APPENDIX

TABLE OF CONTENTS

199 A.3d 634
District of Columbia Court of Appeals.

Paul Anthony ASHBY, Keith A. Logan, and Merle Vernon Watson, Appellants,

v.

UNITED STATES, Appellee.

Nos. 14-CF-414, 14-CF-424, and 14-CF-669

|

Argued December 19, 2016

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Decided January 10, 2019

Synopsis

Background: Defendants were tried together and convicted in the Superior Court, Nos. CF1-3069-10, CF1-21619-10, and CF1-23411-11, Herbert B. Dixon, Jr., J., of various crimes including kidnapping, felony murder, armed robbery, and several counts of possession of a firearm during a crime of violence or dangerous offense (PFCV). Defendants appealed.

Holdings: The Court of Appeals, Nebeker, Senior Judge, held that:

the trial court's refusal to provide defendants' requested missing evidence jury instruction was not an abuse of discretion;

basement tenant had actual or apparent authority to consent to search of basement;

testimony from government witness about two conversation he had with defendant were admissible as statements against penal interest;

the trial court's order precluding bias cross-examination of government witness regarding an unrelated murder was not an abuse of discretion; and

the prosecutor's closing argument, where he referred to codefendants as "hardened killers" and "stone-cold killers" and urged the jury to find defendants guilty in order to vindicate the victim's suffering, did not constitute plain error.

Affirmed in part; remanded in part.

Procedural Posture(s): Appellate Review.

***639** Appeals from the Superior Court of the District of Columbia (CF1-3069-10, CF1-21619-10, and CF1-23411-11) (Hon. Herbert B. Dixon, Jr., Trial Judge)

Attorneys and Law Firms

Alice Wang, with whom Samia Fam was on the brief, for appellant Paul Ashby.

Thomas T. Heslep, Washington, D.C., for appellant Keith Logan.

Margaret M. Cassidy for appellant Merle Watson.

James A. Ewing, Assistant United States Attorney, with whom Channing D. Phillips, United States Attorney at the time the brief was filed, and Elizabeth Trosman, Elizabeth H. Danello, Michael Liebman, and Erik Kenerson, Assistant United States Attorneys, were on the brief, for appellee.

Before Blackburne-Rigsby, Chief Judge,* Fisher, Associate Judge, and Nebeker, Senior Judge.

* Chief Judge Blackburne-Rigsby was an Associate Judge at the time of argument. Her status changed to Chief Judge on March 18, 2017.

Opinion

Nebeker, Senior Judge:

***640** Appellants Paul Ashby, Keith Logan, and Merle Watson appeal, together and separately, various convictions related to the kidnapping and murder of Carnell Bolden and the shooting of Danielle Daniels on December 30, 2009. The three were jointly tried before a jury in July and August of 2013, and were found guilty of a majority of the charged offenses. Given the factual and legal complexities, the number of issues, and the length of this opinion, we set forth a table of contents below.

TABLE OF CONTENTS

I. FACTUAL BACKGROUND

On December 30, 2009, the victims, Carnell Bolden and his girlfriend Danielle Daniels, drove to W Street in the northwest quadrant of the District of Columbia. At approximately six in the evening, Ms. Daniels dropped off Mr. Bolden so he could briefly visit some friends.

Appellant Logan and his girlfriend, Queen Williams, lived on the top two floors of a house located at 70 W Street, N.W., near the area where Ms. Daniels dropped off Mr. Bolden. Logan's uncle, Bruce Adams, was the owner of the home. Derrick Hill had rented the basement apartment, paying rent to Logan, from February or March until November 2009. Mr. Hill and Mr. Bolden were good friends, and Mr. Bolden supplied crack cocaine for Mr. Hill to sell from the basement apartment. Logan was aware of this arrangement, and had purchased cocaine from Mr. Bolden through Mr. Hill in the past. Logan also sold heroin out of the top two floors, and used the drug himself.

After Mr. Bolden exited the car, Ms. Daniels waited in the car. When Mr. Bolden ***641** did not return within ten minutes, as Ms. Daniels had anticipated, she began calling his cell phone. When she received no response, she got out of the car and spent approximately five to ten minutes searching the length of the street, all the while attempting to call Mr. Bolden, and saw no one outside. Ms. Daniels then got back into the driver's seat of her car and shut the door.

Close to 7:00 p.m., Ms. Daniels saw in the driver's side mirror that someone was approaching the driver's side of the car from behind. This "dark figure" in a black hooded sweatshirt "put a gun up to the window and just started shooting." After the assailant stopped shooting and fled, Ms. Daniels exited her car, called for help, and, within five minutes, called 911. Her 911 call was placed at about 7:15 p.m. A neighbor on W Street was looking out her window and saw a "man in dark clothing with a hood" run down the street, and she also called 911 in response to gunshots. Ms. Daniels was subsequently able to receive medical attention and survived the shooting. However, she was hospitalized for three months and underwent several surgeries; at the time of trial, she suffered from nerve damage and loss of use of her left hand.

On the morning of December 31, 2009, a Metropolitan Police Department ("MPD") officer found Mr. Bolden's body twenty-five feet off the side of the road near the 3000 block of Park Drive, S.E.; it appeared to have been dragged there. The cause of Mr. Bolden's death was determined to be two gunshot wounds to the face that appeared to have been fired at close range.[1] Duct tape covered Mr. Bolden's mouth and eyes, his pants were pulled down, and his feet were bound by duct tape, packing tape, and electrical cords "consistent with" having been pulled from a television set. Mr. Bolden also had multiple injuries, including bruising on his left eye, his nose, right cheek, and upper lip; hemorrhaging was also found under the right side of his scalp.

1 No form of identification was found on Mr. Bolden's body, but the police were able to confirm his identity through a fingerprint database.

After searching the 70 W Street house, discussed further in section II.B.i below, the police found substantial evidence

establishing that Mr. Bolden had been murdered there. Mr. Bolden's blood was found on a jacket that Mr. Hill gave to the police. A piece of tape found on Mr. Bolden's body was a "fracture match" with a roll found in the basement, showing that the piece of tape had been torn from that roll. A television set missing a cord like the one found on Mr. Bolden's body was also recovered. Additionally, Mr. Bolden's blood was found in a car which Logan had access to; it had been driven by Ms. Williams and was found abandoned about five blocks from the W Street house on January 8, 2010, days after the murder. A neighbor also testified that the car had been parked around 70 W Street in the past.

Substantial evidence also linked appellants to the murder. Appellants Ashby and Watson had been seen at and around the 70 W Street house in the weeks leading up to the murder. Ashby and Watson had a "close" relationship, and, on December 24, 2009, Watson, Ashby, and Logan were together for at least forty-five minutes at the 70 W Street house. Logan had called Mr. Bolden twice on December 30, 2009, at 4:19 p.m. and 5:47 p.m. Watson also called 911 from his phone at 6:44 the evening of December 30, 2009, about thirty minutes before Ms. Daniels was shot, to falsely report the shooting of an undercover police ***642** officer.[2] Phone records and location data regarding Ashby's call activity, discussed in section II.B.ii below, revealed that Ashby had called Watson five times between 12:59 p.m. and 6:27 p.m. the night of the shooting and murder, from the vicinity of the crime scene, and an expert testified that, based on the progression of phone calls, Ashby's phone had traveled south, towards the area where Mr. Bolden's body was found.

2 The government argued at trial, and appellants disputed, that Watson made this call in order to divert police away from the location where he and the other appellants were moving Mr. Bolden's body into a car.

In addition, John Carrington, an acquaintance of Mr. Bolden, stated that, in November 2009, weeks before Mr. Bolden's murder, Logan suggested they "rob and kill" Mr. Bolden. Mr. Carrington turned down Logan's proposition, telling him "hell no." Melvin Thomas, another acquaintance, stated that, after the murder, Ashby approached him in a CVS parking lot and admitted that he and his co-appellants had killed Mr. Bolden and placed his body in the southeast quadrant of the city.[3] Mr. Thomas and Ashby spoke again later in 2010, when they were both in the D.C. jail library. Ashby expressed that he was not worried about the case because all of the evidence was "pointing at" Logan, except for Ashby's phone, which was in police custody at the time.[4]

3 Mr. Thomas stated that Mr. Carrington approached them about five minutes into this conversation. Mr. Carrington stated that, while he was present in the CVS parking lot, he "stayed back ... out of respect" and could not overhear the conversation.

4 Appellants appeal the admission of these statements, discussed in more detail below. See section II.C., *infra.*

Following the MPD's investigation into the murder and the shooting, Appellants were charged with five crimes related to the killing of Mr. Bolden:

(1) conspiracy to kidnap and rob, in violation of D.C. Code §§ 22-1805a, -2001, and -2801;

(2) first-degree premeditated murder while armed and felony murder while armed, in violation of D.C. Code §§ 22-2101 and -4502; and

(3) kidnapping while armed, in violation of D.C. Code §§ 22-2001 and -4502, and robbery while armed, in violation of D.C. Code §§ 22-2801 and -4502.

They were also charged with three crimes related to the shooting of Ms. Daniels:

(1) assault with intent to kill while armed, in violation of D.C. Code §§ 22-401 and -4502 ("AWIK");

(2) aggravated assault while armed, in violation of D.C. Code §§ 22-404.01 and -4502; and

(3) mayhem while armed in violation of D.C. Code §§ 22-406 and -4502.

They were additionally charged with seven counts of possession of a firearm during a crime of violence or dangerous offense ("PFCV"), in relation to the above offenses, in violation of D.C. Code § 22-4504 (b).

Appellants were tried together. At the conclusion of a month-long jury trial in mid-2013, the jury convicted and the judge sentenced as follows.[5]

(i) Logan was found guilty of:

***643** a. Conspiracy to kidnap or rob Carnell Bolden;

b. First-degree felony murder while armed of Carnell Bolden;

c. Kidnapping while armed of Carnell Bolden;

d. Armed robbery of Carnell Bolden;

e. Three counts of PFCV for the above convictions other than conspiracy related to Carnell Bolden (first-degree felony murder, kidnapping, and armed robbery of Carnell Bolden);

f. One additional count of PFCV (first-degree premeditated murder or second-degree murder of Carnell Bolden), despite the fact that he was not convicted of the predicate offense of first-degree premeditated murder or second-degree murder of Carnell Bolden;

g. AWIK of Danielle Daniels;

h. Aggravated assault of Danielle Daniels;

i. Mayhem while armed with respect to Danielle Daniels;

j. Two counts of PFCV for AWIK and aggravated assault related to Danielle Daniels. Logan was sentenced to life in prison.

(ii) Ashby was found guilty of:

a. Conspiracy to kidnap or rob Carnell Bolden;

b. First-degree felony murder while armed of Carnell Bolden;

c. First-degree premeditated murder while armed of Carnell Bolden;

d. Kidnapping while armed of Carnell Bolden;

e. Armed robbery of Carnell Bolden; and

f. Four counts of PFCV for the above convictions other than conspiracy (first-degree felony murder, first-degree premeditated murder, kidnapping, and armed robbery of Carnell Bolden).

Ashby was acquitted of all the charges related to Danielle Daniels. He was sentenced to ninety years in prison, with a mandatory minimum of thirty-three years.

(iii) Watson was found guilty of:

a. Conspiracy to kidnap or rob Carnell Bolden;

b. First-degree felony murder while armed of Carnell Bolden;

c. Kidnapping while armed of Carnell Bolden;

d. Armed robbery of Carnell Bolden;

e. Three counts of PFCV for the above convictions other than conspiracy (first-degree felony murder, kidnapping, and armed robbery of Carnell Bolden); and

f. One additional count of PFCV (first-degree premeditated murder or second-degree murder of Carnell Bolden), despite the fact that he was not convicted of the predicate offense of first-degree premeditated murder or second-degree murder of Carnell Bolden.

Watson was acquitted of all the charges related to Danielle Daniels. He was sentenced to seventy-three years in prison, with a mandatory minimum of thirty-three years and five years supervised release.

[5] The Honorable Russell F. Canan presided over the pretrial motions in this case. The Honorable Herbert B. Dixon, Jr. presided over one day of pretrial matters, the trial itself – which began on July 2, 2013 and concluded when the verdict was read on August 7, 2013 – and sentencing. Ashby and Logan were sentenced on April 4, 2014, and Watson was sentenced on May 16, 2014.

All three appellants appealed their convictions, and each appellant makes various arguments on appeal. We address them in turn below.

II. ANALYSIS

A. Alleged *Brady* Violations and Sanctions

Logan and Watson both contend that the government committed *Brady* violations ***644** by failing to disclose certain evidence ahead of trial. [6] Specifically, they argue that the government failed to timely disclose that Mr. Bolden's bank card had been used in the days after the murder, and that, at some point thereafter, the prosecution lost an unexamined CD-ROM containing video that the police had obtained from

a BP gas station, one of the locations where the card was allegedly fraudulently used. [7]

6 *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also Andrews v. United States*, 179 A.3d 279, 286 (D.C. 2018) ("The government's obligation to disclose material evidence favorable to the accused arises from the Due Process Clause's purpose of preventing miscarriages of justice." (citing *Brady*, 373 U.S. at 87, 83 S.Ct. 1194)).

7 Logan and Watson make two additional claims unrelated to the bank card.

Logan asserts that the MPD failed to disclose that two men had been stopped near the location where the body was found in southeast D.C., following a report of shots fired. However, Logan offers no details or argument as to how this prejudiced the defense, and it is unclear which men Logan's brief is referencing. In any event, this information was insignificant at best, since the body was found several hours after the murder took place. While two men were also stopped near the scene of the shooting in the northwest quadrant of the District, this information was likewise of minimal value because the men did not match the description of the shooter and they were stopped sometime after the incident.

Watson contends that the trial court improperly denied his request to exclude certain identification testimony following the government's untimely disclosure of out-of-court identification procedures. While Watson correctly notes that the court admonished the government for failing to disclose earlier its plans for in-court identification, the court allowed the government's witnesses to identify appellants because continuances had already been granted in favor of the defense and because the prosecution proffered that the witnesses clearly knew Watson. Thus, there was no issue. Furthermore, Watson did not contemporaneously object when Norlin Washington, one of the government's witnesses, identified him in court.

Following the murder, the decedent's family informed Detective Anthony Greene that Mr. Bolden's debit card "appeared to have been used on December 30th and after." On January 14, 2010, Detective Greene obtained transaction records from Chevy Chase Bank, which revealed that there were four debit card transactions on January 1, 2010, followed by five additional transactions on January 12 at a Wal-Mart, a convenience store, and a Chinese buffet in Sanford and Cameron, North Carolina. One of the January 1 transactions was $72.15 charged to "New York BP Washington DC" at approximately 7:28 p.m. Detective Greene identified the likely location as the BP Gas Station at 1231 New York Avenue, N.E., Washington, D.C., because there was "no other" BP gas station on New York Avenue at the time. He met with the owner, who could not find a receipt for a $72.15 transaction inside the store, which indicated that the transaction may have taken place outside at the pumps. There was no outside surveillance footage available, but Detective Greene requested and viewed the in-store surveillance footage for the time period around the transaction while he was at the gas station.

Detective Greene testified at trial that he did not see "anything ... deemed to be probative" on the footage, but still obtained a copy on a disk, which he brought back to his office. He also stated that, while he was unsure, he believed that, when he tried to look at it again at the police station, the disk did not work on the ***645** computers. He apparently lost track of it after that. At the time of his testimony, he had "no idea" where the disk could be found, and had not seen it for "maybe three and a half years." Detective Greene could not recall if or when he told any of the prosecutors assigned to the case about the missing disk. He also did not believe that he had ever tried to obtain a second copy. Detective Greene also failed to realize that the bank statement showed a charge at another gas station ("Casey's BP") until months before the trial, so he did not investigate the possibility of surveillance footage at that location.

None of this information was disclosed to the defendants until December of 2012 (just over six months before trial, which began in July of 2013), at which point the defendants moved for sanctions for *Brady* violations.

In March of 2013, after one of the prosecutors on the case told Detective Greene that the prosecution had disclosed the information about the bank records to the defense,

Detective Greene began – for the first time – investigating the North Carolina charges on the debit card. Following that investigation, it was discovered that a Ronald Smith had made at least some of the charges on Mr. Bolden's bank card, including the charges at the Walmart in North Carolina. Mr. Smith was called to testify at trial and admitted during his testimony that he had picked up Mr. Bolden's debit card after finding it on 11th Street, N.W. He testified to using the card to purchase gas for other patrons of nearby gas stations, after which he would collect half the cost from the patron and pocket the money. Mr. Smith also recalled going to North Carolina in early January and using the bank card when he arrived, including at a Chinese buffet and a Walmart.

In May of 2013, the case was before Judge Russell F. Canan, who presided over a pre-trial hearing on the defendants' motions to dismiss or for other sanctions as a result of the prosecution's late disclosure of the debit card information. Judge Canan found that the failure to disclose this information was a *Brady* violation and "constitute[d] negligence to a gross degree" on the part of the government. At that time, however, Judge Canan found that a dismissal would be too harsh a sanction for the "gross negligence" of the government, particularly because he found that it was not "willful misconduct or bad faith or even done for tactical advantage." Judge Canan also reserved judgment on further sanctions until it became clear how the disclosures "affected the fairness" of the trial. Judge Canan ultimately passed on the discussion of further sanctions to Judge Herbert B. Dixon, who took over the case.

