "factual issue[s] made by a State court." In any case, it is ultimately not necessary to decide this issue here

[16] *Harrington* addresses whether a state court decision denying a multipart claim without setting forth its reasoning is entitled to deference under 28 U.S.C. § 2254(d)(1). 562 U.S. at 98–99.

because Petitioner's claims fail even without deferring to the legal determinations in the D.C. courts' various decisions.[17]

B. Claims Not Based on Ineffective Assistance of Appellate Counsel (Nos. 33–38)[18]

Petitioner includes in the operative Petition (which is the Third Amended Petition) six claims that are not based on ineffective assistance of appellate counsel, ranging from allegations of *Brady* violations by prosecutors at his trial to assertions of sentencing errors by the trial court. [Dkt. 42 at 30; Dkt. 78-14 at 16–18]. However, in connection with the original petition, the Honorable Colleen Kollar-Kotelly, United States District Judge, dismissed for lack of jurisdiction (pursuant to Section 23-110) all of Petitioner's claims that were not grounded in ineffective assistance of appellate counsel. [Dkt. 3 at 2]. The D.C. Circuit affirmed that part of Judge Kollar-Kotelly's order, stating, "The district court properly dismissed for lack of jurisdiction appellant's claims not related to the ineffective assistance of appellant's counsel . . . ." [Dkt. 22 at 1]. To be sure, in her 2013 decision on Respondent's motion to dismiss the operative Petition, Judge Jackson held that Section 23-110 was not adequate to test claims of ineffective assistance of appellate counsel and so allowed them to proceed, *Johnson*, 2013 WL 8179778, at *2, but did not address

[17] Addressing Judge Canan's decision on Petitioner's fourth Section 23-110 motion, Petitioner contends that, if deference were due to a D.C. court opinion, it would be to the "last reasoned opinion issued by a state court," that is, the D.C. Court of Appeals decision affirming Judge Canan's opinion. [Dkt. 112 at 5]. Petitioner is mistaken. The D.C. Court of Appeals decision summarily affirmed Judge Canan's order without explaining its reasoning. [Dkt. 63-11]. "[W]hen a state appellate court summarily affirms a reasoned lower-court decision, . . . a federal habeas court is to 'look through' the unexplained affirmance to examine the 'last reasoned decision' on the claim, assuming that the summary appellate decision rests on the same ground." *Hester v. Ballard*, 679 F. App'x 273, 278 (4th Cir.) (second alteration in original) (quoting *Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525–26 (4th Cir. 2016)), *cert. denied*, 138 S. Ct. 124 (2017). Moreover, to the extent that deference were required, it would apply to "the last reasoned [D.C.] court opinion addressing *each claim*." *Thomas v. Clements*, 789 F.3d 760, 766 (7th Cir. 2015) (emphasis added) (quoting *Ruhl v. Hardy*, 743 F.3d 1083, 1091 (7th Cir. 2014)).

[18] In connection with these proceedings, counsel for Petitioner produced a chart outlining and numbering the claims included in the Petition, from 1 to 38. [Dkt. 78-14]. In the following discussion, the numbers assigned to each of the claims are cited for reference. Some of the claims argued by Petitioner's counsel fall within the penumbra of the explicit claims raised in the Petition, however, and so are not identified with a claim number.

the other claims included in the Petition. To the extent that those claims are still before the Court (even in light of the opinions of Judge Kollar-Kotelly, Judge Jackson, and the D.C. Circuit) they should now be dismissed.

"For prisoners of the District of Columbia, . . . habeas relief is especially hard to come by," because Section 23-110 divests federal courts of jurisdiction over both claims that could have been brought under that section but were not, as well as claims that were brought under that section but were denied. *Gorbey v. United States*, 55 F. Supp. 3d 98, 102 (D.D.C. 2014). Here, Petitioner's claims that (1) the trial court erred by sentencing him in absentia, (2) trial counsel labored under a conflict of interest, and (3) the government withheld *Brady* material (Nos. 33–35), were raised and denied by the D.C. courts. [Dkt. 63-10 at 16–21, 28–32; Dkt. 78-14 at 16–17; Dkt. 78-38 at 2]. Accordingly, they should be dismissed. Simlilarly, Claim number 38, that the trial court erred by allowing into evidence a photo of Petitioner with a Police Department Identification number [Dkt. 42 at 30], is barred because it could have been but was not raised in a Section 23-110 motion. [Dkt. 78-14 at 18]. And the two claims relating to the sentence he received—that he should be resentenced because "he was sentenced for multiple counts of murder although only one person died" and because "the jury convicted [him] of first-degree felony murder and the lesser included offense of second-degree murder for a single murder" (Nos. 36–37)[19]—should be dismissed because his second-degree murder conviction was vacated in 1996 after remand from the D.C. Court of Appeals. [Dkt. 63 at 3].

[19] These claims apparently were raised in a Section 23-110 motion, but were not adjudicated by a District of Columbia local court. [Dkt. 78-14 at 17–18].

C. Claims Related to Conflict of Interest of Appellate Counsel (Nos. 4–5, 14)

The primary focus of Petitioner's habeas petition is his claim that Judge Sullivan labored under an actual conflict of interest on appeal that adversely affected his performance because he represented prosecution witness Mr. Williams in 1985.[20] Recognizing that Judge Sullivan has repeatedly asserted that he had no recollection of his prior representation of Mr. Williams, Petitioner contends that his former attorney is not to be believed—on this or on most other issues material to the Petition. Specifically, Petitioner argues that the "inconsistent and often implausible explanations that Judge Sullivan has offered [primarily concerning his failure to remember the prior representation] cast serious doubt on his credibility as a witness" and that his "improper disposal of Petitioner's files" in light of reasonably foreseeable litigation "justifies an adverse inference in favor of Plaintiff's claims." [Dkt. 104 at 19, 22].

1. Credibility Finding

Petitioner's overarching argument regarding Judge Sullivan's credibility is that he has made too many inconsistent statements and offered too many unconvincing explanations to credit his testimony. [Dkt. 104 at 19]. "The task of resolving 'discrepancies among the various accounts' offered into evidence is 'quintessentially' a matter" for the fact-finder. *Al-Madhwani v. Obama*, 642 F.3d 1071, 1076 (D.C. Cir. 2011) (quoting *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 561 (D.C. Cir. 1993)). A credibility determination takes into account a witness' demeanor and "apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *United States v.*

[20] The enumerated claims in the Petition argue that Judge Sullivan was ineffective for failing to argue on appeal that the trial court erred by appointing conflicted trial counsel (No. 4), that "new conflict-free counsel should have been appointed" on appeal (No. 5), and that he was deficient for failing to inform the trial court that he had previously represented Mr. Williams (No. 14). [Dkt. 42 at 10, 12; Dkt. 78-14 at 3, 8].

McCoy, 242 F.3d 399, 408 n.15 (D.C. Cir. 2001) (quoting *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963)).

The undersigned finds that Judge Sullivan's testimony at the evidentiary hearing was credible. His demeanor was open and his answers were candid and non-evasive. Indeed, he answered all of the questions presented to him, even when those answers revealed some awkward admissions. His responses on the key issue—that he was unaware of his prior representation of Mr. Williams—were direct and forthright at the hearing, and have been consistent over time. Moreover, his failure to recall his representation of Mr. Williams is both plausible and reasonable, given the hundreds of criminal cases that Judge Sullivan handled in the approximately eight years between the end of his representation of Mr. Williams and the beginning of his representation of Petitioner.[21] [Dkt. 63-10 at 25; Dkt. 102 at 10].

Petitioner's arguments to the contrary are not convincing. Indeed, his catalog of putative inconsistencies overreaches. Petitioner claims that Judge Sullivan's testimony that he did not have a process in place to check for conflicts and simply relied on his memory "contradicts his prior sworn statements" in his submissions in response to both Petitioner's D.C. Bar complaint and the fourth Section 23-110 motion that the misspelling in his database caused his mistake. [Dkt 104 at 20; Dkt. 109 at 8]. Specifically, he asserts that

> Judge Sullivan has previously claimed to the D.C. courts and to Bar Counsel that he never discovered his prior representation of Victor Williams because Williams' name was misspelled in the database that Judge Sullivan used for conflicts checks. At the evidentiary hearing, Judge Sullivan backtracked and offered a completely new explanation, testifying instead that, as a rule, he never ran conflicts checks.[22]

[21] It should be noted that Mr. Williams apparently did not recognize Judge Sullivan, either.

[22] Upon a cursory scan, the undersigned similarly construed Judge Sullivan's prior statements as indicating that he had checked his database as part of a conflicts check process and failed to find Mr. Williams' name because of the typographical error. [Dkt. 84 at 6; Dkt. 114 at 6–7]. However, after closer scrutiny, the Court admitted at the continuation of the evidentiary hearing in January 2018 that such interpretation was an "overread[ing]." [Dkt. 114 at 7].

[Dkt. 104 at 20]. But a closer look at the actual statements at issue undermines this contention. In response to the D.C. Bar complaint, Judge Sullivan stated:

> Ten years prior to [representing Petitioner],[23] I represented a man named Victor J. William (this is the spelling in my database) . . . . Mr. William(s) was charged with first-degree burglary, which was ultimately recharged as unlawful entry and petty theft, to which Mr. William(s) entered guilty pleas. I don't recall what, if any, part Victor J. Williams (as identified by [Petitioner]) played in the trial. . . . The only information I had available to me with regard to Victor J. William(s) and [his] Superior Court [c]ase . . . was as stated above because my file with regard to Mr. William(s) had already been discarded prior to [Petitioner's] trial. My present recollection is that if I had represented a witness who testified in [Petitioner's] trial, I did not know it at the time, because had I known it, it would have been discussed on the record.

[Dkt. 78-24 at 2]. In response to Petitioner's fourth Section 23-110 motion, Judge Sullivan stated:

> After [Petitioner's] conviction, and after it was alleged that I had represented government witness "Victor Williams" I reviewed by existing records and saw that my records were under the name "Victor William" without the "s" which is how his name was listed on the bail report which is why I believe I had his name listed as "William" and not "Williams" in my database.
>
> . . . .
>
> By the time I represented [Petitioner], the only information I had available to me with regard to Victor J. William(s) and [his] Superior [c]ase . . . was that I had represented a Victor J. William . . . , that he had been charged with first-degree burglary and that he had pled guilty to unlawful entry and petty theft because by the time I represented [Petitioner], my file with regard to Mr. Williams(s) had already been discarded ([it] is my practice to keep files five years after the case becomes completely closed (all sentences have been served etc.)[].]
>
> . . . If I had represented a witness who testified in [Petitioner's] trial, I did not know it at the time, because if I had known it, I would have disclosed it to the Court and to government counsel on the record.

[23] It may have been ten years from when Judge Sullivan's representation of Mr. Williams began until the time his representation of Petitioner began; however, the record indicates it was approximately eight years between the time when Judge Sullivan's representation of Mr. Williams ended and his representation of Petitioner began. [Dkt. 63-10 at 25; Dkt. 102 at 10].

[Dkt. 63-9, ¶¶ 4, 6–7]. Neither of those statements indicate that the misspelling in the database caused Judge Sullivan to overlook the fact that he had represented Mr. Williams in the mid-1980s. Indeed, at the evidentiary hearing, he—quite candidly—confirmed that:

> [I]t was spelled wrong in my database, but that really had nothing to do with it. I just didn't recognize him and he didn't recognize me at the trial. Had that happened, I would have immediately—or had the government—you know, if the government told me that one of their witnesses—you represented one of our witnesses, I would have said, well, what are we going to do?

[Dkt. 102 at 89]. Petitioner states that Judge Sullivan's testimony that "it was not his practice to run conflicts checks to ensure that he had never previously represented government witnesses," but rather relied on his memory, is "illogical . . . and highly [ethically] questionable." [Dkt. 104 at 20]. Although it was certainly not best practice, that does not make his testimony incredible.

Petitioner's other attempts to highlight inconsistencies suffer from similar flaws. For example, he contends that Judge Sullivan testified both that "he made no attempt to interview the government's witnesses prior to Petitioner's *trial* or on direct appeal," and, in contrast, that "he would have tried to find and interview government witnesses." [Dkt. 104 at 21 n.12 (emphasis added)]. But that claim misstates the evidence. Judge Sullivan testified, in the context of a colloquy about Mr. Williams' trial testimony, that he hired an investigator and "we went out and, obviously, tried to find and tried to interview" the witnesses they knew about. [Dkt. 102 at 39–40]. He further asserted that he and the investigator "looked to see" if they could find Mr. Williams and "attempt[ed] to locate" him. [Dkt. 102 at 52]. Later, Judge Sullivan was asked, "As a general matter, when you were preparing an *appeal*, would you attempt to interview or re-interview witnesses?" and he replied, "No." [Dkt. 102 at 102 (emphasis added)]. That is, Judge Sullivan

never stated that he made no attempt to investigate Mr. Williams prior to the trial; indeed, he said quite the opposite.[24]

Petitioner also quibbles with Judge Sullivan's assertion at one point in the evidentiary hearing that he kept client files "indefinitely" because it conflicts with his prior declaration, noted above, that he kept files for "five years after the case becomes completely closed" [Dkt. 63-9, ¶ 6;Dkt. 104 at 21 n.13]. But the essence of Judge Sullivan's testimony on his document retention policy actually indicates that he followed the D.C. Bar's guidelines on file retention, which allowed files to be discarded, and he did discard files after varying periods of time depending on the case and the situation. [Dkt. 102 at 27, 92–93]. Specifically, he testified on cross-examination that he would "throw[] some files away, if [he] hadn't heard from the [client] in years." *Id.* at 93. That is not materially different than what he averred to Bar Counsel.

Finally, Petitioner suggests that, given the background investigation Judge Sullivan indicates that he or his investigator performed, which would have included using a Superior Court database to perform criminal background checks on important government witnesses, they would have discovered his prior representation of Mr. Williams. This is both speculative and oversimplifies the testimony. Judge Sullivan testified that such research was not "routine" but was carried out if it was necessary. [Dkt. 102 at 44]. As Petitioner's own witness testified, searching the database by name would provide a list of cases in which the individuals of that name were involved. [Dkt. 103 at 51]. That list would not, itself, reveal other information, such as who represented that person in each of those cases. That could be discovered on a later screen only by

[24] In another example of over-reading the testimony, Petitioner intimates that Judge Sullivan testified that he knew of Mr. Williams' criminal history more than a week prior to the trial, but also states that he did not investigate that criminal history other than by reading the government's so-called *Giglio* letter sent the day before trial. [Dkt. 104 at 12, 21]. However, all Judge Sullivan testified was that he did not think Mr. Williams would have agreed to a pre-trial interview, given that "he had significant ties to the criminal justice system." [Dkt. 102 at 52]. He did not state that he knew of those ties "prior to the week of trial" [Dkt. 104 at 21] or that such knowledge affected his attempt to interview Mr. Williams.

"clicking" on "F2" to get the case summary, or by requesting the case jacket from a court clerk. *Id.* at 54–55. If the case was more than five years old—as was the case here with regard to Judge Sullivan's representation of Mr. Williams in 1985—it could take as long as two weeks to get the case jacket. *Id.* at 56. The case jacket would include such information as a docket sheet, notices of appearance, and the charging document. *Id.* at 57. Thus, it is simply inaccurate to say, based on the evidence, that a person engaging in the research that might have been performed in connection with Mr. Williams would likely have discovered that Judge Sullivan had represented Mr. Williams approximately a decade before he represented Petitioner.

In sum, the undersigned finds that Judge Sullivan's testimony at the evidentiary hearing was credible and that Petitioner's arguments in support of an adverse credibility finding fail.

2. Adverse Evidentiary Inference

Nor is there justification for an adverse evidentiary inference due to Judge Sullivan's purported "improper disposal of petitioner's files." [Dkt. 104 at 22]. To be sure, where a party has intentionally destroyed records relevant to a contested issue in litigation, an inference that those records would have undermined that party's position or supported the opposing party's claims may be appropriate. *See, e.g.*, *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 170–71 (D.C. Cir. 2013). Generally, to merit imposition of an evidentiary sanction, the proponent must establish:

> (1) [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind"; and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defense of the party that sought it.

Ashraf-Hassan v. Embassy of France in the United States, 130 F. Supp. 3d 337, 340 (D.D.C. 2015) (alteration in original) (quoting *Mazloum v. District of Columbia Metropolitan Police Dep't*, 530

F. Supp. 2d 282, 291 (D.D.C. 2008)). Where, as here, the fact-finder is not a jury but a judge, a court should be particularly "circumspect in [its] drawing of inferences" because "prejudice is less likely." *Id.*

Here, Petitioner fails at the first step. The subject files would have included Petitioner's own case file and Mr. Williams' case file, neither of which Judge Sullivan has in his possession, custody, or control. In 2007, in response to Petitioner's D.C. Bar complaint, Judge Sullivan asserted that he had sent Petitioner's case file to Petitioner or his attorney "several years ago" in connection with one of Petitioner's collateral attacks on his conviction. [Dkt. 78-24 at 2]. At the evidentiary hearing, Judge Sullivan similarly testified that he had sent Petitioner's case file to Petitioner or his appointed attorney during the litigation of the first Section 23-110 motion. [Dkt. 102 at 19, 30]. Petitioner has provided no countervailing evidence—indeed, at the evidentiary hearing, he testified merely that he had not seen the briefs filed in his appeal, not that neither he nor his appointed counsel had received the case file from Judge Sullivan. [Dkt. 103 at 83]. Accordingly, there was no destruction of potentially relevant evidence in connection with Petitioner's case file—Judge Sullivan sent it to Petitioner or his agent.