In July of 2013, Judge Dixon heard arguments on sanctions. The government insisted that hefty sanctions from the court were unnecessary because the government had voluntarily provided the defense with "full and complete" discovery on the records and resulting investigation into the missing debit card, and subpoenaed Mr. Smith, whom the government "otherwise probably would not call." The government argued that this assistance offered to the defense, which might not have been necessary if the disclosures had been timely, together with the continuance already granted, were sufficient to remedy any prejudice that might have resulted from the government's delay in disclosing the evidence.

The trial judge agreed that the subpoenaing of witnesses and the continuances had "ameliorated the impact on the defense," but also held that "it probably [had not] really made them whole." Therefore, ***646** the court also ordered the government to produce Detective Greene's grand jury material, Washington Area Criminal Intelligence Information Systems ("WACISS") reports, and notes. The government was able to redact information unrelated to the case, including all identifying information, such as names, addresses, relationships, and locations, of witnesses that were not being called in the case. If the government was "very concerned" about releasing additional information for other security reasons, it was permitted to temporarily redact it, pending an official request to do so. The trial judge cautioned the prosecution against unnecessary redactions, saying that if it had "an inkling that the witness might be helpful [to the defense,]" then it should disclose it.

On appeal, Logan and Watson argue that the late disclosure hindered their ability to mount an effective defense at trial.

The failure to disclose constitutes a constitutional violation that justifies reversal if "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Here, the disclosure of the debit card information, while late, was done early enough to allow for further investigation. This investigation revealed that Ronald Smith had used the stolen debit card, and allowed Mr. Smith to be brought to testify at trial. The only evidence that may have been difficult to obtain at that late stage would have been the videos from the locations where the cards were used, if any videos indeed existed, but the probative value of such videos would have been quite limited, given Mr. Smith's testimony. Logan and Watson were able to make full use of all of this information in their closing statements, making note of the defense's inability to discover Mr. Smith's involvement until later in the case, and linking the use of the debit card to Mr. Smith's involvement in the drug trade. Therefore, there is little reason to believe that an earlier disclosure would have produced a different result for appellants.

The trial judge also found, and appellants do not appear to contest, that the failure to disclose was not in bad faith. [8] This failure was grossly negligent, but not on its own a due process violation. Rule 16 of the Superior Court Rules of Criminal Procedure provides that the "range of available sanctions is extremely broad, [with] the only real limitation being that a sanction must be 'just under the circumstances.' " *Koonce v. District of Columbia*, 111 A.3d 1009, 1020 (D.C. 2015) (quoting *Gethers v. United States*, 684 A.2d 1266, 1272 (D.C. 1996)); *see* Super. Ct. Crim. R. 16. The sanctions offered by the judge here were just and appropriately addressed the

violation. Appellants were able to use Greene's notes, which were turned over pursuant to the judge's order, to attack Detective Greene's investigatory process and conclusions. The court also granted continuances, which allowed the time to discover the necessary information about the debit cards that appellants went on to use at trial. Furthermore, they were able to present Mr. Smith as an alternative perpetrator – a *Winfield* defense [9] – and ***647** use his possession of the cards as a source of reasonable doubt.

8 *Cf. Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) ("unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

9 *See Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (setting forth the "standards governing the admissibility of evidence proffered by a criminal defendant that another person or persons committed the crime alleged"). See section II.D.i, *infra*.

Logan and Watson specifically take issue with Judge Dixon's denial of a missing evidence instruction, which they requested to ameliorate the effects of the government's *Brady* violation regarding the bank records and related information. [10] As noted, the court allowed the defense to make a *Winfield* argument relating to Mr. Smith, who had used Mr. Bolden's bank card, during closing, but it did not give a missing evidence instruction to the jury. Watson submitted a detailed request to instruct the jury on the government's failure to timely investigate the bank card use, asserting an "impermissible burden" on his ability to mount a defense by way of investigating the bank card use.

10 The government construes Watson's argument on appeal as taking issue not with the trial court's refusal to issue a missing evidence instruction, but rather with the trial court's refusal to issue a *Shelton* instruction, which resembles an adverse inference instruction, *i.e.*, an instruction to the jury to draw an inference that the government thought its case was weak. *See Shelton v. United States*, 983 A.2d 363, 369 (D.C. 2009), *opinion amended on reh'g*, 26 A.3d 216, 26 A.3d 233 (D.C. 2011). Appellants did request such an instruction at trial. The government opposed this instruction, but was willing to allow a *Winfield* argument, see section II.D.i, *infra*, regarding Mr. Thomas. Prior to closing, the trial court stated that there was no justification for a *Shelton* instruction, noting that the failure to disclose "demonstrate[d] the government's view of its case [in regards to] weakness." Because appellants do not take issue with the denial of the *Shelton* instruction on appeal, the question of whether the trial court erroneously denied a *Shelton* instruction is not before us.

We see no reason for reversal based on the denial of the missing evidence instruction. A party seeking an instruction to the jury regarding missing evidence must show that the evidence is "likely to elucidate the transaction at issue" and "peculiarly available to the party against whom the adverse inference is sought to be drawn." *Tyer v. United States*, 912 A.2d 1150, 1164 (D.C. 2006) (citations and internal quotation marks omitted). We have "recognized several dangers inherent in the use of a missing [evidence] instruction," as it "represents a radical departure from the principle that the jury should decide the case by evaluating the evidence before it." *Id.* (citation and internal quotation marks omitted). We therefore "review the denial of a request for a missing evidence instruction for abuse of discretion," *id.* (citation omitted), bearing in mind that "the trial court retains considerable latitude to refuse to give a missing evidence instruction, where it determines from all of the circumstances that the inference of unfavorable evidentiary value is not a natural or reasonable one." *Id.* at 1166 (citation, internal quotation marks, and brackets omitted).

On this record, we cannot say that the trial court abused its discretion in denying the missing evidence instruction offered by appellants. The remedies employed by the court, described above, were significant and sufficient.

B. Motions to Suppress Evidence

i. The Search of 70 W Street, N.W.

Much of the evidence found in the 70 W Street house was obtained during a search conducted on January 11, 2010. Police initially searched the basement apartment pursuant to the consent of Derrick Hill, then obtained a warrant and searched the rest of the premises. Logan moved to suppress this evidence before trial, but the motion court denied the motion and admitted the evidence on the grounds that the search was legal, finding that Mr. Hill had actual or

apparent authority to consent to ***648** the search. Logan now challenges this ruling on appeal.

As noted, Mr. Hill had been living in the basement of the 70 W Street house in 2009. Around early November, Ms. Williams, speaking for Logan, had asked for Mr. Hill's front-door key, which Mr. Hill returned, though he kept his key to the back door, which provided direct access to the basement. After Mr. Hill returned the front-door key, he stopped spending the night at 70 W Street, but kept most of his belongings in the basement, including "multiple TVs, bed, the whole nine," and was present in the house often. He would always be let into the front door after knocking, and he went to the house "every day" to check on his things and would stop by to simply "chill."

In the very early morning hours of January 1, 2010, MPD detectives Joshua Branson, Norma Horne, and James Wilson went to 70 W Street to investigate the nearby shooting of Ms. Daniels and spoke to Logan. When they informed Logan that they were looking for Mr. Hill, Logan responded that Mr. Hill "did live at the house, but he was not home." Logan invited the police inside and retrieved Ms. Williams from upstairs, at which point they told the police that "[Mr. Hill's] room was downstairs" and showed them to the basement to allow them to look around.

In the basement, the police could see through an open door that there were "extension cords just strewn about." Since the detectives had been present for the autopsy of Mr. Bolden's body, they were aware that electrical cords had been used in the course of the murder and transport. Detective Branson testified at the pretrial suppression hearing that it was at this point that he began to suspect that Mr. Bolden's murder may be connected to the house. Upon their request, Logan voluntarily went with two of the detectives back to the homicide unit to answer questions about Mr. Hill. At the station, the officers arrested Logan when they discovered there was an outstanding unrelated warrant for his arrest. That same day, the officers also obtained and executed a search warrant for the basement at 70 W Street, where they photographed the scene and seized a television with a missing electrical cord.

On January 4, 2010, Mr. Hill talked to the police, and then went with Detective Greene to 70 W Street to retrieve some of his belongings from the basement. However, the back-door key did not work when Mr. Hill tried to open the door because of an interior latch; later that day, Mr. Hill called Mr. Adams, the owner of the home, who told him that he would remove the latch for him.

On January 11, 2010, Mr. Hill returned to the house and was able to open the unlatched back door with his key. When he found one of his own jackets covered in blood, he called Detective Greene, who arrived twenty minutes later and met Mr. Hill outside. Mr. Hill let Detective Green and Detective Wilson into the house through the open back door and showed them the bloody jacket among his personal items in the basement. Mr. Hill then provided consent for the police to take the jacket as evidence and to search for other items in the basement, signing a written consent form.

In the course of the January 11 search of the basement, MPD officers saw blood on the wall, which they swabbed, and Detective Wilson spotted, in plain view, a bin with duct tape similar to the tape that had been found on Mr. Bolden's body, which they seized.[11] At that point, the detectives ***649** decided to obtain another search warrant for the entire house; they obtained the warrant and searched the rest of the premises the same day.

11 The plain view doctrine provides that, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *West v. United States*, 100 A.3d 1076, 1083-84 (D.C. 2014) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)). As discussed in this subsection, the facts show that the detectives were lawfully in the basement, so they were permitted to seize the duct tape, as its incriminating character was immediately apparent, given its similarity to the tape that had been found on Mr. Bolden's body.

Logan argues that the January 11 search of the basement was a warrantless and illegal search because Mr. Hill did not have authority to consent to it. He argues that Mr. Hill was "evicted" in the fall of 2009, at which point he stopped sleeping at the house and surrendered his front-door key, and that, while Mr. Hill retained a key to the back door, he would gain entry primarily by knocking on the front door and waiting for Logan or Ms. Williams to admit him. Logan also argues that none of the investigating officers knew exactly how Mr. Hill had gained access on January 11. These arguments are not persuasive.

A warrantless search will not violate the Fourth Amendment to the Constitution if the police obtained appropriate consent to search the premises from either the defendant or a third party who "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." (*Cleveland) Wright v. United States*, 608 A.2d 763, 766 (D.C. 1992) (quoting *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)). Moreover, under the doctrine of apparent authority, a consensual warrantless search is valid based on "a police officer's reasonable belief that the person consenting to the search had the authority to do so." (*Cleveland) Wright v. United States*, 717 A.2d 304, 307 (D.C. 1998); *see also Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (search based on third-party consent valid if officer reasonably believes third party has such authority, even if facts developed later show the contrary). [12]

12 *See also Welch v. United States*, 466 A.2d 829, 845 (D.C. 1983) (whether the individual who provided consent had common authority is "factual in nature (based as it is on concepts of mutual use and joint access)"; therefore, "we may not reverse this finding on appeal unless it is clearly erroneous").

The facts credited by the motion court established that, by January 11, Detective Greene had understood from his conversations with Mr. Hill that Logan had asked Mr. Hill to move out of the house, but that Mr. Hill had been allowed to keep his belongings in the basement and went to the house almost every day to visit and check on his things. Detective Green had also understood that Mr. Hill was supposed to move his belongings out by January 1. As noted above, however, Logan had told the other detectives on January 1 that Mr. Hill did live at the house but was not home, and, as Detective Green knew, Logan had been jailed that same day. Finally, Detective Green had understood that, since January 1, Mr. Hill had been in touch with Mr. Adams, the owner of the house, and Mr. Adams had given him access to the house – including after Mr. Hill was not able to get in on January 4. Thus, when Detective Greene arrived at the house on January 11, he was aware of Mr. Hill's history and relationship with the premises, and his understanding was that Mr. Hill was there with the permission of Mr. Adams, the owner of the house. It was ***650** clear that Mr. Hill had already been in and out of the basement that day, and the door was open. The police could therefore reasonably infer that Mr. Hill had gained entry by coordinating with Mr. Adams when he invited them into the basement, where he had found his bloody jacket. Indeed, Detective Greene testified that he had no suspicion whatsoever that Mr. Hill lacked the authority to properly consent to their entry into the basement.

Accordingly, we find that the trial court did not err in holding that the search of the 70 W Street basement was not unconstitutional because Mr. Hill had authority to consent to it. While Mr. Hill was no longer residing in the basement in the traditional sense of the word, as he was not staying overnight there, his relationship to Logan, Mr. Adams, and the premises was sufficient to give him authority over the basement and therefore actual authority to consent to the search. [13] Yet, even assuming arguendo that Mr. Hill did not have actual authority due to the ambiguity of his status as a tenant at that point, he undoubtedly had apparent authority over the basement, as the evidence established that a police officer in Detective Greene's position and with Detective Greene's knowledge of the situation could reasonably believe that Mr. Hill had common authority over the basement and therefore the authority to consent to the police officers' entry and search.

13 For instance, assuming that Mr. Hill was, by January of 2010, not a resident but a "guest" in the basement of 70 W Street, N.W., he was, by all indications, one with "substantially more authority over the premises than [an] occasional user," and he could be "considered to be in charge of the premises." Wayne R. LaFave, Search And Seizure: A Treatise on the Fourth Amendment § 8.5 (5th ed.). This is particularly so because Logan was incarcerated at the time, no one else was living in the basement, and Mr. Adams had allowed Mr. Hill to continue using the basement, storing his things there, and returning there frequently. Moreover, Mr. Hill was "more than a casual visitor," as he "had the run of the [basement apartment]" and he had invited the police there. *Id.* He was "actually present inside the premises at the time of the giving of the consent and the consent [wa]s merely to a police entry of the premises into an area where a visitor would normally be received" – and thus the "police were entitled to assume without specific inquiry as to [his] status that one who answers their knock on the door has the authority to let them enter." *Id.*

We note that this case is distinguishable from other cases in which courts have found that apparent authority did not exist. For instance, indication of forced entry has disallowed the police from reasonably believing the individual had consent to search. [14] In the present case, the police did not need to gain entry forcibly, as Mr. Hill had already been inside the house when he discovered the blood on his jacket and then called the police and invited them in. We have also noted that an individual cannot consent to the search of a co-inhabitant's space where it is "set aside for ... private use." *Welch*, 466 A.2d at 845 (citation omitted). Here, however, Mr. Hill only consented to the search of the basement, where he kept his belongings and found his own jacket covered in blood. The police did not attempt to search the remainder of the house, where Mr. Hill presumably lacked ***651** authority to consent (because it would likely be considered Logan's private space), without first obtaining a warrant. We therefore discern no error in the trial court's denial of the motion to suppress this evidence.

14 Where a mother consented to a police search of a locked footlocker in her son's room, but she did not have a key and the police had to force open the footlocker, the court held that the consenting party did not have authority to consent to the search. *United States v. Block*, 590 F.2d 535 (4th Cir. 1978) (cited in (*Cleveland*) *Wright v. United States*, 717 A.2d 304, 308 (D.C. 1998)); *see also Harris v. United States*, 738 A.2d 269, 274 n.7 (D.C. 1999) (evidence in the record supported a finding of actual or apparent authority to enter the home where the police did not enter forcibly, but were instead let into the apartment by a third party).

ii. Ashby's Cell phone Records

Ashby contends that the call records and cell site location information related to his cell phone, which were used to track his location the night of the murder, as well as whom he was in contact with, should be suppressed as the fruits of an illegal search of his phone. While the investigation into the murder of Mr. Bolden was proceeding, Ashby was arrested on January 11, 2010 on an unrelated charge. He was taken into custody, and his cell phone was seized incident to arrest. Detective Greene used Ashby's cell phone to call his own cell phone twice, Detective Wilson's phone once, and the police department's homicide desk, all while the cell phone was in police custody. Detective Greene testified that he used Ashby's phone to call his own phone in order to obtain the phone number associated with Ashby's phone. The MPD later obtained warrants that allowed them to access the call records and cell site location information used at trial. [15]

15 An FBI cell phone tower location expert testified to Ashby's location based on which cell phone tower the call utilized. Though Ashby challenges the MPD's use of his cell phone while he was in custody, he does not challenge the use of the location information, which the MPD obtained through a warrant issued on January 26, 2010. We note that the Supreme Court recently held that cell phone tower data could generally not be obtained by law enforcement without a warrant. *Carpenter v. United States*, —— U.S. ——, 138 S.Ct. 2206, 2221, 201 L.Ed.2d 507 (2018).

Ashby made a mid-trial motion to suppress the cell phone evidence, which the trial court denied, as it found no Fourth Amendment violation in the detective's conduct. On appeal, Ashby argues that this cell phone evidence was the "only evidence connecting Ashby to the charged crimes" – aside from Mr. Thomas' testimony, discussed in section II.D below – and, because the police could not have obtained this information without Ashby's phone number, it is fruit of the illegal search. The government argues, in part, that the phone calls used to obtain the phone number did not constitute a prohibited invasive search, but rather a permissible search incident to arrest.