As to Mr. Williams' file, as Judge Sullivan explained in 2008 in connection with Petitioner's fourth Section 23-110 motion, he had discarded it five years after Mr. Williams' case was fully closed, and prior to beginning his representation of Petitioner. [Dkt. 63-9, ¶ 6]. Petitioner provides neither evidence nor argument as to why this Court should not credit that representation. In any event, the undersigned finds that there was no pending litigation requiring the Judge Sullivan to retain those records, and it does not appear that any other source of law obliged him to preserve those files at the time they were discarded.[25] Accordingly, because Petitioner has not

[25] Petitioner's only attempt to identify a legal obligation on Judge Sullivan to retain those files is to cite D.C. Bar Legal Ethics Opinion 206 (1989). That opinion states that an attorney who has possession of client property, such as

satisfied even the first step for its imposition, an adverse evidentiary sanction is not appropriate here.

Petitioner then complains that Judge Sullivan failed even to search for responsive records in response to discovery requests propounded prior to the evidentiary hearing, and suggests an adverse evidentiary sanction for that omission. [Dkt. 104 at 23]. However, he identifies no specific source providing for such a sanction. Rule 6 of the Rules Governing Section 2254 Cases allows application of the Federal Rules of Civil Procedure to actions pursuant to 28 U.S.C. § 2254. Rule 37 of the Federal Rules of Civil Procedure permits certain sanctions, including "adverse findings of fact, considering an issue established for the purpose of the action[, or] adverse inferences" when a discovery order has been violated. *Nunnally v. District of Columbia*, 243 F. Supp. 3d 55, 73 (D.D.C. 2017) (quoting *3E Mobile, LLC v. Glob. Cellular, Inc.*, 222 F. Supp. 3d 50, 53 (D.D.C. 2016)); *see also* Fed. R. Civ. P. 37(b). Here, of course, Judge Sullivan did not violate a court order, so Rule 37 does not apply. However, an adverse inference can be imposed pursuant to the court's inherent power "whenever a preponderance of the evidence establishes that a party's misconduct [or that of a witness] has tainted the evidentiary resolution of [an] issue." *Nunnally*, 243 F. Supp. 3d at 73 (quoting *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995)). Again, Petitioner fails to make a sufficient showing. As noted, Judge Sullivan testified that he no longer had case files related to Petitioner or Mr. Williams. Thus, over twenty

"originals of documents provided to the lawyer by the client" should not dispose of that material until the attorney has made a good faith effort to contact the former client to determine whether he wants the material held, returned, or destroyed. Other material, such as attorney work product, may be destroyed as long as "there is no legal obligation or pending litigation for which the documents should be retained and no foreseeable prejudice to the former client" from its destruction. That is, Ethics Opinion 26 does not mandate a particular period of time for which client records must be held. Here, there is no indication that Judge Sullivan destroyed property belonging to Mr. Williams, and no one has argued that five years after a case is closed and sentence is served is an unreasonably short period of time to retain attorney-created materials. And, indeed, a later Ethics Opinion advised that "a five year retention period beginning at the termination of representation is generally sufficient to protect the client's interests [as to client property other than 'valuable client property'] with respect to closed files." D.C. Bar Legal Ethics Opinion 283 (1998).

years after the events in question, Judge Sullivan had no physical documents to produce in response to Petitioner's pre-hearing discovery requests. Judge Sullivan's database—which may or may not have been accessible in 2017 when Petitioner propounded his discovery requests [Dkt. 102 at 98–99; Dkt. 104–4]—would have yielded little other than the clients' names, case numbers, charges, and resolution, all of which were already known by all of the participants. [Dkt. 102 at 22–23, 67]. Petitioner's intimation that the database contained possible relevant "documents" [Dkt. 109 at 9] has no basis in the evidence. Petitioner has again not shown that an adverse inference in favor of his claims is appropriate.[26]

3. Application of Cuyler

Finding Judge Sullivan's testimony concerning his failure to recall his representation of Mr. Williams credible, and no basis on which to draw an adverse inference evidentiary sanction, Petitioner's conflict of interest claims under *Cuyler* must fail. It is Petitioner's burden to show that his appellate counsel labored under an actual conflict of interest that adversely affected his performance. *See, e.g.*, *Gantt*, 140 F.3d at 254. The *sine qua non* of such a claim is that the attorney knew of the conflict during the challenged representation. *See, e.g.*, *Berkeley*, 567 F.3d at 709 ("[B]ecause an unknown conflict could not have 'adversely affected [the attorney's] performance,' the *Cuyler* standard cannot be met." (quoting *Cuyler*, 446 U.S. at 348)). Judge

[26] Although it is unnecessary to the resolution of this dispute, it is worth noting that Petitioner fails at the second and third steps of the analysis, as well. As noted above, Petitioner must establish that any destruction of documents was accompanied by a culpable state of mind. *See Ashraf-Hassan*, 130 F. Supp. 3d at 340. The only evidence presented, however, indicates that Judge Sullivan did not destroy Petitioner's file, but rather turned it over to Petitioner or his counsel in connection with the first Section 23-110 Motion in approximately 1998, and that he got rid of Mr. Williams' file approximately five years after that case was fully closed, that is, in approximately 1992, consistent with his regular business practice. There is no suggestion as to why Judge Sullivan would have destroyed Mr. Williams' file with a culpable state of mind in the early 1990s.

Nor has Petitioner shown that a reasonable factfinder could conclude that Mr. Williams' case file would have supported the claims Petitioner advances here. *See Ashraf-Hassan*, 130 F. Supp. 3d at 340. In light of the evidence that neither Judge Sullivan nor Mr. Williams in fact recognized each other at trial, it is not clear how the case file, itself, could support Petitioner's claims that Judge Sullivan did recognize Mr. Williams. What document, that is, could have functioned as proof of that?

Sullivan's testimony at the evidentiary hearing, as well as other evidence, establishes that he was unaware until approximately 2007 that he had represented Mr. Williams in a criminal case prior to representing Petitioner. [Dkt. 63-9, ¶¶ 4, 8; Dkt. 78-24 at 2; Dkt. 102 at 49–50, 68–69, 76, 99–102; Dkt. 103 at 8–9, 17]. Because he was unaware of that prior representation, he did not face an actual conflict in his representation of Petitioner. *See McGill*, 815 F.3d at 943; *Berkeley*, 567 F.3d at 709; *Gantt*, 140 F.3d at 254.

The Petition includes three claims that rely for their success on a finding that Judge Sullivan's representation of Petitioner was conflicted and that such a conflict adversely affected that representation. He asserts that on direct appeal Judge Sullivan (1) refrained from "making argument that the trial court erred for appointing an attorney who had previously represented a government witness"; (2) refrained from "making argument that new, conflict-free counsel should have been appointed"; and (3) failed to inform the trial court that he had a conflict of interest. [Dkt. 42 at 10, 12; Dkt. 78-14 at 3, 8]. These conflict-based claims should therefore be denied.[27]

D. Ineffective Assistance of Appellate Counsel

Petitioner also advances ineffective assistance of appellate counsel claims not based on a conflict of interest. Specifically, he asserts thirty-two alleged errors made by Judge Sullivan

[27] Petitioner advances a new *Cuyler* claim in the briefing that followed the evidentiary hearing: that, even if Judge Sullivan was unaware of his representation of Mr. Williams until after the appeal was decided, "his interests on appeal conflicted with Petitioner's due to Judge Sullivan's personal interest in avoiding his ineffective trial representation coming to light." [Dkt. 104 at 32]. The D.C. Circuit has rejected such "attempts to force . . . ineffective assistance claims into the 'actual conflict of interest' framework . . . and thereby supplant the strict *Strickland* standard with the far more lenient *Cuyler* test. *United States v. Bruce*, 89 F.3d 886, 893 (D.C. Cir. 1996). For example, in *United States v. Farley*, the D.C. Circuit rejected a claim that an attorney had an actual conflict of interest where the client asserted that the attorney had mishandled a plea hearing to avoid revealing that he had engaged in malpractice. 72 F.3d 158, 166 (D.C. Cir. 1995). The D.C. Circuit also cited with approval the decision in *United States v. Litchfield*, in which the Tenth Circuit rejected an allegation of "a conflict of interest between a counsel's duty of loyalty to [his client] and counsel's desire to protect his own reputation before the district court" where counsel engaged in an *ex parte* colloquy with the court admitting his fear that his client would testify untruthfully. 959 F.2d 1514, 1518 (10th Cir. 1992). In any case, as discussed below, Petitioner has not identified any appellate arguments that would likely have succeeded, so this claim must fail.

during his direct appeal.[28] These can be grouped into several (overlapping) categories: claims relating to appellate counsel's failure (1) to argue issues regarding Petitioner's indictment, conviction, and sentencing for both felony murder and second degree murder; (2) to argue issues regarding the prosecutor's appointment as an Assistant U.S. Attorney; (3) to argue issues regarding alleged *Brady* violations at trial; (4) to perform post-trial investigation to discover the details of Mr. Williams' 1987 conviction on two misdemeanor charges and of his 1994 arrest for robbery and receiving stolen property; (5) to argue issues regarding two witnesses who were not called at trial; (6) to argue issues regarding jury instructions; (7) to argue issues regarding Mr. Nash's prior conviction; (8) to argue issues regarding the motion for judgment of acquittal at trial; (9) to argue issues regarding the admission at trial of a photograph of Petitioner; (10) to argue issues regarding trial counsel's preparation of Petitioner to testify; (11) to argue issues regarding the cross-examination of Mr. Williams; and (12) to advise Petitioner of his right to raise ineffective assistance of trial counsel on appeal. He also raises a claim of cumulative error. For the reasons explained below, none of these claims passes muster under the demanding *Strickland* standard.

1. Claims Related to Indictment, Conviction, and Sentencing for Both Felony Murder and Second Degree Murder (Nos. 1–2, 9–10, 27–30)

Under this category, Petitioner claims that Judge Sullivan was ineffective during the direct appeal because he (1) failed to consult with Petitioner about raising a claim on appeal that his constitutional rights were violated when he was sentenced in absentia in 1995 (No.1); (2) did not

[28] Petitioner has presented the majority of these claims in only the sparsest manner, merely listing them in the Petition. [Dkt. 42 at 10–13]. Indeed, Petitioner's counsel admitted that they focused their attention on Petitioner's strongest arguments, eschewing "most" of the dozens of sub-claims [Dkt. 114 at 53–54]—as, indeed, the Supreme Court has instructed appellate counsel, like Judge Sullivan, to do, *see, e.g. Jones v. Barnes*, 463 U.S. 745, 751–52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). Nonetheless, the Court addresses each of these claims, if for no other reason than that Petitioner has sought for over a decade for a court to address the merits of these claims of error, which he says led to his murder conviction.

raise such claim on appeal (No. 2); (3) did not argue that trial counsel was ineffective for failing to object to sentencing Petitioner in absentia (No. 27); (4) did not raise the issue that Petitioner's sentence violated the Double Jeopardy Clause of the Constitution because he was sentenced for both felony murder and second degree murder for a single killing (No. 9); (5) did not raise the issue that trial counsel was ineffective for failing to make that Double Jeopardy objection (No. 29); (6) did not argue that Petitioner's constitutional rights were violated when he was convicted of both felony murder and second degree murder (No. 10); (7) did not argue that trial counsel was deficient for not objecting to the indictment because it charged both felony murder and second degree murder for a single killing (No. 27); and (8) did not argue that trial counsel was deficient for failing to ask for an instruction that the jury should consider second degree murder only if it found that Petitioner was not guilty of felony murder (No. 28). [Dkt. 42 at 10–11, 13; Dkt. 78-14 at 2, 6–7, 14–15].

To succeed on an ineffective assistance of appellate counsel claim, the petitioner must prove that he was prejudiced by any error that occurred; that is, he must show that, but for counsel's errors on appeal, the outcome of the appeal on the relevant issue would have been different. *See Smith*, 528 U.S. at 285. Here, Petitioner cannot establish prejudice because, on direct appeal, the D.C. Circuit remanded to the trial court to vacate Petitioner's duplicative convictions—which included his conviction for second-degree murder—and for resentencing in light of that vacatur. [Dkt. 24 at 3; Dkt. 63 at 3; Dkt. 63-1 at 4]. Thus, he received the relief to which he would have been entitled had he been successful on his Double Jeopardy claims. Similarly, that relief was sufficient to cure any error regarding the indictment, as a remedy for a multiplicitous indictment is merger of the multiplicitous counts into a single count. *See, e.g.*, *Ball v. United States*, 470 U.S. 856, 864–65 (1985) (where defendant is charged and conviction of duplicitous counts, proper

remedy is to vacate one conviction); *United States v. McCafferty*, 482 F. App'x 117, 126 (6th Cir. 2012) ("The Supreme Court has instructed that the proper remedy for multiplicitous counts may include allowing the jury to consider all counts that are reasonably supported by the evidence and addressing any multiple-punishment issues at sentencing by merging overlapping convictions."); *United States v. Platter*, 514 F.3d 782, 787 (8th Cir. 2008) ("[T]he proper remedy when a defendant is convicted of multiplicitous counts is merger of the counts into one count, not a retrial under just one theory of liability."); *United States v. Dudley*, 581 F.2d 1193, 1199 (5th Cir. 1978) ("Where multiplicitous indictments result in cumulative sentences, the appropriate remedy is to remand the case for dismissal of one count.").

Moreover, Petitioner also received the relief to which he would have been entitled had he been successful on his claims regarding sentencing in absentia. If a defendant's rights are violated because he is not present at his sentencing, the proper remedy is a remand for resentencing. *See, e.g.*, *United States v. Lastra*, 973 F.2d 952, 955–56 (D.C. Cir. 1992) (remanding for resentencing where defendant's constitutional rights were violated because she was not present when consecutive sentences imposed); *United States v. Pinkney*, 551 F.2d 1241, 1249 (D.C. Cir. 1976) (proper course for counsel's errors in connection with sentencing is holding new sentencing hearing). Petitioner was resentenced on August 8, 1996.[29] [Dkt. 63-2 at 3].

For these reasons, the undersigned recommends denying these claims.

[29] The sentencing-in-absentia claim fails for an independent reason. Petitioner has presented no evidence that he was not present at his 1995 sentencing (the transcript of the sentencing was not provided to the Court). In the past, he appears to have relied on a form (seemingly some kind of docket entry) from his criminal case in the D.C. Superior Court dated March 15, 1995—the date of his sentencing—on which the boxes that would indicate the presence of counsel and the defendant are not checked. [Dkt. 73-9 at 11]. However, that form does not indicate that it is related to Petitioner's sentencing. Rather it merely amends the entry of January 19, 1995—the date of Petitioner's conviction—to correctly identify the counts of which Petitioner was convicted. [Dkt. 73-9 at 10–11]. That is not sufficient. Additionally, Petitioner raises no argument about his resentencing in the Petition, although he has previously claimed that neither he nor his counsel was present for that proceeding. [Dkt. 73-7 at 3].

2. Claims Related to Prosecutor's Appointment as Assistant U.S. Attorney (Nos. 13, 31)

Petitioner contends that appellate counsel should have argued that trial counsel was deficient for failing to move to dismiss the indictment on the ground that the prosecutor was not actually an Assistant U.S. Attorney—a claim that the D.C. Superior Court found "palpably incredible" and "wholly speculative."[30] [Dkt. 42 at 12–13; Dkt. 63-14 at 4].

Petitioner has relied for support of his claim exclusively on the absence of a record of the prosecutor's oath of office and the failure of a Freedom of Information Act request to produce any loyalty oaths. [Dkt. 63-15 at 5; Dkt. 73-10 at 4]. However, both the D.C. Superior Court and the D.C. Court of Appeals found as facts that the oath of office for Assistant U.S. Attorneys is taken orally, so there would be no written record of that oath, and that any other loyalty oaths would be protected from disclosure by privacy laws. [Dkt. 63-14 at 4–5; Dkt 63-15 at 5 & n.11]. Although those factual findings were not made in connection with Petitioner's ineffective assistance of appellate counsel claim,[31] they are still entitled to deference under AEDPA unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Winston*, 529 F.3d at 557. As Petitioner has not done so here, the evidentiary basis for his claim—which was tissue-thin to begin with—collapses. These claims should therefore be denied.

[30] Claim No. 13 states that Judge Sullivan was ineffective for not arguing on appeal that he was ineffective at trial for failing to move to dismiss the indictment based on the fact that the prosecutor was not an Assistant U.S. Attorney. Claim No. 31 states that Judge Sullivan was ineffective for not arguing that he was ineffective for failing to seek dismissal of the indictment pursuant to "SCR-Criminal 6(d)(1)" on the same basis.