The Supreme Court has held that, even when a cell phone is seized incident to arrest, a search warrant is required to conduct a search of the digital contents of that phone because of the "vast quantities of personal information" available on a modern cell phone. *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 2485, 189 L.Ed.2d 430 (2014). However, the Court has expressly allowed for manipulation of a cell phone and removal of the battery to prevent remote access to potential evidence, and has limited the prohibition on warrantless searches to the "digital data" contained on the phone. *Riley*, 134 S.Ct. at 2485. A physical search of the cell phone itself for identifying features is a permissible search incident to arrest, as it does not invade the "immense storage capacity" of the digital device. *Id.* at 2488.

In this case, the information that Ashby challenges, such as call records and cell site location information, were obtained pursuant to validly issued search warrants – and Ashby's

phone number was not used to obtain those warrants. In his January 22 application for a warrant for Ashby's cell phone, Detective Greene included only a description of the phone, not the ***652** phone number [16] – and relied on the facts that had emerged from the police investigation up to that point to articulate why Ashby was a suspect and why searching his cell phone would be helpful to the investigation. The January 22 warrant permitted the MPD to legally obtain the digital contents of the phone, including the phone number, call log, and other information – and the phone number and call records were, in fact, obtained using this warrant. [17] On January 26, the MPD applied for another warrant – this time making use of the phone number obtained using the last warrant – and obtained a warrant that allowed them to access the cell site location information.

16 The warrant application referred to a "black and silver Motorola Boost [ ] cell[ ]phone," and included the International Mobile Equipment Identity/Identifier ("IMEI") number and Subscriber Identity/Identification Module ("SIM") number. While the record does not indicate exactly how Detective Greene obtained the IMEI and SIM numbers, they were presumably viewable by removing the back of the phone and looking at the numbers printed on the interior hardware. *See, e.g.*, Fed. Commc'n Comm'n, Protect your Smart Device (March 28, 2018), https://www.fcc.gov/consumers/guides/protect-your-mobile-device ("the [IMEI] ... is usually found in your device settings or printed on a label affixed to your device underneath the battery."). This would appear to be a physical manipulation of the phone that is permissible without a warrant under *Riley*, 134 S.Ct. at 2485.

17 Ashby argues that the January 22 search warrant is outside the appellate record and cannot be considered because it was not presented at trial. However, we granted appellee's motion for the Court to take judicial notice of these Superior Court Records. *See S.S. v. D.M.*, 597 A.2d 870, 880 (D.C. 1991) (the court may "take judicial notice of the contents of court records."); D.C. Code § 17-305 (2012 Repl.) (the appellate court "shall review the record on appeal").

On this record, it is clear that the detective's effort to physically examine and obtain identifying information for the cell phone was a permissible warrantless search incident to arrest. While *Riley*, 134 S.Ct. at 2485, does not specifically address a scenario in which a police officer makes phone calls from the suspect's phone, as was done here, this is ultimately immaterial, as the phone number was not used to obtain the January 22 warrant, and the search conducted pursuant to the January 22 warrant independently yielded the phone number. Thus, even assuming arguendo that there were a poisonous tree, that tree bore no fruit, as nothing was done with Ashby's phone number after Detective Greene first obtained it. Indeed, the phone number was all but irrelevant in the first instance, as the cell phone was already in police custody, so there was no question about how to locate the device or which device to search once the warrant was obtained. The evidence that was obtained as a result of the January 22 and January 26 warrants was therefore not the result of an "exploitation of ... illegality" and did not require suppression. *Hicks v. United States*, 705 A.2d 636, 639 (D.C. 1997). We thus find no Fourth Amendment violation and do not disturb the trial court's holding.

C. Admission of Out-of-Court Statements

i. Statements Against Penal Interest

Logan and Watson argue that government witness Melvin Thomas' testimony included hearsay statements from two separate conversations he had with appellant Ashby that were improperly admitted against them.

Mr. Thomas and Ashby spoke in a CVS parking lot in early January 2010 and then again in the library of the D.C. jail on July 16, 2010. Mr. Thomas testified at a pretrial ***653** hearing that, while in the CVS parking lot, Ashby approached Mr. Thomas and "started explaining the story." Ashby told Mr. Thomas "it was all [Logan's] idea. I told [Logan], man, don't do that shit in this house," referencing the 70 W Street house and the murder of Mr. Bolden. Mr. Thomas also stated that Ashby described the shooting of Ms. Daniels; Mr. Thomas described his reaction to this as: "then you are going to shoot an innocent bystander that was sitting there and don't know shit from bean dip, just sitting there, waiting ...." After the pretrial hearing, the court held that Ashby's statements in both the CVS parking lot and the jail library were admissible under the *Laumer* hearsay exception for admissions against a person's penal interest. *Laumer v. United States*, 409 A.2d 190, 199 (D.C. 1979) (en banc).

At trial, Mr. Thomas testified that Ashby admitted that he had "choked [Mr. Bolden] ... or knocked him out in the basement" of "Ted's house," referring to Logan's house. Mr. Thomas also testified that Ashby had told him that the attack was "Shorty's idea," referring to Logan. The end of this conversation was overheard by John "John-John" Carrington, another government witness. During the D.C. jail conversation, Ashby told Mr. Thomas that, once Mr. Bolden was unconscious, Ashby and Watson took him to the southeast part of the city in a car of unknown ownership. Ashby also told Mr. Thomas that they did not get any money off of Mr. Bolden and that Watson helped Ashby "wrap the body up." Mr. Thomas testified that Ashby did not think the police had any evidence against Ashby and all the evidence was "pointing at" Logan. The only evidence Ashby believed the police had against him was, as he told Mr. Thomas, a phone call made "up northwest on W Street," which Ashby did not believe to be incriminating, because his brother owned property in the area. Ashby also told Mr. Thomas that Ashby's lawyer had spoken to "John-John" and asked Mr. Thomas if he knew John-John's real name or where he was located, to which Mr. Thomas responded in the negative. Mr. Thomas testified that he believed Ashby intended to "hit [Mr. Carrington's] head" if he found him.

On appeal, Logan and Watson contend that the court should have found Ashby's statements to be an unreliable attempt to shift blame away from himself and onto his co-conspirators. Watson also argues that such statements should not have been admitted against him, as they were not made in furtherance of the conspiracy.

"Hearsay is an out-of-court assertion of fact offered into evidence to prove the truth of the matter asserted." (*Damion M.*) *Jones v. United States*, 17 A.3d 628, 632 (D.C. 2011). Such a statement is not admissible unless it is "not offered at trial to prove the truth of the matter asserted [and therefore] not hearsay," or it falls under another exception to the rule against hearsay. *Id.* A "determination of whether a statement falls under an exception to the hearsay rule is a legal conclusion, which we review de novo." *Dutch v. United States*, 997 A.2d 685, 689 (D.C. 2010). "However, we will not disturb the factual findings supporting the court's conclusion unless they are clearly erroneous." *Thomas v. United States*, 978 A.2d 1211, 1225 (D.C. 2009).

One exception to the hearsay rule is a statement made against penal interest, which "at the time of its making ... so far tended to subject the declarant to ... criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Thomas*, 978 A.2d at 1227 (quoting Fed. R. Evid. 804(b)(3)). When statements fall under this exception, ***654** they may be properly admitted "without redaction against the non-declarant defendants." *Thomas*, 978 A.2d at 1225. In *Laumer*, this court held that, in order to determine whether a statement constitutes a statement against penal interest, the court must "ascertain (1) whether the declarant, in fact, made a statement; (2) whether the declarant is unavailable; and (3) whether corroborating circumstances clearly indicate the trustworthiness of the statement." *Laumer*, 409 A.2d at 199.

In this case, the trial court set forth this analysis exactly. It found that (1) Mr. Thomas' testimony that Ashby made the statements was credible, and (2) Ashby was unavailable to testify because he asserted his Fifth Amendment privilege. It then found that (3) the statement in the CVS parking lot was trustworthy because: (a) Thomas and Ashby had known each other for twenty years; (b) the statements were made days after the homicide; and (c) the information in the statements matched details of the case, such as where the body was found and the fact that Ms. Daniels was in a car. It also found that (3) the statement in the jail library was trustworthy because of: (a) the relationship between the two men; (b) the corroborating evidence that the two were in the library together at the time; (c) the connection to the earlier CVS conversation; and (d) the corroborated facts that were contained in the statements, such as the use of duct tape to bind the victim, the DNA evidence at the crime scene and in Logan's car, and the phone records that matched the call to which Ashby referred.

When analyzing the third step – whether corroborating circumstances clearly indicate the trustworthiness of the statement – the court should consider "the time of the declaration and the party to whom it was made; the existence of extrinsic evidence in the case corroborating the declaration; and – the fundamental criterion – the extent to which the declaration was 'really against the declarant's penal interest' when it was made." *Thomas*, 978 A.2d at 1228 (quoting *Laumer*, 409 A.2d at 200). The statements in the CVS parking lot were made in early January, shortly after the murder, which lends credibility. *Laumer*, 409 A.2d at 200 ("declarations made shortly after the crime for which an accused is charged are often more reliable than those made after a lapse of time."). While the jail conversation took place in July, "the mere fact that the declaration was made after a lapse of time does not [i]n and of itself render the statement unreliable." *Laumer*, 409 A.2d at 201; *see, e.g., Walker v. United States*,

167 A.3d 1191, 1210-11 (D.C. 2017) (statement made two months after the crime is not unreliable where other factors – such as a close relationship between the declarant and the witness and other corroborating circumstances – are present). Furthermore, as pointed out by the trial court, this statement is more reliable considering Ashby discussed the same matter with Mr. Thomas earlier in the year.

There were extensive corroborating circumstances to support Mr. Thomas' account of the events. Ashby's story, as told to Mr. Thomas, matched the other evidence presented in this case. In the D.C. jail, Ashby told Mr. Thomas that the only evidence against him was the phone call that he placed in the neighborhood, a fact that was corroborated by the prosecution's evidence that, on the night of the murder, there were five incoming and five outgoing calls to and from Watson's phone, and one incoming and two outgoing calls to Logan's phone. Ashby also said that Watson was involved, which matches up with the false 911 call made from Watson's phone at the time. In addition, Ashby's knowledge of where the body was taken was corroborated ***655** by Ashby's later protestation that he did not "throw nobody in the woods" prior to being told where the body was found.

Watson and Logan argue that these statements were "blame shifting" on Ashby's part, since he discussed Logan and Watson's involvement, and therefore the statements do not qualify as statements against penal interest. Where a declarant implicates others as well as himself, the Supreme Court has said "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Williamson v. United States*, 512 U.S. 594, 599, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). Therefore, we have held that "the trial court must assess each component remark for admissibility as a statement against penal interest, rather than base its ruling on the overall self-inculpatory quality of the declarant's narrative in its totality." *Thomas*, 978 A.2d at 1229.

Here, the court, as explained above, did examine each of the statements in turn, looking first at the statement made in the CVS parking lot and finding it credible for the reasons explained above. Next, the trial court considered the time elapsed between the murder and the conversation at the D.C. jail, and still found it to be credible. While some of Ashby's statements may seem as if he was attempting to shift the blame to Logan, this is not a situation wherein Ashby could be looking to escape liability, as he was not being interrogated by the police, nor did he ever think he would get caught. Moreover, these statements are in no way "neutral" to Ashby, as he admitted to committing the actual murder, implicating Logan as part of a conspiracy that, if discovered, would only heighten the potential jeopardy for Ashby. *See Thomas*, 978 A.2d at 1229. If anything, it appears from the totality of the circumstances that Ashby felt free to tell the truth to a friend he had known for over twenty years.

Finally, Logan and Watson argue that the court should have declined to admit hearsay statements from Mr. Thomas because he was an unreliable witness – one who offered testimony not because it was truthful, but in an attempt to shift the blame away from himself and curry favor with the prosecution. Yet, as noted above with respect to the first prong of the *Laumer* analysis – whether the statement was actually made – the court must "assess the general credibility of the witness and probe for interest, bias, and the possible motive for fabrication." *Laumer*, 409 A.2d at 199. For the reasons discussed, the trial court conducted a detailed analysis and found Mr. Thomas' testimony credible. We do not find Mr. Thomas' motives for lying to be so compelling as to mandate a reversal of the trial court's decision here.

We discern neither clear error in the factual findings nor errors of law in the trial court's conclusions, and we therefore do not disturb its holdings regarding statements against penal interest.

ii. The State-of-Mind Exception

Watson challenges a statement that was admitted under the exception to the hearsay rule that permits statements introduced " 'for the limited purpose of showing the state of mind of the declarant' if the declarant's state of mind is at issue in the trial."[18] *Jones*, 17 A.3d at 632 (quoting *Evans-Reid v. District of Columbia*, 930 A.2d 930, 944 (D.C. 2007)). During a pretrial hearing, government witness John Carrington identified Logan in court and testified that, prior to Mr. Bolden's murder, Logan asked Mr. Carrington "to rob Dink and kill him," referring to Mr. Bolden ***656** as "Dink." Mr. Carrington said that, after he refused, Logan "said he would have his man, Tiger [Ashby,] do it." The court ruled that it would allow this testimony from Mr. Carrington under the state-of-mind exception to the hearsay rule, though it instructed counsel that the statement must be redacted to omit any reference to Ashby ("Tiger").[19]

18 Logan does not challenge the admission of these statements on appeal.

19 The trial court also instructed that the statement be redacted to omit reference to Logan committing the crime with "other people," though Mr. Carrington included this portion of the statement in his testimony at trial, appellants did not object, and the court did not intervene.

This statement, as edited by the trial court, meets the requirements of the state-of-mind exception. In the past, we have held that a declarant's expression of an intent to do harm to the victim is relevant to state of mind, where the government has the burden of showing an intent to commit the crime. *See, e.g., Rink v. United States*, 388 A.2d 52, 55-56 (D.C. 1978) (declarant's threats towards the victim are admissible to establish declarant's malice aforethought in a second-degree murder trial). Here, in order to secure a conviction for felony murder, the government had to show "intent to commit the underlying felony." *Waller v. United States*, 389 A.2d 801, 807 (D.C. 1978). Logan's statements reveal an intent to rob and kill Mr. Bolden, actions which are both at issue in this case. Where hearsay statements have "a highly prejudicial nature," they must be excluded, even if they are probative and fall under this exception. *Clark v. United States*, 412 A.2d 21, 27 (D.C. 1980). This statement, however, was not so prejudicial as to be barred. Mr. Carrington recounted Logan's statement about killing Mr. Bolden, but did not mention Watson or Ashby, as there was no reference to Watson in the first place and the reference to "Tiger" (Ashby) was redacted. Thus, the jury was not told who Logan's accomplices may have been, and would have had to infer, based on other evidence, the extent of Watson and Ashby's involvement. [20]

20 This is not unlike our ruling in *Baker v. United States*, where the admitted statement of future intent was harmless because it was "vague and cumulative .... The statement itself offer[ed] only an imprecise notion that Baker, along with unnamed and unenumerated others" planned to commit a crime. *Baker v. United States*, 867 A.2d 988, 1003 (D.C. 2005). While Logan was clear about the exact crime he planned to commit, the omission of Ashby's nickname made the statement seemingly refer to "unnamed and unenumerated others" that Logan would eventually recruit to join in his plan. *Id.*

Additionally, Watson contends that, because Logan's state of mind would not have been at issue if Watson had been the only defendant at trial, the statement should not have been admitted against him, even in a trial where all three appellants were tried together. However, the court provided this limiting instruction to the jury, which was sufficient to ameliorate any prejudice to Watson:

> The testimony of John Carrington that Keith Logan made a statement to him or in his presence was offered to prove the state of mind of Defendant Keith Logan. That statement attributed to Mr. Logan was not offered as proof of the state of mind of Defendant Paul Ashby or Defendant Merle Watson and may not be considered proof of the state of mind of Defendant Watson or Defendant Ashby.

See Thomas, 978 A.2d at 1232, n.65 (a statement that implicates a co-defendant admitted under the state-of-mind exception entitles the implicated, non-declarant co-defendant to a limiting instruction).

***657** We therefore find no error in the trial court's admission of Mr. Carrington's statement. [21]

21 We note that, while the trial court permitted this statement under the state-of-mind exception to the hearsay rule, it would likely also have been admissible as an opposing party's statement, as such statements include those made by co-conspirators during and in furtherance of the conspiracy. *See, e.g., Harris v. United States*, 834 A.2d 106, 116 (D.C. 2003) (discussing and applying Fed. R. Evid. 801(d)(2)).

iii. Denial of Severance

Watson contends that the trial court erred in denying his motion to sever his case from that of his co-appellants. He moved for severance upon the introduction of the statements against penal interest discussed above, and argues that the trial court abused its discretion in not granting severance, as the

statements were not made in furtherance of the conspiracy and were unreliable and prejudicial. [22]

22 Watson also contends severance should have been granted because these statements are not reliable. For the reasons discussed in section II.C.i, *supra*, we find this argument to be unpersuasive.

"The disposition of a motion for severance is within the sound discretion of the trial court, and its ruling either way will be reversed only on a showing of an abuse of discretion." *Perez v. United States*, 968 A.2d 39, 76 (D.C. 2009) (quoting *Scott v. United States*, 619 A.2d 917, 930 (D.C. 1993)). Where the government seeks to admit a statement that incriminates the declarant and a co-defendant "the trial court must ordinarily either sever the trials or exclude the statement." *Id.* at 76. However, this court has recognized other ways for a trial court to permissibly avoid prejudice. In *McCoy v. United States*, we held that the trial court's decision to admit a statement was permissible because the statement was "redacted to eliminate any reference to [a co-defendant]." (*Edward*) *McCoy v. United States*, 890 A.2d 204, 215 (D.C. 2006). In *McCoy* the trial court also instructed the jury that the statement could only be used against the declarant. *Id.* Moreover, these precautions and severance are unnecessary "if the evidence would be admissible against the defendant in a separate trial." *Perez*, 968 A.2d at 76.