[31] These findings were made in response to Section 23-110 motions filed by Petitioner in 2010 in the D.C. Superior Court. [Dkt. 63-14 at 1; Dkt. 73 at 5].

3. Claims Related to Alleged Brady *Violations (Nos. 3, 6–8, 15)*[32]

Petitioner's five claims related to the prosecution's obligations under *Brady* complain that appellate counsel (1) did not advise Petitioner that he could have a new attorney appointed to present his claims of *Brady* violations/ineffective assistance of trial counsel in a Section 23-110 motion (No. 3); (2) did not argue that the government withheld *Brady* material (No. 6); (3) did not argue that twelve specific pieces of evidence were withheld in violation of *Brady* (No. 8); (4) did not argue that trial counsel was deficient for failing to raise an argument that the government violated *Brady* (No. 8); and (5) did not argue in favor of a remand to the trial court for an evidentiary hearing on withheld *Brady* material (No. 7). [Dkt. 42 at 10–12; Dkt. 78-14 at 4–6, 8].

To obtain relief for a *Brady* violation, the claimant must show that "the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence is suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). The prejudice standard for *Brady* claims—also known as a "materiality" standard—"is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks v. Dretke*, 540 U.S. 668, 698–99 (2004) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). This standard is higher than a finding "that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Kyles*, 514 U.S. at 435 (internal quotation marks omitted) (quoting *Brecht v. Abramson*, 507 U.S. 619, 623 (1993)). A court should examine "the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item." *Kyles*, 514 U.S. at 420.

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[32] Petitioner refers to "claims under *Brady* and *Giglio*" [Dkt. 104 at 41], that is, *Giglio v. United States*, 405 U.S. 150 (1972). *Giglio* "clarif[ied] that the rule stated in *Brady* applies to evidence undermining witness credibility." *Wearry v. Cain*, __ U.S. __, __, 136 S. Ct. 1002, 1006 (2016). Discussions of Petitioner's claims under *Brady* herein should be read to include any claims under *Giglio*.

To show that appellate counsel was ineffective for failing to raise a *Brady* issue, the claimant must show that the *Brady* issue was "clearly stronger than [the arguments actually] presented" on appeal, *Agramonte*, 366 F. Supp. 2d at 87 (quoting *Smith*, 428 U.S. at 288), and also that the argument would likely have succeeded on appeal, *see Smith*, 428 U.S. at 285. When the argument is that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to raise a *Brady* issue, the claimant must also show that trial counsel was ineffective for failing to raise the *Brady* issue—that is, that trial counsel's failure was unreasonable and there was a substantial likelihood that it would have succeeded had it been raised. *See, e.g.*, *Harrington*, 562 U.S. at 112 (petitioner must establish that "likelihood of a different result [is] substantial, not just conceivable"); *Peete*, 942 F. Supp. 2d at 54 ([P]etitioner must demonstrate that appellate counsel's failure to pursue an ineffective assistance of trial counsel claim . . . was itself deficient and prejudicial."). If any one of these links fails, so does the ineffective assistance of appellate counsel claim.[33] *See, e.g.*, *O'Neal v. Woods*, No. 10-CV-12836, 2013 WL 5340767, at *18 (E.D. Mich. Sept. 23, 2013) ("Determining whether Petitioner's attorney was constitutionally ineffective for failing to preserve Petitioner's *Brady* claim requires the Court to reach the merits of Petitioner's *Brady* claim, because in order to show that counsel was ineffective for failing to raise a claim, Petitioner must show a reasonable probability that the claim would have succeeded if it had been raised by counsel."), *aff'd sub nom. O'Neal v. Burt*, 582 F. App'x 566 (6th Cir. 2015).

Petitioner fails here because he has not established a *Brady* violation in the first instance. Most of the evidence that Petitioner claims was suppressed by the government was available to

[33] The prejudice (or materiality) standard articulated in *Brady*'s progeny mirrors *Strickland*'s prejudice standard. Indeed, in *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court imported "the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel" from *Strickland* to define "the appropriate standard to judge the materiality of information withheld by the prosecution . . . ." *Strickler*, 527 U.S. at 299 (Souter, J., concurring in part and dissenting in part). That is, if suppressed information is not material under *Brady*, its suppression cannot have caused prejudice under *Strickland*.

him because, although it was not provided to Petitioner prior to trial, it was revealed at trial. Indeed, Judge Canan found that the following allegedly suppressed facts were actually "available for the jury to consider with regard to the credibility of each witness": Ms. Nash saw Mr. Williams with a gun prior to the shooting; Ms. Nash had a gun and ammunition during the shooting; Mr. Williams removed Ms. Nash's gun from the scene of the shooting before turning it over to police; although Mr. Williams testified that he shot Mr. Nash's gun, when it was turned over to police, it was inoperative and fully loaded; Ms. Gary disposed of a gun before speaking with police; Ms. Gary and Mr. Williams were in a romantic relationship; and Ms. Gary had been a paid informant for Detective Reed. [Dkt. 63-10 at 28–29, 31; Ex. P-22 at 31–32, 44–45, 210, 235–36, 305–06, 365]. Other allegedly suppressed facts—that Detective Reed intervened to get a criminal case against Ms. Gary dismissed and that Ms. Gary attacked Ms. Rowell because she would not give a statement to police—were also disclosed at trial.[34] [Ex. P-22 at 309, 363–64; Dkt. 63-7 at 15, 17].

Although it is the prosecution's duty to disclose *Brady* material "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure," *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976), delayed disclosure—even disclosure that occurs in the middle of trial—is not a *Brady* violation unless the petitioner can establish prejudice from the delay, including "that had the information or evidence been disclosed earlier, there is a probability sufficient to undermine . . . confidence in the actual outcome that the jury would have acquitted." *United States v. Clarke*, 767 F. Supp. 2d 12, 40–41 (D.D.C. 2011) (quoting *United States v. Celis*, 608 F.3d 818, 835 (D.C. Cir. 2010), *aff'd sub nom. United States v. Straker*, 800 F.3d 570 (D.C.

[34] These are ten of the twelve pieces of evidence Petitioner lists. [Dkt. 42 at 10–11]. The other two, relating to the [redacted] and the details of Mr. Williams' 1994 arrest, *id.* at 11, are addressed below.

Cir. 2015). There is no indication that earlier disclosure or "highlight[ing]" these facts at trial or on appeal [Dkt. 42 at 13] would have resulted in a different result at either proceeding. Rather, the jury heard these potentially impeaching facts and nevertheless believed the testimony of the four eyewitnesses who claimed that Petitioner shot Mr. Nash during the commission of a robbery.

In addition to the evidence discussed above that was disclosed at trial, Petitioner identifies other potentially impeaching evidence that was not disclosed before or during trial: [redacted], and the details of the crimes for which Mr. Williams was convicted in 1987 and for which he was arrested in 1994.

Petitioner argues that [redacted]

In his post-evidentiary hearing briefs, Petitioner focuses on two pieces of evidence that might have been used to impeach Mr. Williams and that the parties agree were not disclosed by the government before or during the trial: (1) the "facts underlying [Mr.] Williams' 1987 conviction" (for unlawful entry and theft in the second degree [Dkt. 102 at 49]), which were allegedly "similar[] to those involved in Petitioner's trial" in that "he robbed an acquaintance at gunpoint for a small sum of cash with an accomplice," and (2) Mr. Williams' 1994 "no-papered"

arrest, which could assertedly have been used to show that he had reason to curry favor with the government when he testified at Petitioner's trial in 1995. [Dkt. 104 at 38 n.27, 43 & n.31; Dkt. 109 at 4–5].

Petitioner's theory at trial was that Mr. Williams was the robber and first aggressor, and that Petitioner was defending himself when, in the tussle for Mr. Nash's gun, shots inadvertently hit Mr. and Ms. Nash in the front seat of the car. Recognizing that the facts of a crime are generally not admissible to show propensity to commit a crime, Petitioner argues that Mr. Williams' 1987 arrest, which involved him "breaking into an apartment with an accomplice who brandished a gun and demanded a small sum of money" [Dkt. 109 at 5 n.5], would have advanced that argument. On that theory, Petitioner asserts that the facts underlying the conviction would have been admissible to show Mr. Williams' modus operandi because of their similarity to the crime of which Petitioner was convicted. *Id.* at 5–6.

Judge Canan ruled that the crime underlying Mr. Williams' 1987 conviction "had nothing in common" with the crime for which Petitioner was convicted. [Dkt. 63-10 at 27]. The case on which Petitioner primarily relies supports Judge Canan's conclusion. In *Calaway v. United States*, the appellant challenged his rape conviction on the basis of, among other things, the fact that the trial court had admitted evidence of his eight-year-old rape conviction as relevant to identity, motive, and intent. 408 A.2d 1220, 1226 (D.C. 1979). The D.C. Court of Appeals affirmed the lower court on that issue, finding that there were "strong" similarities between the two crimes that were "probative of [the] appellant's identity as the attacker":

> The victims were both young, white women. The attacker in both instances either ordered the victim to remove her clothes or began forcibly removing them himself. A severe blow to the jaw was then given to subdue both victims, followed by the attacker's climbing on top of the victim and manually strangling her.

Id. The court in *Calaway* cited other cases in which such evidence had been allowed, including *Arnold v. United States*, 358 A.2d 335 (D.C. 1976). In that case, another rape prosecution, "the methods employed by the rapist in each case were strikingly similar":

> For example, in each case the rapist, driving a light blue Volkswagen, invited the victim into the automobile as an act of friendly concern and for an apparently innocent purpose. In each case the friendly attitude of the rapist changed suddenly, and without provocation, to one of anger accompanied by threats of bodily harm and death, because of some injury allegedly perpetrated on him or some one of his relatives by the victim or some one of her relatives. In each case the rape was accomplished by first putting the victim in fear of her life and then apparently abandoning that purpose and demanding and obtaining submission to sexual intercourse. Finally, after each rape the victim was treated kindly and returned to her destination.

Id. at 338–39). And in *Bridges v. United States*, similarities between the two crimes included that the assailant broke into the rear of each victim's dwelling in the early morning hours, within the same area and the same six-month time period, awakened the victim and menaced her with a weapon to gain her submission, cut or threatened to cut her phone lines, completed the act of intercourse, and then fled the way he had come. 381 A.2d 1073, 1078 (D.C. 1977).

The resemblances between the crime at issue in Petitioner's case and in Mr. Williams' 1987 case are significantly "less unique," *id.*, than in any of those cases. The only identified correlations are that there was a gun, an accomplice, and a small sum of money involved. It is therefore not at all clear that the underlying facts of the 1987 conviction would have been admissible at Petitioner's trial, had those facts been disclosed by the government prior to trial.

Petitioner is on somewhat stronger ground in arguing that Mr. Williams' 1994 arrest should have been disclosed because it was admissible impeachment evidence. Mr. Williams was arrested for robbery and receiving stolen property in July 1994, after Petitioner's arrest but before his trial. [Dkt. 102 at 65; Dkt. 104 at 30]. Although the arrest was no-papered, it could conceivably have

been brought again at the time of Mr. Williams' trial testimony, thus giving Mr. Williams a motive to curry favor with the prosecution by testifying against Petitioner.

For example, in *United States v. Lampkin*, on which Petitioner relies [Dkt. 112 at 1–2], the D.C. Circuit held that the defense had been entitled to cross-examine two juvenile witnesses about no-papered offenses in order to show the witnesses' motive to lie, regardless of the fact that the actual threat of prosecution was slight. 159 F.3d 607, 610–13 (D.C. Cir. 1998). *Lampkin*, however, goes on to undermine any argument that the failure to disclose this arguably admissible information caused Petitioner prejudice sufficient to constitute a *Brady/Giglio* violation. For the D.C. Circuit "decline[d]" to reverse one of the appellants' convictions for possession with intent to distribute cocaine because there was "ample circumstantial evidence" of his "dominion and control over the apartment and the drugs inside [it]," including testimony that the appellant had rented and lived in the apartment, discovery of the apartment keys and his car registration inside the apartment, and the presence of ziplock bags of cocaine base within the dwelling. *Id.* at 613. That is, there was sufficient evidence to support the verdict such that the absence of the potentially impeaching evidence "did not have a substantial effect on the jury's verdict," as required for a *Brady/Giglio* violation. *Id.*

So it is here. Even assuming that Mr. Williams' prior bad acts would have been admissible at trial and sufficiently undermined his credibility with the jury, there was still the testimony of three other eyewitnesses—Ms. Nash, Ms. Rowell, and Ms. Gary—that inculpated Petitioner for the murder of Mr. Nash. There was also corroborating forensic evidence supporting their stories. For example, the medical examiner's evidence about the angle of the wounds in Mr. Nash's neck was consistent with those witnesses' explanation of the shooting. Indeed, that is the problem with Petitioner's contentions about all of this undisclosed, late-disclosed, and possibly uninvestigated

evidence. The jury actually had before it significant impeaching evidence of each of the eyewitnesses, yet it still believed those witnesses. Given the strength of the evidence against Petitioner, he cannot show that any or all of the alleged *Brady* material, had it been disclosed or been disclosed earlier, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Banks*, 540 U.S. at 698–99.

4. Claims Related to Appellate Counsel's Failure to Consult and Investigate on Appeal

Extrapolating from claims presented in the Petition, Petitioner asserts in his post-evidentiary hearing brief that Judge Sullivan did not consult with Petitioner during the pendency of the appeal and did not conduct any post-trial investigation. [Dkt. 104 at 34–37]. These errors purportedly resulted in a failure to discover the circumstances underlying Mr. Williams' 1987 conviction as well as the fact of his 1994 arrest, which prejudiced Petitioner by preventing him from raising claims related to those facts on appeal. [Dkt. 104 at 37–38, 43].

To the extent that Judge Sullivan's alleged lapses foreclosed the opportunity to raise *Brady* claims related to these non-disclosed facts, the failure does not constitute ineffective assistance because, as discussed above, there were no true *Brady* claims. "[C]ounsel does not perform deficiently by declining to pursue a losing argument." *United States v. Watson*, 717 F.3d 196, 198 (D.C. Cir. 2013); *see also United States v. Brisbane*, 729 F. Supp. 2d 99, 117 (D.D.C. 2010) ("[T]here clearly is no 'reasonable probability' that the outcome of the defendant's appeal . . . 'would have been different' had appellate counsel . . . argued [a meritless claim]." (quoting *Strickland*, 466 U.S. at 694)). Nor, given the strength of the evidence against Petitioner, is there a reasonable probability that the discovery and use of these facts in a non-*Brady* related argument on appeal (such as a claim that trial counsel was ineffective for failure to use these facts at trial) would have resulted in a different outcome.

Petitioner's contention that, had Judge Sullivan conducted adequate research into Mr. Williams' criminal background, he would have realized that he had previously represented the witness [Dkt. 104 at 38] is also flawed. Surely Petitioner cannot be suggesting that Judge Sullivan's performance was deficient because he did *not* suffer from an actual conflict of interest. If the argument is that the discovery of the prior representation would have resulted in Judge Sullivan's withdrawal, "the mere fact that another attorney would have taken over the case does not demonstrate that [Judge Sullivan] was deficient in representing [Petitioner]." *Gantt*, 140 F.3d at 254. That is true even if the replacement attorney would have raised all of the claims Petitioner urges, because they are meritless.

5. Claims Related to Two Uncalled Witnesses (Nos. 19–20, 23)

These claims relate to an alleged "promise" Judge Sullivan apparently made, both to Petitioner during plea negotiations and to the jury in his opening statement, that he would call two witnesses to testify that they had seen Mr. Williams with a gun at the crime scene. [Dkt. 42 at 12–13]. Petitioner asserts that, as appellate counsel, Judge Sullivan was deficient for failing to argue that he was ineffective for not presenting these witnesses at trial—that is, for "falsely promising" to present them (No. 20). *Id.* Petitioner also argues that Judge Sullivan was deficient for failing to argue that he was ineffective for "obstructing" plea negotiations with this false promise, which purportedly helped to induce Petitioner to plead not guilty (Nos. 19, 23). *Id.*

"[T]he law of this Circuit and many others dictates" that if a petitioner seeks to show that counsel is ineffective for failing to call one or more witnesses, he "must allege with specificity what each witness would testify to, and how that would affect the evidence at trial." *United States v. Campbell*, No. 92-cr-0213, 2004 WL 5332322, at *14–15 (D.D.C. Sept. 1, 2004) (citing *United States v. Askew*, 88 F.3d 1065, 1073 (D.C. Cir. 1996), *aff'd in part, dismissed in part*, 463 F.3d 1

(D.C. Cir. 2006); *United States v. Sands*, 968 F.2d 1058, 1066 (10th Cir. 1992), and *United States v. Debango*, 780 F.2d 81, 85–86 (D.C. Cir. 1986), *aff'd in part, dismissed in part*, 463 F.3d 1 (D.C. Cir. 2006). Here, Petitioner has not identified these two witnesses and has stated only in the most general terms that they would testify that Mr. Williams had a gun at the crime scene. [Dkt. 42 at 12]. Without more detail it is difficult to understand how that testimony could possibly have made any difference. It was not, after all, in serious doubt at the trial that Mr. Williams was in possession of a gun—Mr. Nash's gun—at the scene of the crime. [Dkt. 63-2 at 8; Dkt. 63-7 at 14, 16; Dkt. 73-1 at 31; Dkt. 73-3 at 10; Dkt. 78-18 at 10–11, 15–16].