Ashby's statements were properly admitted as statements against interest; as discussed, such statements are admissible when a declarant is unavailable to testify and the statements were made against the declarant's penal interest. Fed. R. Evid. 804(b)(3). First, because Ashby was unavailable to testify due to his assertion of his Fifth Amendment privilege, his statements would have been admissible in Watson's trial, even if Watson had been tried as the sole defendant. Fed. R. Evid. 804(a)(1). Second, like the court in *McCoy*, the trial court here edited Logan's statements to omit any reference to Ashby, and, absent any reference to Watson, they were not so prejudicial as to mandate exclusion, severance, or reversal, as explained above. We thus find no abuse of discretion in the trial court's holding.

D. *Winfield* Defense and Bias Cross-Examination

The testimony of Melvin Thomas, discussed above, spanned two days at trial and included not only direct examination by the government, but significant cross-examination by Ashby, Logan, and Watson. All three appellants claim in some manner that the trial court improperly restricted the cross-examination of Mr. Thomas, who they contend testified for the government in an effort to direct suspicion away from himself.

***658** Specifically, appellants assert that the trial judge impermissibly limited proposed lines of questioning regarding: (i) Mr. Thomas' own involvement in the murder of Mr. Bolden, and (ii) Mr. Thomas' involvement in other serious crimes being investigated at the time of the trial, namely, the murder of Terrance McFadden and a heroin operation at Mama's Southern Cuisine, an establishment co-owned by Mr. Thomas and a man named Raymond Proctor. These claims essentially amount to allegations that the trial court erred in (i) prohibiting appellants from portraying Mr. Thomas as a *Winfield* suspect in the murder of Mr. Bolden, and (ii) limiting bias cross-examination.

i. *Winfield* Defense

Under *Winfield v. United States*, 676 A.2d 1 (D.C. 1996), a criminal defendant may attempt to create reasonable doubt regarding his or her guilt by asserting that a witness at trial is, in fact, a suspect – another individual who may be at fault for the crime. In order to present a *Winfield* defense, a defendant must proffer to the trial court a sufficiently detailed explanation that provides context "as to third-party responsibility for a crime [and avoids the] risks [of] misleading the jury by distracting it from the issue of whether *this* defendant is guilty or not." *Id.* at 5 (emphasis in original). This proffer must suggest a "nexus between the proffered evidence and the charged crime" – and the nexus must be more than just a simple motive. *Winfield*, 676 A.2d at 5 (citations omitted). In ruling upon a defendant's proffer, "the trial court should exclude *Winfield* evidence if it is too remote in time and place, completely unrelated or irrelevant to the offense charged, or too speculative with respect to the third party's guilt." *Andrews v. United States*, 179 A.3d 279, 295 (D.C. 2018) (quoting *Turner v. United States*, 116 A.3d 894, 917 (D.C. 2015)). On appeal, "[w]e review a trial court's determination on the admissibility of a third-party perpetrator defense for abuse of discretion, and that determination 'will be upset on appeal only upon a showing of grave abuse.' " *Melendez v. United States*, 26 A.3d 234, 241 (D.C. 2011) (quoting *Gethers v. United States*, 684 A.2d 1266, 1271 (D.C. 1996)).

In order to support a *Winfield* line of questioning, Ashby provided a factual proffer that stated:

> It's our belief that Mr. Thomas has an extensive heroin operation that essentially ran its course ... and ended up butting heads with the decedent's operation. Mr. Thomas has a longstanding heroin business centered in LeDroit Park, specifically 70 W Street. We have information about his suppliers, the number of people who ran heroin for him in the area. And we know that in spite of what he says, that he was very familiar with Mr. Bolden and what operations Mr. Bolden had and what success Mr. Bolden had .... Although I will not be confronting him on being the actual trigger man .... As the Court knows, Mr. Thomas is a convicted murderer ....

The trial court recognized that "there's much less of a burden on the defense to make a showing than it is for the government to bring charges against the defendant," but found that the allegations of drug dealing were not sufficient to show a "nexus to the underlying murder." However, based on Ashby's argument at trial that the "drug relationship" between Logan and Mr. Thomas was relevant, the court allowed questioning to establish the "friendship" between Logan and Mr. Thomas.

We find no abuse of discretion in the trial court's holding that *Winfield* evidence was inappropriate as to Mr. Thomas. The ***659** evidence proffered against Mr. Thomas was remote, as nothing placed him in the vicinity of the crime or near the victims at any time near the murder, aside from testimony that Mr. Thomas was at 70 W Street on December 24, 2009, six days before the murder. It established that Mr. Thomas likely knew Mr. Bolden at one time and had been convicted of murder in the past, but was totally speculative as to Mr. Thomas' potential involvement in the murder of Mr. Bolden. Since Ashby presented no evidence that Mr. Thomas had a viable reason to harm Mr. Bolden and Ms. Daniels, aside from an inference that Mr. Thomas and Mr. Bolden may have been competitors in the drug trade, there was no evidence of a nexus to the crime.

Ashby contends that the trial court applied the incorrect standard in determining whether this *Winfield* evidence should be admitted, an argument based primarily on the trial court's comment that there was no "triggering event" in the proffer as to what would have prompted Mr. Thomas to commit such a heinous crime. However, the trial court did not require the "exhaustive proffer" that Ashby claims it did; rather, it noted that there was no evidence presented that showed anything other than Mr. Thomas and the victim's willingness to come and go from 70 W Street, trading in drugs. Absent any evidence – even circumstantial evidence – of a connection or motive, the trial court permissibly found that there was no evidence that tended to create a "reasonable possibility" that Mr. Thomas was involved in the crimes. *Winfield*, 676 A.2d at 5 (quoting *Johnson v. United States*, 552 A.2d 513, 516 (D.C. 1989)). We see no reason to upset the trial court's determination on appeal. [23]

23 Ashby also argues that the trial court incorrectly prohibited him from making *Winfield* arguments regarding Mr. Thomas in his closing. However, Ashby's counsel did make remarks in closing arguments implying that Mr. Thomas was involved in the murder. He stated: "Mr. Carrington and Mr. Thomas met together, perhaps in the CVS parking lot, and they came up with a story. And Melvin Thomas' plan was for all of them to say the same story that Paul Ashby confessed to this crime." He also referred to Mr. Thomas as a "puppet master" who "needed Paul Ashby to be the one who is in that chair." There was no objection and the court allowed these arguments to proceed.

ii. Bias Cross-Examination

At trial, the judge allowed extensive bias cross-examination of Mr. Thomas, and precluded it only as it related to (a) heroin dealing at Mama's Southern Cuisine; (b) the murder of Terrance McFadden; and (c) further cross-examination of Mr. Thomas relating to his drug dealing and his involvement in the murder of Mr. Bolden.

First, all three appellants asked for a federal case file on a man called "Pappy," who, together with others, was under investigation for conspiring to import heroin from Guatemala. They stated that the authorities had originally believed Mr. Thomas was "Pappy," based on repeated phone calls between Mr. Thomas and a man named Eric Braxton, but then came to realize that Mr. Braxton, not Mr. Thomas, was "Pappy." Appellants argued mid-trial that they had just learned of these

developments, and that they needed access to the case file on the investigation to reveal "what [the government has] on Mr. Thomas and especially what [the file] might reveal that [Mr. Thomas] knows they have." They also argued that they should be permitted to question Mr. Thomas about Mama's Southern Cuisine, which he co-owned with Raymond Proctor, as Mr. Proctor was arrested for selling drugs out of Mama's Southern Cuisine. The court denied these requests, finding appellants' allegations too weak to sustain further exploration.

***660** On appeal, Ashby argues that the court erred in not allowing appellants to explore the "Pappy" investigation further, as this would have shown Mr. Thomas' motive to lie in the trial for Mr. Bolden's murder in order to "curry favor" with the government and avoid suspicion in a drug trafficking case. On a related note, appellants, primarily Watson and Ashby, argue that the court erred by not allowing them to question Mr. Thomas regarding Mama's Southern Cuisine, as this line of questioning would have shown that Mr. Thomas was biased and provided favorable government testimony to avoid being caught up in the restaurant investigation himself – and would have additionally shown that he was involved in the drug trade in the area.

Second, appellants argue that they should have been permitted to question Mr. Thomas regarding his involvement in the murder of Mr. McFadden. Watson's counsel presented information, based on unnamed witness accounts, that there was a fight outside of Chuck and Billy's Bar, after which Mr. Thomas shot Mr. McFadden and handed the gun off to someone else. However, the trial court found the proffer insufficient, as the defense counsel was not willing to tell the Court any more about the alleged witnesses.

Third, appellants take issue with the trial court's denial of cross-examination pertaining to Mr. Thomas' drug trafficking generally, and how those activities connected Mr. Thomas to the charged crimes. Ashby argued at trial that this information was relevant not just for *Winfield* purposes, but to show that Mr. Thomas had a motive for lying – to conceal his own guilt. Ashby's counsel pointed to the two drug investigations discussed above and alleged that Mr. Thomas was "a major drug player," who "clearly has an incentive to curry favor with the government." The trial court declined to allow questions about the drug dealing between Logan and Mr. Thomas, but, as noted above, allowed questions about "their friendships" and association.

It is true that the right of the defendants "to present a complete defense ... includes the guarantee of 'a full and fair' opportunity to show that the government's witnesses are biased.' " *Martinez v. United States*, 982 A.2d 789, 794 (D.C. 2009) (quoting *McDonald v. United States*, 904 A.2d 377, 381 (D.C. 2006)). This court has held that a motive to lie is clear where a witness is under suspicion by the government for another matter and therefore may be motivated to "slant his testimony in favor of the government" to curry favor. *Id.* at 794 (quoting *Beynum v. United States*, 480 A.2d 698, 707 (D.C. 1984)). Furthermore, "the refusal to allow *any* questioning about the facts indicative of bias ... is an error of constitutional dimension, violating the defendant's rights secured by the Confrontation Clause." *Id.* at 794.

However, this right "is not unlimited"; once meaningful cross-examination has been permitted, "the trial court has broad discretion to impose reasonable limits on cross-examination based on concerns about ... confusion of the issues ... or interrogation that is repetitive or only marginally relevant." *Coles v. United States*, 808 A.2d 485, 489 (D.C. 2002) (quoting *Grayton v. United States*, 745 A.2d 274, 280-81 (D.C. 2000)). Additionally, before a line of bias questioning can be pursued, the proponent must provide "[a]n adequate foundational 'proffer ... to establish the relevance of a proposed inquiry by facts from which the trial court may surmise that the line of questioning is [in fact] probative of bias.' " (*Ricardo*) *Jones v. United States*, 27 A.3d 1130, 1148 (D.C. 2011) (quoting *Melendez v. United States*, 10 A.3d 147, 152 (D.C. 2010)).

***661** First, the trial court did not err in denying further cross-examination into the drug investigations. [24] The defense was able to present the alleged connection between Mr. Braxton and Mr. Thomas through cross-examination of Mr. Thomas regarding drug-related phone calls and other statements; Mr. Thomas provided testimony about the close relationship between himself and Mr. Braxton, and denied the use of the name "Pappy" in their dealings – a statement that Ashby was able to impeach with prison phone calls. The defense was also able to question Mr. Thomas about the investigation into the heroin importation. In the past, we have held that it was an abuse of discretion for a trial judge to disallow cross-examination into the investigatory matters which may induce a witness to lie for the government, "without otherwise making or permitting adequate inquiry about the investigation." *Martinez*, 982 A.2d at 795. In this case, however, it is clear that the court allowed "a meaningful degree of cross-examination to establish bias," not only as it

pertained to Mr. Thomas' relationship to Mr. Braxton, but also as it pertained to his other motives for lying. *McCray v. United States*, 133 A.3d 205, 232 (D.C. 2016) (quoting *Grayton v. United States*, 745 A.2d 274, 279 (D.C. 2000)).

24 As described above, there were two drug-related cases that the defense sought to introduce on cross-examination of Mr. Thomas: the importation of heroin undertaken by Mr. Braxton, or "Pappy," and the drug charges against Raymond Proctor for dealing out of Mama's Southern Cuisine. From the record, it appears that the charges related to Mama's Southern Cuisine were dismissed and then "incorporated" into the heroin importation case, which was a joint FBI-MPD endeavor.

Second, the court did not err in excluding cross-examination regarding the murder of Mr. McFadden. Watson's counsel was unable to provide sufficient detail in her proffer to the court, telling the court only she had "talked to the individuals that were there" and had "a good faith basis to believe that Mr. Thomas was involved in the homicide." When the court asked for the "factual underpinning of [this] good faith basis," counsel declined to say anything further on the record to justify the cross. Thus, Watson offered what essentially amounts to a rumor that Mr. Thomas was involved in a crime, with no evidence to support this assertion. She also failed to offer any proof that Mr. Thomas was being investigated for the crime. Thus, there was no reason for the unrelated crime to be introduced during these proceedings.

Finally, the trial court did not err in prohibiting further cross-examination about Mr. Thomas' involvement in the murder of Mr. Bolden. We have long held that there is a "conceptual similarity" between bias cross-examination of a witness and a *Winfield* defense, as bias cross-examination is intended to show that the witness is motivated to lie to divert suspicion away from the true murderer, while a *Winfield* defense is intended to show, through cross-examination, that the witness himself or herself is the true murderer. *Jolly v. United States*, 704 A.2d 855, 860 (D.C. 1997). The defense's burden for obtaining bias cross-examination is relatively low, as it need only show and the court need only find that there are "some facts which support a genuine belief that the witness [was] biased in the manner asserted." *Id.* at 860 (quoting (*Irving J.*) *Jones v. United States*, 516 A.2d 513, 517 (D.C. 1986)). It is within "the discretionary role of the trial court [to] control[ ] bias cross-examination." *Brown v. United States*, 683 A.2d 118, 124 (D.C. 1996) (quoting *Ford v. United States*, 549 A.2d 1124, 1127 (D.C. 1988)). Moreover, "[b]ias is always a proper subject of cross-examination," ***662** *Brown*, 683 A.2d at 124 (quoting (*Irving*) *Jones*, 516 A.2d at 517), because "evidence that the testimony of the key eyewitness to the [crime] might be motivated by his effort to cover up his own involvement in the [crime], and perhaps to downplay the culpability of his partner in criminal activity, is highly relevant to the jury's assessment of the witness' credibility." (*Louis*) *McCoy v. United States*, 760 A.2d 164, 174 (D.C. 2000).

In this case, the trial court allowed ample inquiry into Mr. Thomas' involvement with appellants and his relationship to the crime. Appellants were permitted to question Mr. Thomas about his involvement in the drug trade generally. The trial court also allowed bias cross-examination as to Mr. Thomas' presence in Logan's house and heroin dealing on December 24, 2009, which was also corroborated in another witness' earlier testimony. The defense was likewise permitted to question Mr. Thomas about his past crimes and his resulting parole status, as well as his previous charges for firearm possession and assault on a police officer. Yet, there was no evidence proffered that he had actually committed the murder of Mr. Bolden himself, beyond a mere speculative claim of guilt by association. Thus, the trial court did not err in prohibiting additional cross-examination, beyond what it had already permitted.

We therefore discern no abuse of discretion in the court's decision to deny additional bias cross-examination on the three issues raised by appellants. We also find that, even assuming that the trial court was in error, such an error would be harmless beyond a reasonable doubt.

In assessing harmlessness, the mere fact that significant cross-examination had been conducted is, on its own, insufficient to ensure the defendant's constitutional rights were not violated. *See, e.g., Coles v. United States*, 36 A.3d 352, 359 (D.C. 2012). Rather, we must determine " 'whether, assuming that the damaging potential of the cross-examination were fully realized, [we] might nonetheless say that the error was harmless beyond a reasonable doubt.' " *Martinez*, 982 A.2d at 796 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). In doing so, we look to "a host of factors," including the importance of the witness' testimony to the prosecution's case, corroboration by other witness testimony, the extent of cross-examination otherwise permitted, and the strength of the prosecution's case. *Id.* (citation and internal quotation marks omitted).

As explained above, ample cross-examination was permitted and undertaken by appellants. The jury had full knowledge of Mr. Thomas' connection to the defendants and other known drug dealers, as well as Mr. Thomas' own involvement with drugs and other crimes. The defense impeached his testimony using his prior grand jury statements. They asked him about his presence in the house prior to the murder to engage in heroin dealing, and how often he spoke with Logan. The jury was also informed of the consequences that Mr. Thomas was attempting to avoid. As a result of the firearm and assault charges, he had to go in front of the parole board and risked the revocation of his lifetime parole. Appellants asked Mr. Thomas about whether the prosecution had offered to speak on his behalf at the hearing, which Mr. Thomas denied. *See Martinez*, 982 A.2d at 795 ("inquiry into whether a government witness might be facing severe penalties that his testimony might help avert can be an important part of effective cross-examination for bias.") He was also asked about his relationship with Mr. Braxton, and the court allowed the defense to play audio clips of telephone ***663** conversations between the two that were recorded while Mr. Thomas was in jail. The defense questioned Mr. Thomas about his tendency to put on a deceptive "act" for others. In sum, there was extensive cross-examination over the course of two days and hundreds of pages of transcript, and the defense was able to provide enough damaging cross-examination that additional cross-examination would have been cumulative.