For the same reason, the claims based on counsel's "obstruct[ion]" of plea negotiations must fail. Petitioner has provided no inkling of how the alleged promise affected plea negotiations. It is Petitioner's burden to "set forth evidence upon which the elements of a constitutionally deficient performance might properly be found." *Simms v. United States*, 730 F. Supp. 2d 58, 61 (D.D.C. 2010) (quoting *Pinkney*, 543 F.2d at 916). Petitioner has not done so here, failing to elicit facts even at the evidentiary hearing about this issue. Petitioner's claim that Judge Sullivan made an "unfulfilled promise" to the jury fails for a more fundamental reason. The transcript of Judge Sullivan's opening statement shows that no such promise was made.[35] [Ex. P-23 at 36–44].

Moreover, the scant facts presented point to a strategic decision on Judge Sullivan's part. He may have indicated to Petitioner that he planned to call the two witnesses, but, after hearing testimony, decided against it, perhaps because other testimony had already established that Mr. Williams had possession of a gun at the scene. *See, e.g.*, *United States v. Blackson*, 236 F. Supp. 3d 1, 7 (D.D.C. 2017) (counsel not ineffective where he knew of potential witnesses, considered

[35] Judge Sullivan has asserted he made no such promise [Dkt. 63-9 at 4] and, as Petitioner admits, counsel appointed to represent Petitioner in his first collateral attack on his conviction reviewed the trial transcript and agreed "that trial counsel never made the purported promise." [Dkt. 73-2 at 33].

putting them on stand, and made intentional decision not to call them based on assessment of proceedings). Finally, Petitioner makes no attempt to show that the outcome of his trial would have been different had these witnesses testified. On this record, there is no basis for finding that trial counsel erred, and therefore none to indicate that appellate counsel was ineffective for failing to raise these arguments on appeal.

6. Claims Related to Jury Instructions (Nos. 25, 32)

These claims assert that Judge Sullivan was ineffective on appeal because he did not argue that he had been ineffective at trial for failing to request (1) an instruction that the jury could consider that the murder was accidental (No. 25) and (2) an impeachment instruction after Mr. Williams' testimony (No. 32). [Dkt. 42 at 13]. Neither claim has merit.

Trial counsel made a strategic decision to present self-defense as the defense theory of the case. *See, e.g., Souza v. Mendonsa*, No. Civ. A. 12-10705, 2013 WL 4517978, at *6 (D. Mass. Aug. 23, 2013) ("Trial and appellate counsel[s'] decision not to pursue [a particular] theory was the sort of tactical decision that is not the stuff of an ineffective assistance claim."). As the Supreme Court has noted, accident and self-defense are "two inconsistent affirmative defenses." *Matthews v. United States*, 485 U.S. 58, 64 (1988); *see also Gezmu v. United States*, 375 A.2d 520, 523 (D.C. 1977) ("[A]ppellant's defense of accidental death was totally inconsistent with a theory of self-defense."). It is not ineffective assistance to choose to present a single theory of the case rather than two or more inconsistent theories. *See, e.g., Soler v. Ward*, 281 F.3d 1278, 1278 (5th Cir. 2001) (per curiam) ("[C]ounsel's decision[] not to . . . develop other theories inconsistent with his chosen strategy, [was] reasonable."); *Jackson v. Shanks*, 143 F.3d 1313, 1320 (10th Cir. 1998) ("Trial counsel's decision not to present inconsistent defense theories does not constitute ineffective assistance."); *Nelson v. Nagle*, 995 F.2d 1549, 1554 (11th Cir. 1993) (decision not to

present inconsistent defenses was reasonable). Nor did the fact that the jury was not instructed as to accident prejudice Petitioner. Given the strength of the evidence against Petitioner—four eyewitnesses testified that he purposefully shot Mr. Nash—there is not a reasonable possibility that an accident instruction would have changed the outcome of the trial.

Similarly, the determination not to request an impeachment instruction after Mr. Williams' testimony was a tactical decision. The prosecution impeached Mr. Williams with his prior convictions. [Dkt. 63-10 at 25; Ex. P-22 at 211–12]. Judge Sullivan testified that he "loved it when the government did that," because he "could then get up and argue that they didn't even . . . want to believe [their own witness]." [Dkt. 102 at 80]. He purposefully did not request an impeachment instruction because he believed the instruction favored the government and would undercut his ability to emphasize that "the government [was] making [Mr. Williams] a bad person." *Id.* at 83. Such a strategic decision by counsel does not rise to the level of ineffective assistance. *See, e.g. United States v. Quattlebaum*, 933 F. Supp. 2d 208, 212 (D.D.C. 2013) ("[C]ounsel's particular approach to the government's evidence was tactical, constituting a quintessential 'strategic choice' that 'is virtually unchallengeable.'" (quoting *United States v. Toms*, 396 F.3d 427, 433 (D.C. Cir. 2005)). In any event, the trial court gave an impeachment instruction when it instructed the jury prior to deliberations. [Dkt. 63-10 at 26]. Thus, there was no prejudice to Petitioner. *See, e.g.*, *United States v. Bruner*, 657 F.2d 1278, 1286 (D.C. Cir. 1981) (finding no error where jury did not receive immediate impeachment instruction because instruction given later in trial).

7. Claim Related to Mr. Nash's Conviction (No. 24)

Petitioner further contends that Judge Sullivan should have argued that he was deficient at trial for failing to introduce evidence of Mr. Nash's armed robbery conviction in 1979 to support

"the defense theory that Keith Nash was the first aggressor." [Dkt. 42 at 13; Dkt. 78-31 at 10–11]. Addressing this claim, the D.C. Superior Court said that it "could not fault" Judge Sullivan for employing the strategy of "attack[ing] Mr. Williams and not Mr. Nash." [Dkt. 78-27 at 10]. As that statement shows, the defense's theory was that Mr. Williams was the first aggressor when he tried to rob Petitioner at gunpoint. Petitioner testified to that at trial. But here, he suggests that Judge Sullivan should have focused instead on Mr. Nash.

"[C]ourts are extremely reluctant to second guess questions of trial strategy." *Browne v. Heath*, No. 11 CV 1078, 2014 WL 8390320, at *29 (E.D.N.Y. Aug. 25, 2014), *report and recommendation adopted*, 2015 WL 1469182 (E.D.N.Y. Mar. 30, 2015). Thus, a petitioner's "desire to have a specific defense theory presented does not amount to ineffective assistance on federal habeas review." *Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007). In addition, Judge Sullivan could reasonably have concluded that an argument that Mr. Nash was the first aggressor "was inconsistent with Petitioner's own description of the killing." *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000). To fail to adduce evidence that supported a narrative that would have undermined Petitioner's own testimony was not deficient performance. Petitioner also fails to provide any indication that introduction of a then-fifteen-year old conviction at trial [Dkt. 78-27 at 10] would have had any effect on its outcome.

8. Claim Related to Motion for Judgment of Acquittal (No. 12)

Petitioner asserts that Judge Sullivan should have argued on appeal his performance at trial was deficient because he did not renew the motion for judgment of acquittal at the close of testimony. [Dkt. 42 at 11]. Petitioner has not shown that such a renewed motion would have succeeded, however. Indeed, on direct appeal, the D.C. Court of Appeals rejected the argument that "the trial court erred in denying [Petitioner's] motion for judgment of acquittal on the ground

of insufficient evidence." [Dkt. 63-1 at 3]. Thus, there was "no prejudice suffered by [P]etitioner based on counsel's failure to make [that] motion." *Browne*, 2014 WL 8390320, at *26 (petitioner could not show prejudice for failure to move for dismissal on the basis of legal insufficiency where, on direct appeal, appellate court found that there was sufficient evidence).

9. Claim Related to Photo of Petitioner (No. 11)

According to Petitioner, the trial judge allowed the government to introduce a photograph of Petitioner that included a police department identification number. [Dkt. 42 at 11]. He asserts that Judge Sullivan should have argued on appeal that this was reversible error. *Id.*

"It is well-settled law that the criminal record of a defendant may not be introduced into evidence at trial unless the defendant takes the stand or otherwise places his character in issue. A photograph which on its face reveals the existence of such a criminal record is likewise inadmissible when the defendant's character has not been placed in issue." *Barnes v. United States*, 365 F.2d 509, 510 (D.C. Cir. 1966) (opinion of Levanthal, J.). Here, however, the photograph of Petitioner introduced at his trial was identified at trial as being from his arrest in connection with the crimes at issue in that very trial. [Ex. P-22 at 204]. There can have been no prejudice, then, from any implication that Petitioner had contact with law enforcement—that much was evident from the fact that he was being tried for the killing of Mr. Nash, among other crimes. *See, e.g.*, *United States ex rel. Bleinmehl v. Cannon*, 525 F.2d 414, 419 (7th Cir. 1975) (noting that problem with introducing mug shot into evidence is "the prejudicial effect of revealing the defendant's prior record"). Admission of the photograph was not error, and cannot be the basis for an ineffective assistance claim.