E. Sufficiency of the Evidence for the Daniels Shooting Conviction

Logan, the only appellant to be convicted for the shooting of Ms. Daniels, argues that his convictions must be reversed for insufficiency of evidence. In connection with the shooting of Ms. Daniels, Logan was convicted of assault with intent to kill ("AWIK") while armed, aggravated assault while armed, mayhem while armed, and two counts of possession of a firearm during a crime of violence ("PFCV") – one related to AWIK and one related to aggravated assault.

We have held that, "[w]hen analyzing the sufficiency of the evidence, we view the evidence 'in the light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence.' " *Medley v. United States*, 104 A.3d 115, 127 n.16 (D.C. 2014) (quoting *Curry v. United States*, 520 A.2d 255, 263 (D.C. 1987)). On appeal, we will not disturb a conviction on grounds of insufficient evidence unless "the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt." *Id.* at 127 (quoting *Zanders v. United States*, 678 A.2d 556, 563 (D.C. 1996)). In order to prove AWIK while armed, "the government had to show beyond a reasonable doubt that [Logan]: (1) made an assault on [Ms. Daniels]; and (2) did so with specific intent to kill; (3) while armed." *Hagans v. United States*, 96 A.3d 1, 42 n.131 (D.C. 2014) (citing *Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999)); *see also* D.C. Code § 22-401 (2018 Supp.).

Logan does not contend that the government failed to prove intent to kill or the presence of a gun during the crime; he contends only that the evidence that placed Logan at the scene of the assault was not sufficient to overcome his alibi, which was Diane McCray testifying that Logan was in her apartment at the time. However, the testimonial and physical evidence in the record was more than sufficient to place Logan at the scene.

The evidence showed that the murder of Mr. Bolden was committed in Logan's basement. The month before the murder, Logan asked Mr. Carrington to "rob [Mr. Bolden] and kill him," while Ashby told Mr. Thomas that killing Mr. Bolden in the basement was Logan's idea. Logan called Mr. Bolden twice before the attacks. Physical evidence found in Logan's basement and on Mr. Bolden's body also pointed to Logan being involved in the crime. The cord missing from a TV in the basement was "consistent with" the cord found wrapped around Mr. Bolden's body. Mr. Bolden's blood was found on a jacket and a wall in the basement. The tape found on Mr. Bolden's body matched the roll found in the basement, and the evidence suggested that the piece found on Mr. Bolden had been ripped from the roll.

The evidence also showed that the shooting of Ms. Daniels was connected to the murder of Mr. Bolden. The last place Ms. Daniels saw Mr. Bolden alive was in close proximity to Logan's house on W Street, and she waited for him in the car for about an hour before she was shot. ***664** Ashby told Mr. Thomas that Logan began "tripping when he seen the girl sitting outside in the car" and that Logan started talking about "killing everybody." Ashby also told Mr. Thomas that he (Ashby) and Watson left the house to transport Mr. Bolden's body "southeast," where the body was ultimately found by the police, and the cell tower location information indicated that Ashby's cell phone traveled from the vicinity of W Street, N.W. to the southeast part of the city, where Mr. Bolden was found. Meanwhile, at the time of the shooting, Logan's phone

never moved from the area, and an eyewitness saw someone running away from the scene following the gun shots at Ms. Daniels. Thus, there was substantial evidence from which a jury could conclude that Logan was at the scene of the shooting of Ms. Daniels.

Logan contends that he had an alibi: he was with Ms. McCray the whole night. Yet, Ms. McCray herself testified that Logan seemed "disturbed" when he showed up to her house that night, and that she then left to go to the grocery store for "close to an hour." The jury may have discounted Ms. McCray's statement entirely; based on her testimony that she had known Logan for thirty years and that they had "always been close like family friends," the jury could have reasonably concluded that she lied for Logan – and this would be within its province as the finder of fact. *Tann v. United States*, 127 A.3d 400, 430 (D.C. 2015) ("[w]e afford the jury's credibility determination substantial deference on appellate review."). However, even if the jury had credited Ms. McCray's story, there would have been time for Logan to leave her house, commit the crime, and return, unbeknownst to her. Thus, there is no question that, even taking Logan's purported alibi to be true, there was more than sufficient evidence for the jury to place Logan at the scene of the shooting of Ms. Daniels and therefore find that each element of AWIK while armed was satisfied.

F. The *Pinkerton* Instruction

Ashby also challenges the *Pinkerton* instruction given at trial, arguing that the *Pinkerton* doctrine is not applicable in the District of Columbia because it is not authorized by statute. The *Pinkerton* doctrine, articulated by the Supreme Court in 1946, provides that co-conspirators can be held liable for the acts of their fellow co-conspirators done in furtherance of the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946) ("[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." (citations omitted)). Ashby contends that, because the District's common law does not include any doctrines that were not in existence in 1801, including the *Pinkerton* doctrine, and no statute has been passed to codify this theory of liability, a *Pinkerton* instruction is not allowed in the District.

In 1901, Congress passed the "1901 Code Act," which incorporated into the law of the District the common law and all British statutes in effect in Maryland in 1801, principles of equity and admiralty, and applicable laws of Congress in force in 1901. D.C. Code § 45-401 (2012 Repl.). Yet, "[w]e have held ... that by incorporating the common law of Maryland ... Congress did not intend to freeze the common law as it existed in 1801. Rather, Congress meant to incorporate the 'dynamic' common law." (*Robert*) *Williams v. United States*, 569 A.2d 97, 100 (D.C. 1989) (citations and internal quotation marks omitted). This means that, as we have ***665** stated in the past, when the Maryland common law was incorporated into this jurisdiction, it was "not a bar to the exercise of our inherent power to alter or amend the common law." *Williams*, 569 A.2d at 100 (quoting *United States v. Jackson*, 528 A.2d 1211, 1216 (D.C. 1987)). Indeed, our jurisprudence is clear that the *Pinkerton* doctrine has been accepted as part of this jurisdiction's common law. This court has adopted and applied the *Pinkerton* doctrine, and has stated, while sitting en banc:

> As articulated by this court, the *Pinkerton* doctrine provides that "a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement."

Wilson-Bey v. United States, 903 A.2d 818, 840 (D.C. 2006) (en banc) (quoting *Gordon v. United States*, 783 A.2d 575, 582 (D.C. 2001)) (brackets in original).

In light of this court's holdings, "the validity of a *Pinkerton* instruction as part of D.C. law" is clearly not "an issue of first impression," as Ashby contends. It is settled law.

The instruction offered in this case, based on the Red Book instruction for conspiracy,[25] was:

> A conspiracy is kind of a partnership in crime. And its members may be responsible for each other's actions. A defendant is responsible for an offense committed by another member of the conspiracy if the defendant was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance and as a natural consequence of the conspiracy.

See Criminal Jury Instructions for the District of Columbia 7.102 (Barbara E. Bergman ed., 5th Ed. 2016). This is not unlike instructions that we have quoted and found no error with, such as the instruction that evidence against "one participant in furtherance of a joint criminal venture can be held against another participant, since each participant in a shared venture is responsible as a principal, even though he does not personally commit each of the acts that constitute the offense." (*David*) *Williams v. United States*, 858 A.2d 978, 983 (D.C. 2004). Therefore, we find no error in the trial court's application of the *Pinkerton* doctrine or its jury instruction in the instant case.

25 The book of criminal jury instruction for the District is often referred to as "the Red Book." *See* Criminal Jury Instructions for the District of Columbia (Barbara E. Bergman ed., 5th Ed. 2016)

G. The Prosecutor's Closing Argument

Logan alone contends that the prosecutor's closing argument "was improper and should have been corrected by the judge." Logan specifically challenges the prosecution's references to appellants as "hardened killers" and "stone-cold killers," and his statements that the jury must find appellants guilty "in order to make sure that Danielle Daniels' suffering is vindicated, in order to make sure that Carnell Bolden receives a possibility of justice ...." Logan contends that, with these comments, the prosecution impermissibly attacked the character of appellants, sought vengeance, and may have led the jury to "impute to [the prosecution] knowledge that had not been set before them." Logan did not, nor does he contend on appeal that he did, preserve this objection ***666** to the closing argument at trial, and we therefore review for plain error. [26]

26 *See Ventura v. United States*, 927 A.2d 1090, 1098 n.8 (D.C. 2007) ("The plain error standard generally applies to contentions not raised before the trial court." (citation omitted)); *see also* (*Richard C.*) *Jones v. United States*, 124 A.3d 127, 129 (D.C. 2015) (plain error review is a "rigorous standard" that requires an appellant to show that the trial court's action "was (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings." (quoting *Coleman v. United States*, 948 A.2d 534, 544 (D.C. 2008))).

We have observed that the government may prosecute its case "with earnestness and vigor." *Perez*, 968 A.2d at 82 (quoting *Irick v. United States*, 565 A.2d 26, 36 (D.C. 1989)). While a prosecutor "should not express his or her opinion on the ultimate issues in the case to the jury during closing argument," *Sherrod v. United States*, 478 A.2d 644, 656 (D.C. 1984), we have held that, when reviewing prosecutorial remarks during closing arguments, the "court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning, or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Perez*, 968 A.2d at 80 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

Here, we discern no plain error on the part of the trial court, as it was not required to intervene *sua sponte* in response to the assertions to which Logan belatedly objects. The prosecutor referred directly to the charges in this case and the evidence in this case, and put forward a characterization that was consistent with the government's theory of the case. The prosecutor first stated: "[Y]ou have been sitting in this room with three hardened killers.... [L]adies and gentlemen, you have to be willing to consider that these defendants – these defendants brutally attacked Carnell Bolden, a man with children, a life, a girlfriend." Later in his closing, he said: "[Y]ou have to ... accept the fact that you have been sitting in a room with stone-cold killers almost every day for the last several weeks. And the evidence in this case, ladies and gentlemen, proves beyond a reasonable doubt that that is what these people are." There was no mention of the character of appellants or any reference to evidence other than the evidence in this case. As to the request to vindicate suffering and ensure justice, even assuming some ambiguity in this remark, it cannot reasonably be construed as an improper call for vengeance.

H. Logan's Unannounced PFCV Conviction

Pursuant to Superior Court Rule of Criminal Procedure 31, "[t]he jury must return its verdict to a judge in open court." Super. Ct. Crim. R. 31 (a). We have held that, until the verdict has been announced in open court, giving the parties an opportunity to poll the jurors for unanimous agreement, the verdict is not final. *See Speaks v. United States*, 617 A.2d 942, 947 (D.C. 1992).

Here, the jury verdict form indicates that it found Logan not guilty of first-degree premeditated murder and second-degree murder, but found him guilty of PFCV during first-degree premeditated murder or second-degree murder. The trial judge asked the jury to state, and the jury foreperson did state, its verdict as to the first-degree premeditated murder and second-degree murder charges against Logan; it found him not guilty. However, the trial judge did not ask the jury to state its verdict on the PFCV count related to first-degree ***667** premeditated murder or second-degree murder.

The judge sentenced Logan for five counts of PFCV – four counts of PFCV related to (1) kidnapping, (2) armed robbery, (3) assault with intent to kill, and (4) aggravated assault, as well as (5) one count of PFCV related to first-degree premeditated murder or second-degree murder – all to run concurrently with one another and with the conspiracy sentence, but consecutively to the sentences for the violent crimes.

As Logan rightly asserts, he should not have been sentenced for a conviction that was not read in open court. Therefore, this individual sentence – for the PFCV count related to first-degree premeditated murder or second-degree murder – should be vacated, and we will remand to allow the trial court to vacate it. We note, however, that, because Logan's sentences for the PFCV convictions run concurrently with one another, vacating one of them will not impact his ultimate prison term.

I. Merger of Convictions

Finally, appellants argue that several of their convictions should merge. Logan contends, and the government does not contest, that his convictions for mayhem and for aggravated assault should merge. Logan and Watson also contend, again without opposition from the government, that their convictions for felony murder merge with their convictions for the predicate felonies. Additionally, Ashby argues that his convictions for first-degree premeditated murder and felony murder should merge, and that his PFCV convictions related to the merged offenses should also merge. The government offers no response to Ashby's arguments.

As these arguments regarding merger of convictions appear to have merit, we will remand for the trial court to address the merger issues. We note that the merger of some of the convictions in this case may have little practical effect on the prison terms of appellants, as they are each over fifty years old, Ashby and Watson were sentenced to ninety and seventy-three years respectively (each with thirty-three year mandatory minimums), Logan was sentenced to life in prison, and several of their sentences are set to run concurrently. Nevertheless, we remand to allow these convictions to be properly merged and the sentences to be adjusted accordingly.

III. CONCLUSION

For the foregoing reasons, we affirm in part and remand in part. We remand to the trial court to vacate Logan's unannounced PFCV conviction and to merge any convictions that should be merged. The judgments are otherwise affirmed.

So ordered.

All Citations

199 A.3d 634

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	
v.	Criminal Action No.
PAUL ASHBY,	2010 CF1 3069
KEITH LOGAN,	2010 CF1 21619
MERLE VERNON WATSON,	2011 CF1 23411
Defendants.	
	Washington, DC
	July 31, 2013

The above-entitled action came on for a motions hearing before the Honorable HERBERT DIXON, Associate Judge, in Courtroom Number 215, commencing at approximately 9:30 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:
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Erik Kenerson, Esquire
Assistant United States Attorney

On behalf of the Defendant Ashby:
Eugene Ohm, Esquire
Matthew Davies, Esquire
Washington, DC

APPEARANCES CONTINUED ON NEXT PAGE

Sherry T. Lindsay, RPR (202) 879-1050
Official Court Reporter

back and forth looking at instructions. I mean, if by habit you stand, that's fine, you won't be criticized, but feel free to be seated.

Okay. In terms of requests made yesterday, there was a request for 7.103, which is the -- in essence, the Pinkerton instruction. And I know there is a motion in opposition to that particular instruction. However, I want to hear first from the proponent of the request.
Mr. Kenerson, you raised the issue. Are you the one that is going to speak to it?

MR. KENERSON: Yes.

THE COURT: If you like, you can be seated or whatever is comfortable for you.

MR. KENERSON: Thank you. I mean, the Government -- I think it has been no secret in this case, for a very long time that the Government was seating in part on a Pinkerton theory of liability. There is a charged conspiracy. There is -- the Court has actually denied motions for judgment of acquittal on that count. I think there is ample evidence upon which the Court can send the case to the jury on a Pinkerton theory of liability. And I don't think -- I don't read the defense's objection, at least what was filed as a written objection, as saying that there is insufficient evidence for a Pinkerton theory of liability. I think they are trying to make an argument that

Pinkerton is an unconstitutional theory of liability in this jurisdiction. And with regards to that, I would note that, first, we were, obviously, just given the pleading last night. But the DC Court of Appeals has upheld convictions on a Pinkerton theory of liability in numerous cases.

THE COURT: Let me allow you to respond to the defendant's argument after they make it. What I am curious about, if you will take a look at the instruction, when -- when in the elements it refers to offense, and I guess, with respect to element number 1, I assume that is a conspiracy to kidnap and rob Carnell Bolden.

MR. KENERSON: Yes. Although I would ask that be "or" not "and."

THE COURT: Okay. Now, element 2, because that should define the rest of it. What offense or offenses are you referring to?

MR. KENERSON: I think we are asking for Pinkerton on every offense charged.

THE COURT: So that would be the murder, kidnapping and firearms offenses related to the murder and kidnapping of Carnell Bolden -- murder, kidnapping, robbery -- I'm sorry -- of Carnell Bolden and the related firearms offenses. The assault and mayhem of Danielle Daniels, offenses related to Danielle Daniels and the related firearms offenses.

MR. KENERSON: Yes.

THE COURT: That is essentially everything.

Okay. I will let you make your argument in response to the defendant's argument after we hear it.

Mr. Davies.

MR. DAVIES: Your Honor, we -- you have the written pleadings, so we will submit on what we submitted to the Court. But just, essentially, this Pinkerton liability has not been codified in the District. And what the Government is asking the Court to do is to have a standard of guilt where Mr. Ashby could be found guilty of any offense charged if -- under the instruction if it was reasonably foreseeable that someone else did it. And it is just way too expansive. It is way more expansive than the law in the District allows. And I will submit under a written pleading, Your Honor.

THE COURT: Okay. Just a couple of questions, Mr. Kenerson. Since the initial conspiracy, as alleged by the Government, was to kidnap or rob, why should those offenses be included in the Pinkerton liability?

MR. KENERSON: Why should kidnapping and robbing be included in the Pinkerton theory of liability when they were originally the objects of the conspiracy?

THE COURT: Right.

MR. KENERSON: Well, I think -- I guess I don't

see a reason why they wouldn't be, in that if there was a conspiracy with the object to kidnap and rob Carnell Bolden, and, for example, myself and Mr. Liebman conspired to do that, but my role in the conspiracy didn't involve me being there, Mr. Liebman carried that out, the conspiracy of liability would still apply to me. Just because they are objects of the conspiracy, I don't think removes them from the Pinkerton analysis.

THE COURT: Okay. Let me hear the rest of your argument and then I think I will have one other question. Any further response to the defense?

MR. KENERSON: Just to note that the Court of Appeals has affirmed Pinkerton liability numerous times, so it is the law of the District of Columbia as stated by the Court of Appeals, not just the United States Supreme Court. And if the Court would entertain that further, we would ask for further time for briefing.

THE COURT: Have you run this by your appellate section?

MR. KENERSON: Given the timing of which it was filed and the timing of this morning's hearing, no, I haven't had a chance to do that.

THE COURT: Because, you know, tentatively indicating I believe that under the law as we know it, you have the right to make this request for Pinkerton liability

for all offenses, but I still wonder if Pinkerton is a train wreck waiting to happen at some point down the line. And there may have been some assessment by your appellate section that they want to avoid part of that train wreck.

MR. KENERSON: Well, I mean, if the Court wants to take a break at some point for me to call back to appellate, I would be happy to do that.

THE COURT: All right. I will do that because -- and I don't mind telling everyone now, just based on everything that I heard, you know, if I were writing the law from scratch, I wouldn't come out this way. But I think under the existing law, the Government has the right to make this request with respect to all of the offenses and tentatively I am going to give the instruction. I just really wonder if it is a train wreck waiting to happen for an -- if it is a train wreck waiting to happen. I will keep it right there.

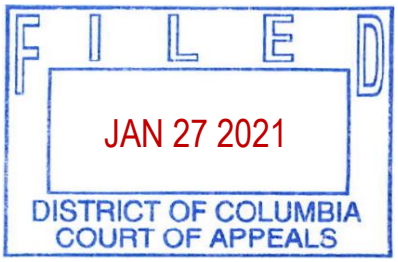
MR. LIEBMAN: If I may, Your Honor, I remember a couple of years back when the aiding and abetting issue was kind of in the same posture the Court is suggesting. We were getting guidance from our appellate division to kind of dial that back a little bit by asking for that instruction before the Court of Appeals announced their en banc decision. We haven't heard anything like that about Pinkerton.

THE COURT: I understand. But tentatively I will give the instruction. That is going to be related. And I will give you the language in a moment -- a little later. But the language with respect to the offenses will be something to the effect of the murder, kidnapping and robbery of Carnell Bolden and related firearm offenses and the assault and mayhem offenses related to Danielle Daniels and the related firearms offenses. In other words, it covers everything. I do think you ought to check with your appellate section. I mean, I don't mind my name being the trial judge when the law changes with respect to some issue. But I would like the US Attorney's Office to at least check into it to see if this is the route you want to go down. Because one other possibility -- one other possibility that would seem to make sense would be relating the Pinkerton liability to the assault and mayhem offenses related to Danielle Daniels and the related firearm offenses. Because, obviously, they were not a part of the original conspiracy. But I will wait to see what you advise me.

So, right now, 7.103 will be given. I will alert everyone to the language. I do want to hear back from Government counsel.

All right. Prior consistent statements. I was advised -- I think I advised yesterday that that instruction seemed appropriate and I will include it. I will include it

District of Columbia
Court of Appeals



No. 14-CF-414

PAUL ANTHONY ASHBY, Appellant, **CF1-3069-10**

No. 14-CF-424

KEITH A. LOGAN, Appellant, **CF1-21619-10**

No. 14-CF-669

MERLE VERNON WATSON, Appellant, **CF1-23411-11**

v.

UNITED STATES, Appellee.

BEFORE: Blackburne-Rigsby, * Chief Judge; Glickman, Thompson, Beckwith, Easterly, McLeese; Nebeker, * and Fisher, ** Senior Judges.

O R D E R

On consideration of appellant Paul Anthony Ashby's unopposed motion for leave to exceed page limit for the lodged petition for rehearing or rehearing *en banc*, appellants' Keith A. Logan and Merle Vernon Watson's petitions for rehearing or rehearing *en banc*, appellee's motion for leave to exceed page limit for the lodged opposition to appellants' petitions for rehearing or rehearing *en banc*, and it appearing that no judge of this court has called for a vote on the petitions for rehearing *en banc*, it is

ORDERED that appellant Paul Anthony Ashby's unopposed motion for leave to exceed page limit for the lodged petition for rehearing or rehearing *en banc* is granted, and the Clerk shall file appellant Paul Anthony Ashby's petition for rehearing or rehearing *en banc*, it is

Nos. 14-CF-414, 14-CF-424 & 14-CF-669

FURTHER ORDERED that appellee's motion for leave to exceed page limit for the lodged opposition to appellants' petitions for rehearing or rehearing *en banc* is granted, and the Clerk shall file appellee's opposition to appellants' petitions for rehearing or rehearing *en banc*, it is

FURTHER ORDERED by the merits division* that appellants Paul Anthony Ashby, Keith A. Logan and Merle Vernon Watson's petitions for rehearing are denied, it is

FURTHER ORDERED that appellants Paul Anthony Ashby, Keith A. Logan and Merle Vernon Watson's petitions for rehearing *en banc* are denied.

PER CURIAM

Associate Judge Deahl did not participate in these cases.

** Judge Fisher was an Associate Judge at the time of submission. His status changed to Senior Judge on August 23, 2020.

Copies emailed to:

Honorable Herbert B. Dixon, Jr.

Director, Criminal Division

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Margaret Cassidy, Esquire

Elizabeth Trosman, Esquire
Assistant United States Attorney

No. 14-CF-414 (Ashby)
No. 14-CF-424 (Logan)
No. 14-CF-669 (Watson)

DISTRICT OF COLUMBIA COURT OF APPEALS

PAUL ASHBY,
KEITH LOGAN,
MERLE WATSON,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT ASHBY

SAMIA FAM

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STATEMENT OF FACTS

Overview

On the evening of December 30, 2009, Danielle Daniels was shot multiple times as she sat in a car outside Keith Logan's house in Northwest D.C. waiting for her boyfriend Carnell Bolden to return from a rendezvous. Daniels survived the shooting but did not see who shot her. Bolden's dead body was found the next day in Southeast D.C., shot and bound in duct tape and electrical cords. The bulk of the evidence pointed to Logan. Although no eyewitness identified the perpetrators, and none of the fingerprints, hair, or DNA recovered in this case matched that of the defendants, police discovered Bolden's blood—along with duct tape and electrical cords similar to those found on Bolden's body—in Logan's basement and car.

Prosecution witness Derrick Hill testified that he sold heroin for Logan and crack cocaine for Bolden from the basement of Logan's house, and that Logan's girlfriend had asked him for Bolden's cell phone number the day of the shootings. Logan's cell phone records showed two calls to Bolden that afternoon. The government theorized that Logan had arranged a drug deal with Bolden as a pretext for robbing him, but when Logan learned that Bolden had no cash and that Daniels was waiting outside in Bolden's car, he panicked and decided to kill them both.

Logan's close friend John Carrington testified pursuant to a cooperation agreement that, about a month before the shootings, Logan had solicited him to rob and kill Bolden. Although Carrington claimed that he rejected the proposal and had nothing to do with the charged crimes, he gave the police a false alibi for the night of the shootings. The government posited that, after being turned down by Carrington, Logan recruited defendants Paul Ashby and Merle Watson as accomplices during a gathering at Logan's house on December 24, 2009.

To establish Ashby's complicity in the crimes, the government relied primarily on the word of cooperating witness Melvin Thomas, a convicted murderer and known drug dealer who

was close friends with Logan and Carrington but not with Ashby, and who himself had been seen packaging heroin at Logan's house on December 24, 2009, when Logan was allegedly enlisting accomplices. Although he was an unlikely confidant for Ashby, Thomas claimed that Ashby twice approached him to confess the details of the crimes: once in a CVS parking lot several days after Logan was arrested on January 1, 2010, and again six months later in the D.C. Jail. According to Thomas, Ashby told him that Logan came up with the idea to kill Bolden and Daniels, that Ashby choked or beat Bolden in Logan's basement and shot Daniels in Bolden's car, and that Ashby and Watson transported Bolden to Southeast D.C. Despite his allegiance to Logan, Thomas fed this story to the police on January 11, 2010, and claimed at trial that he did so only because his wife, who knew Daniels, had urged him to help bring the culprits to justice.

Although the government introduced cell phone evidence to place Ashby in the general vicinity of the crime scenes on December 30, 2009, and to show that the defendants called each other that day, the cell phone evidence also contradicted Thomas's account of what Ashby and Watson did that night, placing Ashby in Southeast D.C. when Daniels was shot outside Logan's house in Northwest D.C., and placing Ashby and Watson in Northwest D.C. when a witness in Southeast D.C. heard the gunshots that allegedly killed Bolden. The government urged the jury to ignore these problems and convict all three defendants on a theory of co-conspirator liability, which did not require the jury to receive reliable evidence of who did what, so long as it found that the defendants had agreed to rob or kidnap Bolden.

On appeal, Ashby raises four claims of reversible error. First, although defense counsel proffered a "well-reasoned suspicion" that Thomas was motivated to make himself useful to the authorities in this case because he feared that the police might suspect him of being involved in not only Logan's scheme to kill Bolden, but also two other serious crimes being investigated at

the time of trial, the trial court erroneously precluded the defense from cross-examining Thomas about these potential sources of bias. Second, when the government argued in summation that Thomas could not have reported such accurate details about the crimes unless he learned them from Ashby, the trial court erroneously precluded Ashby's counsel from arguing in response that Thomas could have gained the same information from his own or Carrington's involvement in the crimes, and not Ashby's unlikely confession. Third, the trial court erred in instructing the jury on a theory of co-conspirator liability for the charged crimes, when that theory of liability is not authorized by statute. Finally, the trial court erred in denying Ashby's Fourth Amendment motion to suppress evidence obtained as a result of a warrantless search of Ashby's cell phone.

The Shootings and Crime Scene Investigation

Danielle Daniels testified that, around 5:30 p.m. on December 30, 2009, she drove her boyfriend Carnell Bolden "to see his friends" in the LeDroit Park neighborhood of Northwest D.C. 7/2/13 Tr. 239-40. Around 6:00 p.m., they arrived at the unit block of W Street, where Bolden got out and Daniels stayed in the car, expecting him to return within ten minutes. *Id.* at 240-42. When he did not, Daniels called and texted his cell phone but received no answer. *Id.* at 244. Shortly before 7:15 p.m., a "[d]ark figure" approached the car and fired multiple gunshots into the driver's side window. *Id.* at 247-48. Daniels was struck by six gunshots, which caused permanent nerve damage to the left side of her body. *Id.* at 248, 254. Daniels called 911 at 7:15 p.m., within five minutes of the shooting. *Id.* at 249, 262. She did not see the shooter's face and could not tell if the shooter was a male or a female. *Id.* at 248, 273.

Justin Lewis testified that, on the night of December 30, 2009, he heard one or two gunshots from his house on 31st Street and Park Drive in Southeast D.C. *Id.* at 313-15. He looked out the window toward the wooded area behind his house and saw a vehicle driving

slowly on Park Drive. *Id.* at 316-17. The next day, around 2:00 p.m., police found Bolden's dead body in the 3000 block of Park Drive. *Id.* at 355-56. When interviewed that day, on December 31, 2009, Lewis told police in a written statement that he had heard gunshots the previous night around 8:30 p.m. *Id.* at 326, 331.[3]

Bolden's autopsy revealed two fatal gunshot wounds to the head, 7/11/13 Tr. 48, 69, and injuries consistent with a beating but not a choking, *id.* at 70-71, 75-76. His body was bound with duct tape and electrical cords, and his wallet and cell phone were missing. 7/10/13 Tr. 416; 7/11/13 Tr. 77. According to the government's firearms examiner, the two bullets recovered from Bolden's autopsy were fired from a revolver, while the five cartridge casings recovered from the shooting of Daniels were fired from a semi-automatic firearm. 7/9/13 Tr. 587-88, 591. No guns were found in connection to this case.

After responding to the scene where Bolden's body was found, Metropolitan Police Department (MPD) Detective Joshua Branson spoke with Bolden's mother and learned that Bolden's girlfriend had been shot on W Street the previous night. 7/9/13 Tr. 448. Shortly after midnight on January 1, 2010, Branson went to 70 W Street looking for Bolden's friend Derrick Hill. *Id.* at 417-19. Keith Logan answered the door and explained that Hill was not there. *Id.* at 420-21. With Logan's consent, Branson looked in the basement and saw a television set with its power cord ripped out, and electrical cords strewn about the room. *Id.* at 426. Branson then told Logan that he needed to speak with him at the police station about the shooting on W Street. *Id.* at 429. When Logan arrived at the station, Branson checked his criminal history, discovered an outstanding parole warrant, and arrested Logan on that warrant. *Id.* at 430.

[3] Lewis testified in the grand jury on November 12, 2010, that he was "[f]airly sure" he heard the gunshots "between 8-ish and 8:30" because it was around his youngest son's bedtime. 7/2/13 Tr. 336. Although Lewis estimated at trial that he heard the gunshots around 7:30 or 8:00, *id.* at 332, he admitted that his memory of the events was better in 2010 than in 2013, *id.* at 334.

Later that morning, police searched Logan's basement and seized the television set and electrical cords that Branson had seen. 7/11/13 Tr. 90, 100, 108-10. During a subsequent search of the basement on January 11, 2010, police discovered bloodstains on a bedroom wall and on a yellow jacket belonging to Hill, and two rolls of duct tape tucked inside a laundry basket—none of which they had seen during the first search. *Id.* at 118, 124, 128-30, 174; 7/17/13 Tr. 524, 530-38.[4] Two days later, on January 13, 2010, police found more bloodstains and duct tape in a Land Rover associated with Logan. 7/17/13 Tr. 542, 545, 568.[5] DNA analysis showed that the blood in the basement and the Land Rover was Bolden's. 7/18/13 Tr. 937, 939, 941, 944-45. Forensic examination indicated that the duct tape and electrical cords found on Bolden's body were consistent with the duct tape and television set found in Logan's basement. 7/15/13 Tr. 14-15; 7/25/13 Tr. 1243-44, 1258.

None of the physical evidence recovered from the crime scenes was connected to Ashby. Police found latent fingerprints on Bolden's car and on a shard of glass in Logan's basement, but none matched the defendants'. 7/17/13 Tr. 677, 700. Police also recovered hairs from the Land Rover where Bolden's blood was found, but microscopic analysis determined that the hairs did not come from Ashby. 7/25/13 Tr. 1302-03. Finally, according to DNA testing conducted by both the government and the defense, Ashby was not the source of any of the DNA recovered from various objects at the crime scenes, including the bedroom wall of Logan's basement, a

[4] Police conducted the second search after Hill reported discovering a bloodstain on his jacket during a drug deal in Logan's basement on January 11, 2010. 7/9/13 Tr. 251-52, 256-57, 288; 7/11/13 Tr. 117-20. The scene was not secured during the ten days between the two searches. 7/11/13 Tr. 189.

[5] Police conducted a traffic stop of the Land Rover on January 1, 2010, and arrested both occupants—Logan's god-sister Diane McCray and his girlfriend Queen Williams—after finding cocaine in the car. 7/17/13 Tr. 602, 612-14. McCray testified that Williams had driven the Land Rover to her apartment that day, that she had seen Williams in the Land Rover two weeks earlier, and that she saw the Land Rover parked outside 70 W Street in December 2009. *Id.* at 613-16.

shard of glass in Logan's basement, the duct tape on Bolden's body, the neckline of the yellow jacket where Bolden's blood was found, and a black knit hat found at the scene of Daniels's shooting. 7/18/13 Tr. 951-52; 7/22/13 Tr. 1161-68.

Nor were any of the defendants found with proceeds from the alleged robbery of Bolden. To the contrary, although Detective Anthony Greene learned on January 14, 2010, that Bolden's debit card had been used at two gas stations in Northeast D.C. on January 1, 2010, two days after the murder, and at three businesses in Sanford, North Carolina, on January 12, 2010, after Logan and Ashby had been incarcerated on unrelated charges, the government withheld this information from the defense for three years, and Greene failed to preserve security camera footage that may have depicted the unauthorized purchases. 7/29/13 Tr. 16, 20-21, 34-36; 12/14/12 Tr. 7-8.[6] Police eventually traced the purchases to Ronald Smith, a crack cocaine dealer who supposedly found Bolden's debit card near his home at 11th and H Streets in Northeast D.C. before moving to Sanford, North Carolina, in January 2010. 7/29/13 Tr. 37-38; 7/30/13 Tr. 113-20, 132.

The Government's Motive and Conspiracy Theories

Derrick Hill testified that, in 2009, he lived in the basement of Keith Logan's house at 70 W Street in Northwest D.C. 7/8/13 Tr. 179-81. Hill sold heroin for Logan and crack cocaine for

[6] Bolden's bank statement showed four debit card purchases at two gas stations in Northeast D.C. on January 1, 2010: three at "Casey's BP," located at 1396 Florida Avenue, and one at "New York BP," located on New York Avenue near Brentwood. 7/29/13 Tr. 16, 21-22, 34. Although Greene spoke to the manager of New York BP and obtained security camera footage for January 1, 2010, he lost the footage soon thereafter, and he never requested footage from Casey's BP because he mistakenly believed it was the same gas station as New York BP. *Id.* at 22-34. Nor did Greene investigate the debit card purchases made in North Carolina until three years later, when the security camera footage had been destroyed, and one of the establishments had gone out of business. *Id.* at 34-37. The trial court ruled that the government's lengthy delay in disclosing this exculpatory information to the defense violated *Brady v. Maryland*, 373 U.S. 83 (1963), and constituted "negligence to a gross degree." 5/23/13 Tr. 64. As a sanction, the trial court ordered the government to disclose Greene's investigative files to the defense, but it denied the defense request for a "missing evidence instruction" regarding the security camera footage that Greene failed to preserve. 7/26/13 Tr. 1389-91; 7/30/13 Tr. 25-28; 7/31/13 Tr. 63.

Bolden, who was "like a nephew" to him. *Id.* at 182-83; 7/9/13 Tr. 288. Bolden would come to Logan's basement three or four times a week to supply Hill with crack cocaine, which he would sell, sometimes to Logan. 7/8/13 Tr. 183-84. According to Hill, both Bolden and Logan were successful drug dealers. 7/9/13 Tr. 287, 316.

In October 2010, Hill stopped paying rent and was asked to move out of the basement. 7/8/13 Tr. 187. He moved to Fort Washington, Maryland, but kept his belongings in Logan's basement and continued to go there every day. *Id.* at 190-91. Hill testified that, the day before the shootings, Bolden came to Logan's basement for a drug deal that Hill had arranged, and then went upstairs to speak with Logan while Hill stayed downstairs. *Id.* at 205-07. The next day, on December 30, 2009, while Hill was at Logan's house, Logan's girlfriend, Queen Williams, came downstairs to ask him for Bolden's cell phone number, and Hill wrote down Bolden's "business" number on a piece of paper, which Williams brought upstairs to Logan. *Id.* at 211-15; 7/9/13 Tr. 240-41. Logan's cell phone records showed two outgoing calls to Bolden's "business" number at 4:19 p.m. and 5:47 p.m. on December 30, 2009. 7/22/13 Tr. 1036.

Hill testified at trial that he had seen Ashby and Watson "once or twice" at Logan's house in the weeks before the shootings—a fact that Hill failed to mention in his police statements and grand jury testimony when he claimed to have seen Ashby at Logan's house the day after the shootings. 7/8/13 Tr. 195-96, 219; 7/9/13 Tr. 267-72; 7/25/13 Tr. 1334. In addition to being impeached with his lengthy criminal record[7] and his concern about being an initial suspect in Bolden's murder, Hill admitted that he regularly used heroin in late 2009 and early 2010, and that his memory of that time period was "blurry." 7/9/13 Tr. 261-62, 272, 300.

[7] Hill was convicted of cocaine distribution in 1997, possession of cocaine in 1989, violation of the Bail Reform Act in 1989, shoplifting in 1984, and credit card fraud in 1980. 7/8/13 Tr. 177.

Norlin Washington testified that, in late 2009, he frequently went to 70 W Street to buy drugs. 7/8/13 Tr. 16-17.[8] He bought heroin from Logan and cocaine from Hill, and he used drugs with Watson. *Id.* at 20, 58, 70. He knew Ashby from seeing him around the Shaw area, near Howard University, where Ashby hung out with Watson. *Id.* at 21, 69.

Washington testified that, on December 24, 2009, he went to 70 W Street to buy heroin, and he saw Logan, Ashby, and Watson there, along with Gregory Shipman and Melvin Thomas, whom Washington had seen distributing "large quantities" of heroin. *Id.* at 23-26, 63-64, 73-75. According to the government, it was during this gathering at 70 W Street on December 24, 2009, that Logan began recruiting accomplices for Bolden's murder. 7/31/13 Tr. 167-68. Washington also testified that, some time between late January and early March 2010, Watson asked him "if a person's location can be identified by a phone call," and remarked that Hill "needs to keep his . . . mouth shut." 7/8/13 Tr. 36, 41-42. Washington did not mention these alleged statements when he spoke to the police in July 2010 or when he testified in the grand jury in August 2010. *Id.* at 100. Finally, Washington identified Watson's voice on a 911 call, made at 6:44 p.m. on December 30, 2009, reporting that an undercover police officer had been shot at 5th Street and W Street—a report that turned out to be false. *Id.* at 45; 7/15/13 Tr. 81-83; 7/22/13 Tr. 1038.[9] According to the government, Watson made the false report from 5th and W to divert police attention from the shooting of Daniels four blocks away. 7/31/13 Tr. 172-75. According to the defense, Watson and his father were at 5th and W to buy heroin when Watson noticed suspicious activity and summoned police quickly to the area to protect his elderly father. 8/1/13 Tr. 141-42.

[8] Washington had numerous drug and theft convictions from 1997 to 2012, and he had pending criminal cases in D.C., Maryland, and Virginia at the time of trial. 7/9/13 Tr. 47-48.

[9] Thomasina Reed, who lived with Watson and had a child with him, also identified Watson's voice on the 911 call and described his voice as sounding "[s]cared." 7/8/13 Tr. 128, 130.

John Carrington testified that, in November 2009, his close friend Logan solicited him to rob and kill Bolden, whom Carrington knew from growing up in LeDroit Park. 7/18/13 Tr. 742-44.[10] According to Carrington, he was at Logan's house when Logan asked if he "needed some money." *Id.* at 744. When Carrington said he did need some money, Logan suggested that he rob and kill Bolden. *Id.* Carrington claimed that his "exact response" was "hell no," and that Logan said "he would do it with other people." *Id.* at 744, 751.

Carrington insisted that he had nothing to do with Bolden's murder. *Id.* at 760. He told the police and the jury that, on the night of the shootings, he was "on the worst date of [his] life" with a woman he knew from work named Tameka Jackson. *Id.* at 906-07; 7/29/13 Tr. 13-14. Carrington claimed that he and Jackson sat in his car, parked in front of her apartment building in Southeast D.C., from 5:00 p.m. to 11:00 p.m.; that he left the car during those six hours only to use the bathroom inside Jackson's apartment; and that his friend Warren Alexander "came and told [him] about the shooting [on W Street]" around 8:00 p.m., in the middle of this six-hour date. 7/18/13 Tr. 906-07, 910. Carrington also testified that, around 3:30 p.m. the next day, he heard from a friend that Bolden's body had been found in Southeast D.C. *Id.* at 906, 910-11.

Tameka Jackson testified that, although Carrington had driven her home from work on occasion, she never went on a date with him, she never sat in his car for hours, he never entered her apartment to use the bathroom, and she never heard anyone tell him about a shooting on W Street. 7/30/13 Tr. 172-75, 185. Detective Greene testified that, although he tried to contact Jackson to verify Carrington's alibi, he gave up after a few attempts because "other stuff was going on with the investigation." 7/29/13 Tr. 13-14. Greene also testified that Bolden's body

[10] Carrington was convicted of assault with a dangerous weapon and possession of a firearm during a crime of violence in 1992; attempted possession with intent to distribute marijuana in 1990; and possession of PCP, marijuana, and heroin in 1987. 7/18/13 Tr. 736.

was not identified until after 7:00 p.m. on December 31, 2009, and the news of his murder was not disclosed to the public until after 8:00 p.m. that night. *Id.* at 9-10.

Carrington testified that, the day after the shootings, he went to 70 W Street to see Logan, who introduced him to Ashby. 7/18/13 Tr. 753-57. When Carrington mentioned hearing that "a girl had gotten shot in a truck," Logan said "it was some girlfriend/boyfriend shit." *Id.* at 801. Carrington testified that, several days later, he went to the parking lot of the CVS pharmacy at 7th Street and Florida Avenue to find his close friend Melvin Thomas because he was worried about being a suspect in Bolden's murder, and Thomas "was somebody that [he] really trusted." *Id.* at 758-60. As Carrington approached, he saw Thomas talking with Ashby and another man he did not recognize. *Id.* at 762-63. Carrington testified that he did not join or overhear their conversation because he "stayed back," about ten feet away, "out of respect." *Id.* at 763-64. According to Carrington, he did not approach Thomas until after the conversation ended and Ashby and the other man walked away together. *Id.* at 764.

On January 7, 2010, Carrington was questioned by homicide detectives about Bolden's murder. *Id.* at 831. Although he told them about seeing Ashby with Logan at 70 W Street and with Thomas in the CVS parking lot, he did not mention that Logan had solicited him to rob and kill Bolden until May 2011, when he was arrested for threatening to kill a woman after crashing into her car while driving drunk—a parole violation for which he faced ten years in prison. *Id.* at 777-80, 893. By the time of trial, Carrington had secured a cooperation agreement in which he promised to testify against Logan and Ashby in exchange for the government's assistance in his pending criminal case and parole revocation hearing. *Id.* at 737-38, 775-76.

Melvin Thomas, who was close friends with Carrington and Logan but not with Ashby, also testified at trial pursuant to a cooperation agreement. 7/15/13 Tr. 151-52; 7/16/13 Tr. 307,

342, 383 ("best friends" with Logan; "good friends" with Carrington; "not friends" with Ashby). By the time of trial, Thomas—who was on lifetime parole for a murder conviction and had been previously convicted of multiple drug and gun offenses—had collected a slew of felony charges for which he received or expected the government's assistance in exchange for his testimony in this case. 7/15/13 Tr. 149-50, 153, 220; *see infra* note 13.

Thomas claimed that, in early January 2010, he encountered Ashby and Shipman[11] in the CVS parking lot at 7th Street and Florida Avenue, and Ashby "just walked up and started talking to [him]" about the shootings of Daniels and Bolden. 7/15/13 Tr. 157-59. According to Thomas, Ashby told him that "they got [the] dude in [Logan's] house," that "it was [Logan's] idea," that Ashby "choked [Bolden] out or knocked him out in the basement," that Logan "started tripping and talking about killing everybody" when he saw "the girl sitting in the car," and that they took Bolden "over to Southeast" in "another car." *Id.* at 164-66, 168, 173-74, 176. Thomas testified that he did not "immediately go to the police and tell them what he knew" because it was "none of [his] business," but that when the police "came to [him]" about the shootings on January 11, 2010, he pointed the finger at Logan and Ashby, and cooperated with the police for the first time in his life, because his wife, who knew Daniels, had urged him to help in the investigation of the shootings—an explanation that he gave for the first time at trial. *Id.* at 172, 178, 191-92; 7/16/13 Tr. 355-58.[12] In contrast to Carrington's account of what happened in the CVS parking lot, Thomas claimed that Shipman walked away before the conversation started, that Carrington joined the conversation—standing in between Thomas and Ashby—about five minutes after Ashby started talking, that Carrington announced to Thomas and Ashby that he had just spoken

[11] Thomas testified that he knew Shipman but was not friends with him. 7/16/13 Tr. 331.

[12] When Thomas inculpated Logan and Ashby on January 11, 2010, both defendants had been arrested for unrelated offenses, and Thomas mistakenly believed that Logan had been arrested for the shootings of Daniels and Bolden. 7/2/13 Tr. 292; 7/15/13 Tr. 156, 165.

to homicide detectives, and that Ashby continued to incriminate himself for another twenty minutes in front of Carrington, who was a "perfect stranger" to Ashby. 7/15/13 Tr. 177-78; 7/16/13 Tr. 336-40, 393-94.

Thomas further claimed that, on July 16, 2010, after he was arrested and incarcerated for soliciting a prostitute and assaulting two police officers, he once again encountered Ashby, this time in the law library of the D.C. Jail, where Ashby told him more about the shootings. 7/15/13 Tr. 180-84; 7/16/13 Tr. 394-95.[13] According to Thomas, Ashby declared that "all the evidence was pointing at [Logan]," that Logan's "fingerprints were on the duct tape," that Ashby "wasn't worried about nothing because the girl ain't see him when he walked up on the side of the car," that Ashby "had an alibi about his phone" because "his brother has property on W Street,"[14] that Watson "helped him wrap the body up" and take Bolden "over to Southeast," that "they didn't get nothing" from Bolden, and that Ashby wanted to "hit [Carrington's] head" for talking to the police. 7/15/13 Tr. 184-91; 7/16/13 Tr. 359-61.[15]

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[13] In April 2010, Thomas was arrested and charged with one count of solicitation and two counts of felony assault on a police officer (APO), for which he faced thirty years of imprisonment and revocation of his lifetime parole. 7/16/13 Tr. 395-98. In May 2010, just a few days after being released on his APO charges, Thomas was arrested in Virginia on drug and traffic charges that were still pending at the time of this trial. *Id.* at 408-09, 411, 414-15. In October 2010, Thomas promised to testify in this case in exchange for a misdemeanor plea on his APO charges, which he acknowledged was "a good deal." *Id.* at 397. In May 2013, after completing his sentences for his APO convictions and associated parole violations, Thomas was again arrested for assaulting a police officer and unlawfully possessing a firearm—charges that were dismissed by the time of trial. 7/15/13 Tr. 220-23. At the time of trial, Thomas was awaiting a parole revocation hearing for his most recent arrest and had secured the government's promise to advocate for him at that hearing in exchange for his testimony in this case. *Id.* at 152; 7/16/13 Tr. 415-19.

[14] Ashby's girlfriend of twenty years, Andrenia Walker, testified that Ashby did not have a brother who owned property on W Street in Northwest D.C. 7/22/13 Tr. 1141, 1144.

[15] Detective Kenniss Weeks testified that, when she served Ashby with a warrant to obtain a DNA sample on January 28, 2010, he responded: "I didn't leave blood anywhere. I didn't bite anyone. . . . I don't know anything about that Cadillac Escalade and I didn't . . . throw nobody in the woods." 7/10/13 Tr. 620, 626. Although Weeks did not memorialize Ashby's statement until twelve hours later, she claimed to have remembered it "word for word." *Id.* at 637-38, 642.

The Precluded Bias Cross-Examination

At trial, Thomas cast himself as a neutral third party who somehow became Ashby's confidant and had nothing to gain from blaming Logan and Ashby for the shootings when first questioned by the police in January 2010. In an effort to raise doubt about Thomas's account of Ashby's confession—the only evidence at trial that directly linked Ashby to the crimes—defense counsel sought to cross-examine Thomas about his potential motives to incriminate Ashby, including his own apparent connections to the charged crimes. In support of this proposed line of bias cross-examination, counsel proffered a collection of facts tending to show that Thomas was involved in Logan's scheme to kill Bolden, or at least "potentially look[ed] like a suspect to the police," and thus had a strong incentive to make himself useful to the authorities to avoid their suspicion of him as Logan's likely accomplice. 7/15/13 Tr. 195.

Defense counsel proffered that Thomas appeared to be involved in Logan's scheme to kill Bolden because, as Logan's "very close" friend and "business cohort" in the heroin trade at 70 W Street—the same place where Bolden ran his lucrative crack cocaine business—he likely shared "whatever motive that Mr. Logan might have" to kill Bolden, whether to rob him for cash or to eliminate him as a competing drug dealer. 7/16/13 Tr. 270. Although Thomas insisted that he did not sell drugs around the time of the shootings,[16] 7/15/13 Tr. 208, 219—a claim that even the government was forced to disavow by the end of trial, 8/1/13 Tr. 177-78—the government's

[16] Thomas testified that, although he was wealthy enough to finance a restaurant, support two girlfriends, and send money to other inmates, his "only source of income" was his long-time job at Central Communications, a cell phone store located at 7th Street and Florida Avenue, where he worked forty hours a week for $8.50 an hour. 7/15/13 Tr. 153, 237-42; 7/16/13 Tr. 287-88, 292-301. Donald Campbell, who owned and operated Central Communications, testified that, although Thomas frequented the store as a customer, he never worked there and was not a paid employee. 7/29/13 Tr. 165-69. Although Thomas testified that he received most of his paystubs from Gregory Webb, who sometimes managed the store in Campbell's absence, 7/30/13 Tr. 195; 7/29/13 Tr. 173, the government did not call Webb at trial to verify Thomas's employment.

own evidence indicated that police regarded Thomas as a "known drug dealer" in January 2010, and that government witness Norlin Washington saw him "packaging large quantities of heroin" at 70 W Street less than a week before the shootings. 7/15/13 (sealed) Tr. 4-5; 7/15/13 Tr. 23. In investigating the murder of Bolden, who sold drugs at 70 W Street, police would naturally focus on who else sold drugs at 70 W Street: Thomas. As a convicted murderer with access to firearms around the time of the shootings, Thomas had "the ability and the power" to commit the crimes, which made it more likely that Logan would recruit him for the job, and that police would view him with suspicion. 7/15/13 Tr. 196. And as one of the men seen assembled at 70 W Street on December 24, 2009, when Logan was allegedly enlisting accomplices for the crimes, Thomas had an opportunity to join Logan's venture and a reason to fear that police might suspect him of doing so. *Id.* at 25, 195; 7/16/13 Tr. 270. Based on these facts, defense counsel sought to cross-examine Thomas about his apparent connections to Logan's scheme to kill Bolden—including his "drug relationship" with Logan, and their "shared motive" to kill Bolden—to show that Thomas had a "motive to place blame on Mr. Ashby" in order to shift suspicion away from himself. 7/16/13 Tr. 270-71.

The government objected to this proposed line of cross-examination. 7/15/13 Tr. 197. Although the government conceded that Thomas "was involved in heroin operations around this time period . . . in the very house that [Bolden] was running his crack cocaine distribution from," it argued that Thomas's heroin business at 70 W Street—whether shared with Logan or not—did not make it more likely that he helped Logan kill Bolden, when "the evidence in this case so far is that they're perfectly willing to operate side by side in the very same house," and "[t]here's absolutely no proffer as to . . . what triggering event . . . might have made him want to attempt to kill [Bolden]." *Id.*; *see also* 7/16/13 Tr. 276-77. Ashby's counsel responded that no "triggering

event" was necessary to meet the foundational requirement for initiating bias cross-examination, and that even the government's own case lacked evidence of a "triggering event" that prompted Logan to target Bolden when the two men had no history of animosity. 7/15/13 Tr. 198. Indeed, defense counsel argued, because "the government's entire theory [of Ashby's motive] is [his] association" with Logan, the defense was entitled to cross-examine Thomas about his business ties to Logan to show that he might have had a stronger "association" and "shared motive" with Logan than Ashby did. 7/16/13 Tr. 270.[17]

The trial court sided with the government, ruling that the defense had proffered "an insufficient basis for showing any nexus to the underlying murder in this case." 7/15/13 Tr. 198; *see also id.* at 203-04. Accordingly, the court precluded Ashby's counsel from cross-examining Thomas about his apparent connections to Logan's heroin business and Bolden's murder—lines of inquiry that the court characterized as "trying to set up this *Winfield* issue for which . . . I ruled there's an insufficient proffer." *Id.* at 198-99, 203; *see also* 7/16/13 Tr. 277.[18]

The defense also sought to cross-examine Thomas on a separate, independent theory of bias: that Thomas was potentially involved, or at least feared being implicated, in several other serious crimes being investigated at the time of trial, which gave him a strong liberty interest in currying favor with the government by providing testimony that the government wanted to hear in this case. 7/16/13 Tr. 251-57, 261, 273. First, defense counsel proffered that, according to an arrest warrant affidavit filed in federal court the previous day, Thomas had been under police investigation for conspiring to import heroin from Guatemala with his "right-hand man" Eric

[17] Logan objected to Ashby's proposed cross-examination, and both Logan and Ashby moved for a severance, which the trial court denied. 7/16/13 Tr. 274, 277.

[18] Pursuant to an earlier ruling, 7/15/13 Tr. 26-31, the trial court permitted the defense to cross-examine Thomas on whether he packaged heroin at 70 W Street on December 24, 2009, in front of government witness Norlin Washington, "as tending to show a basis for Mr. Thomas wanting to curry favor with the government" in order to avoid prosecution for that crime, *id.* at 198.

Braxton—"the person that Mr. Thomas is on the phone with once, twice, sometimes three times a day while incarcerated," often talking "in code" and directing Braxton "in certain drug-related or illicit ways." *Id.* at 249-50, 254.[19] The affidavit stated that, in April 2013, police believed that Thomas was the man known as "Pappy" who had arranged a shipment of heroin from Guatemala that was intercepted in Houston; after Thomas was arrested on unrelated charges in May 2013, police determined that "Pappy" was actually Braxton, and arrested him on July 15, 2013—the day Thomas testified on direct examination in this case. *Id.* at 248-50, 255-56.

Second, defense counsel proffered that, according to federal court records, Thomas's business partner Raymond Proctor was arrested and indicted earlier that year for selling large quantities of heroin to undercover federal agents at Mama's Southern Cuisine, a restaurant located at 3118 Georgia Avenue that Thomas co-owned with Proctor. 7/15/13 (sealed) Tr. 5-6; 7/16/13 Tr. 250-53. According to counsel's information, Thomas was "a partner" in Proctor's drug operation, and "they both got drugs from the same supplier together." 7/16/13 Tr. 252.

Finally, defense counsel proffered that, according to eyewitness accounts, Thomas was responsible for the January 2013 murder of Terrance McFadden at Chuck & Billy's Bar, located at 2718 Georgia Avenue. *Id.* at 261-62. Thomas and McFadden got into a fight at the bar, and Thomas asked McFadden "to bring it outside to the parking lot where he was shot and killed."

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[19] Defense counsel proffered phone records showing more than 400 calls between Thomas and Braxton while Thomas was incarcerated at the D.C. Jail. 7/16/13 Tr. 254. Thomas admitted that Braxton had access to his bank accounts, *id.* at 291-92, and that he and Braxton spoke "in code" the "majority of the time" because "all the phone calls are recorded," *id.* at 325.

During one of those phone calls, on August 14, 2010, Braxton reported to Thomas a street rumor that Logan had been released from jail, and asked "[W]hat do you want me to do, your call?" *Id.* at 370-72. Thomas reacted with shock, wondering aloud, "[W]hat the fuck is going on?" *Id.* at 372-73. Braxton commented, "[T]his don't look too pretty," and Thomas agreed, "[I]t don't for real." *Id.* at 376. Braxton then observed, "It's the only way they can get the other two names and put you with them, right?" and Thomas responded, "[Y]eah." *Id.* at 377-78. When cross-examined on his reaction to the news of Logan's release, Thomas denied being "concerned that this meant that the government no longer believed what [he was] saying." *Id.* at 373.

Id. at 261. According to eyewitnesses who had spoken to the defense, "Thomas was the shooter" and "handed off the gun to somebody else who took it away from the scene." *Id.* at 261-62.

The government argued that, although Thomas's concern about being investigated for importing heroin with Braxton was "a fair area of inquiry" because his "name [was] mentioned in a publicly filed affidavit," defense counsel was not entitled to cross-examine Thomas about his potential connection to the other two crimes—Proctor's heroin operation at Mama's Southern Cuisine, and the murder of McFadden at Chuck & Billy's—because he had "no reason to think that he's under investigation for any of those things" and thus no reason to curry favor with the government to avoid prosecution. *Id.* at 266. In opposing these topics of cross-examination, the government did not challenge defense counsel's factual proffer that Thomas co-owned Mama's Southern Cuisine with Proctor, or that Thomas was present for McFadden's murder at Chuck & Billy's. In fact, the government acknowledged that, when Thomas was arrested on unrelated charges in May 2013, a detective questioned him about McFadden's murder at Chuck & Billy's because the detective knew that "he hangs out there" and "thought he might have information." *Id.* at 265. The government argued, however, that because the detective did not suspect Thomas of being involved in McFadden's murder, Thomas "thinks the police think of him as a potential witness and nothing more." *Id.* at 265-66.[20] The defense countered that, regardless of whether police had named Thomas a suspect in "a publicly filed affidavit," his potential connection to these two crimes, and his knowledge that "his confederates are being rounded up and taken to

[20] According to the government, Thomas denied any knowledge about McFadden's murder when questioned in May 2013. 10/9/13 Tr. 7. In August 2013, however, as soon as this trial ended, the police questioned Thomas again about McFadden's murder, and this time Thomas claimed "to have information as to who might have been involved or who might be culpable, which is not what he said when he was asked about it in May." *Id.* at 7-8; *see also* 11/15/13 Tr. 7. Based on this newly discovered evidence, the defense moved for a new trial, which the trial court denied. R. 117; 2/21/14 Tr. 23-27.

Federal Court," would create "an incentive to curry favor with the government—especially at this stage of the investigation, where [he may be] thinking that if I testify in this murder case, maybe they'll leave me alone." *Id.* at 254. Indeed, defense counsel pointed out, "so far that appears that has happened." *Id.* The trial court summarily denied the defense request for cross-examination and discovery on these subjects, dismissing it as "such a weak presentation it's not worthy of a debate." *Id.* at 259, 268-69, 273; *see also* 7/30/13 Tr. 205-06; 10/9/13 Tr. 9-10.

The Cell Phone Evidence

In an effort to support its conspiracy theory and to corroborate Thomas's account of the crimes, the government presented cell phone records showing frequent communication between Logan, Ashby, and Watson on December 30, 2009, and "cell site location information" placing Ashby's cell phone in the general vicinity of the crime scenes that day.

Kevin Horan, an expert in cell site analysis, testified that he examined the "call detail records" for three cell phone numbers allegedly associated with the defendants: 202-536-0656 (Ashby), 202-361-6722 (Logan), and 301-407-7313 (Watson). 7/22/13 Tr. 993, 998-99, 1001. The call detail records listed all incoming and outgoing calls; the date and time of each call; the phone number on the other end of each call; and the cell tower, or "cell site," used to make or receive each call. *Id.* at 1000-06.[21] Based on information obtained from the cell phone service providers about the location and orientation of each cell site, Horan mapped the general areas where each phone was used at various times on December 30, 2009. *Id.* at 995-97, 1005-06.[22] Horan explained that such cell site analysis could not pinpoint a cell phone's precise location at any given time; rather, it could determine only that a phone was located within a cell tower's

[21] The call detail records showed three calls between Logan and Ashby, and more than twenty calls between Ashby and Watson, on December 30, 2009. 7/22/13 Tr. 1030, 1038.

[22] The cell site maps that Horan used as demonstrative aids during his testimony are reproduced in the Appendix for Appellant Ashby, at Tab B, for this Court's reference.

estimated "footprint," which could span multiple city blocks or even multiple miles, depending on the surrounding geography and the distance between cell sites. *Id.* at 1055-76, 1084-86.

Based on his analysis of the call detail records and cell site location information, Horan opined that, on December 30, 2009, Ashby's phone was in the LeDroit Park or Shaw area from 12:59 p.m. to 6:27 p.m.; it "was traveling south" from 6:47 p.m. to 6:53 p.m.; it was in Southeast D.C. from 7:07 p.m. to 7:20 p.m.; and it was back in the LeDroit Park or Shaw area from 8:01 to 9:00 p.m. *Id.* at 1032-35, 1039, 1046-48.[23] Logan's phone was in the LeDroit Park or Shaw area from 1:29 p.m. to 10:33 p.m., except between 5:47 p.m. and 8:08 p.m., when it did not make or receive any calls and thus could not be tracked by cell site analysis. *Id.* at 1035-37.[24] Watson's phone remained in the LeDroit Park or Shaw area from 5:21 p.m. to 9:00 p.m. *Id.* at 1037-39.

Because none of the call detail records provided any identifying information about the subscribers, the government relied on other evidence to connect the cell phone numbers to the defendants.[25] Hill testified that Logan's phone number was 202-361-6722. 7/9/13 Tr. 241-44. Two police officers testified that, on January 9, 2010, a cell phone was seized from Ashby during his arrest for an unrelated offense. 7/2/13 Tr. 292; 7/16/13 Tr. 469. Detective Greene testified that, on January 11, 2010, he retrieved Ashby's cell phone from the property office, where it had been stored as "prisoner's property," and placed it into an evidence bag associated with this case.

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[23] Ashby's long-time girlfriend testified that she lived at 1741 28th Street in Southeast D.C., and that Ashby's mother and brother also lived nearby. 7/22/13 Tr. 1137, 1139-40, 1144.

[24] Logan's friend Diane McCray testified that, "early in the evening" of December 30, 2009, while "it was still light outside," Logan came to her apartment at 230 W Street and asked to speak with Charles Mobley, McCray's fiancé and Logan's friend. 7/17/13 Tr. 597-606, 609-10, 621. According to McCray, Logan seemed "disturbed" or "mad." *Id.* at 603. McCray left her apartment soon thereafter, and when she returned an hour later, Logan was still there, where he remained until the next morning. *Id.* at 607-09.

[25] Horan explained that call detail records for "prepaid" cell phones typically do not provide identifying information about the subscriber: if the subscriber "chooses not to give a name," "[t]hose fields would be blank." 7/22/13 Tr. 1115-16.

7/17/13 Tr. 486-91. Although Greene initially testified that he did not turn on or look inside the phone before placing it into evidence, as such actions would require a search warrant, *id.* at 492-96, he later admitted that, upon reviewing his "paperwork," he remembered that, after retrieving Ashby's phone from the property office on January 11, 2010, he turned on the phone and "dialed [his own] phone number to get [Ashby's] phone number so [he] could get a search warrant for the phone." 7/29/13 Tr. 52-53.[26] A subsequent electronic search of Ashby's phone confirmed that its phone number was 202-536-0656, and that an outgoing call had been placed to 202-607-8268—Detective Greene's cell phone number. 7/17/13 Tr. 639, 645. The electronic search also yielded a "contact list" that included the phone number 301-407-7313. *Id.* at 639-41. Detective Weeks testified that she called that phone number at Greene's request on February 17, 2010, and the person who answered the phone identified himself as Watson. 7/10/13 Tr. 627-29.

After learning mid-trial that Greene had searched Ashby's cell phone without a warrant, counsel for Ashby filed a Fourth Amendment motion to suppress all of the evidence that police obtained as a result of learning Ashby's cell phone number, including the contact list and call detail records for 202-536-0656. R. 93. Relying on the Seventh Circuit's decision in *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012)—a decision that the Supreme Court later rejected in *Riley v. California*, 134 S. Ct. 2473 (2014)—the government argued that Greene's actions did not require a warrant because he merely "opened the phone to figure out what the phone number was," and did not "go through the contents of the phone" or "look at pictures or text messages or anything of that nature, which is what the Fourth Amendment is potentially concerned about in the area of the cell phone." 7/30/13 Tr. 31.

[26] According to the prosecutor, "it is not unusual, that detectives will, when they recover a cell phone, call their own cell number to try to get the number on the caller I.D. of their own phone, what the number is of the phone they've recovered." 7/17/13 Tr. 646.

The trial court ruled that, although Greene "turned the phone on" and "dialed his number from the phone to discover what the phone number was," such a minimal search did not require a warrant. *Id.* at 32. The court reasoned that, even if a warrant was required "to forensically find out what was contained within the inner workings of the phone"—"past calls, call history[,] call logs, text messages sent and received"—it was "not a violation of the Fourth Amendment . . . to determine the telephone number for the phone so that a warrant could be sought for other inner workings of the phone." *Id.* at 32-33. Thus, the trial court denied Ashby's suppression motion.

Jury Instructions and Closing Arguments

At the end of its case, the government requested Redbook Instruction 7.103—"the *Pinkerton* instruction" on co-conspirator liability—for all charged substantive offenses. 7/31/13 Tr. 5-7. Counsel for Ashby submitted a written opposition arguing that, because co-conspirator liability is not authorized by statute, and because only the legislature, and not a court, may create criminal liability in the District of Columbia, instructing the jury on a judicially created theory of co-conspirator liability "violates basic separation of powers principles." App. C, at 2;[27] *see also* 7/31/13 Tr. 7. In response, the government argued only that the "Court of Appeals has upheld convictions on a *Pinkerton* theory of liability in numerous cases." 7/31/13 Tr. 6. Although the trial court agreed with the government and instructed the jury accordingly, it expressed serious doubt about the validity of the instruction: "[I]f I were writing the law from scratch, I wouldn't come out this way. . . . I just really wonder if it is a train wreck waiting to happen." *Id.* at 9; *see also id.* at 159-61 (instructing jury on co-conspirator liability).

Based on the trial court's instruction on co-conspirator liability, the government argued to the jury that, because Logan, Ashby, and Watson had all conspired to rob or kidnap Bolden, they

[27] A copy of Ashby's written opposition, which was submitted to the trial court by email, is included in the Appendix for Appellant Ashby at Tab C.

were all guilty of the reasonably foreseeable crimes committed in furtherance of the conspiracy, including the shootings of Daniels and Bolden, even if they did not actually participate in those crimes. According to the government, Logan came up with the idea to rob Bolden because he knew Bolden was a successful drug dealer, and "drug dealers deal in cash." 7/31/13 Tr. 167. But because Logan, who was much smaller than Bolden, could not subdue Bolden on his own, he "need[ed] to recruit people" to join his criminal venture. *Id.* Logan's first choice was his close friend Carrington, but "Carrington said no. Who is left? Who can he find?" *Id.* Citing Washington's testimony that Ashby and Watson were at Logan's house on December 24, 2009, the government posited that "those are the people who [Logan] recruited to commit this awful crime." *Id.* at 168. With no direct evidence of a criminal agreement and no physical evidence tying Ashby and Watson to the crimes, the government pointed to the cell phone calls between Logan, Ashby, and Watson on December 30, 2009, arguing that such communication reflected their agreement to rob or kidnap Bolden. *Id.* at 175-76, 179; 8/1/13 Tr. 185.

To explain how the crimes unfolded, the government relied on Thomas's account of what Ashby supposedly told him. 8/1/13 Tr. 18-23. The government argued that Thomas's narrative was trustworthy because, when he first told his story to the police on January 11, 2010, he "was a parolee who was gainfully employed with nothing hanging over his head"—"no pending case, no pending parole hearing," and no "possible motivation" to "incriminat[e] his good friend [Logan] . . . unless it was true." *Id.* at 17, 20; *see also id.* at 176, 178. The government also argued that, because "there [was] not much out in the public there about what happened in this case" when Thomas first spoke to the police on January 11, 2010, he could not have recounted such accurate details about the crimes unless he learned them from Ashby:

> [S]omehow Melvin Thomas knows that this happened in the basement. And it is quite clear from the context he was referring to [Logan's] house. How would he know that?

> How would he possibly