10. Claim Related to Counsel's Preparation of Petitioner to Testify (No. 21)

This claim alleges that appellate counsel was ineffective for failing to argue that trial counsel performed deficiently because he did not "prepare Petitioner to testify about the physical positions of the victims at the time they were shot in order to demonstrate how [Mr.] Williams would have been responsible for the murder." [Dkt. 42 at 12; Dkt. 63-2 at 9–10]. The forensic evidence regarding the placement of Mr. and Ms. Nash's wounds (on their left sides) was consistent with testimony from the four eyewitnesses for the prosecution that Mr. and Ms. Nash were in the front seat of the car when they were shot from the left rear side of the car. Petitioner's testimony, however, placed Mr. Nash in the driver's seat, Ms. Nash in the middle of the back seat, and the putative shooter, Mr. Williams, to the right of both of them, directly behind the front passenger seat. [Ex. P-22 at 431–32; Dkt. 63-2 at 7–8; Dkt. 73-1 at 27]. Petitioner asserts that, had Judge Sullivan pointed out the relevant forensic evidence before trial, Petitioner "would have understood the significance of his potential testimony as to the positions of [the Nashes] and could have testified accordingly."[36] [Dkt. 63-2 at 10].

The D.C. Superior Court found in 1999 that Judge Sullivan met with Petitioner several times to prepare him to testify, and that Judge Sullivan was familiar with Petitioner's version of events and "sat down on more than one occasion to go over [that story] extensively." [Dkt. 78-27 at 8]. There is no allegation that Petitioner was unaware of the forensic reports, which were, after all, introduced into evidence at trial, presumably in his presence. That is, he was aware of the evidence at the time that he testified. Thus, "there was nothing to prevent [Petitioner] from telling his story." *Id.* at 9. Moreover, both the D.C. Superior Court and the D.C. Court of Appeals found

[36] This is not, as it appears, a suggestion that Petitioner would have changed his story to fit the forensic evidence. Rather, Petitioner insists "[t]he gunshot wounds on the left side of [Mr.] Nash's neck and [Ms.] Nash's abdomen were consistent with their being in the positions described by [Petitioner] at the time the shots were fired." [Dkt. 63-2 at 9].

that the defense made a strategic decision to present the theory of a "great commotion in the car with people struggling, running away, and turning around," which would not have been furthered by testimony as to the precise positions of the passengers in the car at the time of the shooting. [Dkt. 78-27 at 9; Dkt 63-3 at 4]. It is not clear, then, what would have been gained by Judge Sullivan highlighting the forensic evidence while preparing Petitioner. *See, e.g.*, *Stuart v. Ward*, 236 F. App'x 344, 348 (10th Cir. 2007) (trial counsel not ineffective for failing to prepare defendant to testify where defendant "testified on direct and cross-examination consistently with his theory of the case"); *see also, e.g.*, *Nowicki v. Cunningham*, No. 09 Civ. 8476, 2011 WL 12522139, at *6 (S.D.N.Y. Mar. 30, 2011) ("As counsel's actions were grounded in strategy that advanced the defense's theory of the case they cannot serve as the basis for a *Strickland* claim."), *report and recommendation adopted*, 2014 WL 5462475 (S.D.N.Y. Oct. 27, 2014).

And, as before, Petitioner has not shown prejudice. The jury apparently believed the four eyewitnesses' testimony as to the positions of those involved in the crime, which were largely consistent with each other and diverged substantially from Petitioner's. In light of the strength of the evidence against him, Petitioner has not shown that additional preparation from his counsel prior to Petitioner's testimony could reasonably be expected to have changed the outcome. *See, e.g.*, *United States v. Jenkins*, 714 F. Supp. 2d 25, 32–33 (D.D.C. 2010) (counsel not ineffective for failing to prepare defendant to testify where defendant did not show he was prejudiced and "the strong evidence of guilt adduced at trial trivializes any such prejudice"). Because any failure to prepare did not constitute ineffective assistance, Judge Sullivan was not ineffective for foregoing the argument on appeal.

11. Claims Related to Cross-Examination of Mr. Williams (Nos. 17–18, 26)

These three claims concern the cross-examination of Mr. Williams. Petitioner contends that Judge Sullivan was ineffective for not arguing on appeal that he was ineffective at trial for failing to (1) confront Mr. Williams with the forensic report showing that the gun he allegedly shot at Petitioner was fully loaded when it was turned over to the police (No. 17); (2) undermine Mr. Williams' testimony with Ms. Nash's testimony that she saw him with a gun prior to the shooting (No. 18); and (3) impeach Mr. Williams with his prior convictions and with information gleaned from Judge Sullivan's prior representation of Mr. Williams (No. 26). [Dkt. 42 at 12–13].

Petitioner makes no attempt to show that there is a reasonable probability that employing any or all of these strategies would have changed the outcome at trial. As has been discussed repeatedly herein, the evidence against Petitioner was strong. Moreover, the jury had Ms. Nash's testimony and the forensic report regarding Mr. Williams' gun before it when it found Petitioner guilty. Additionally, as noted in the analyses above, the government impeached Mr. Williams with prior convictions, and it is unlikely that evidence of other convictions would have been admissible at trial. And, as has been established, counsel was unaware of his prior representation of Mr. Williams at the time of the trial and appeal, so he could not have used material gleaned from that representation at those proceedings. Nor should he have done so. Rather, had he remembered his prior representation of Mr. Williams, he should have withdrawn from his representation of Petitioner.

Because none of these arguments establish that trial counsel was ineffective, appellate counsel's performance was not deficient for failing to raise them.

12. Failure to Advise Petitioner of Right to Argue Ineffective Assistance of Trial Counsel on Appeal

According to Petitioner, appellate counsel's choice to pursue the "weak" claim that there was insufficient evidence to convict Petitioner "despite the presence of significantly stronger claims, including ineffective assistance of trial counsel, runs afoul of counsel's obligations."[37] [Dkt. 104 at 44–45]. Whether or not the sufficiency-of-the-evidence claim was a particularly weak claim—a likely possibility, given the strength of the evidence against Petitioner, *see, e.g.*, *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005) ("[I]t is black letter law that testimony of a single eyewitness suffices for conviction even if 20 bishops testify that the eyewitness is a liar.")—Petitioner cannot show prejudice because, as discussed exhaustively above, none of the claims he might have raised has merit. That is, even had Judge Sullivan advised Petitioner that he could argue ineffective assistance of trial counsel on appeal and thereafter withdrawn from the representation so that new counsel could make all of the arguments Petitioner has presented here, the outcome of the appeal would not have been different because none of those claims would have succeeded.

13. Cumulative Error

Finally, Petitioner argues that, if none of the grounds he raises challenging the adequacy of his appellate counsel entitles him to relief standing alone, in the aggregate they "demonstrate representation far below what is considered effective under the Constitution" [Dkt. 104 at 45]—what Petitioner's counsel terms a "sort of death by a thousand cuts approach" [Dkt. 114 at 35].[38] However, in order for a cumulative error argument to succeed, there must first be errors. As the Fifth Circuit has put it, "[m]eritless claims or claims that are not prejudicial cannot be cumulated,

[37] This claim is not enumerated in the Petition, but was argued by counsel in subsequent submissions.
[38] Again, this claim was argued by counsel although not enumerated in the Petition.

regardless of the total number raised." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996); *see also United States v. Chambers*, 681 F. App'x 72, 81 (2d Cir. 2017) ("The errors argued . . . were either harmless or not errors. Thus, considered individually or cumulatively, they afford no relief . . . ."); *United States v. Simmons*, 431 F. Supp. 2d 38, 68 (D.D.C. 2006) ("[defendant's] contention that the cumulative effect of errors requires a new trial must be rejected because this Court has already rejected [defendant's] claims of error."), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016); *Sanders v. Sullivan*, 701 F. Supp. 1008, 1013 (S.D.N.Y. 1988) ("The cumulative-error rule, whatever form it takes, can only come into play after errors have been discovered . . . ."). Because Petitioner has not identified any error by his appellate counsel, this claim, too, should be denied.

CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Petitioner's Third Verified Amended Petition for Writ of Habeas Corpus [Dkt. 42] be **DENIED**.

* * * * *

The parties are hereby advised that under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985).

Date: April 11, 2018

G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE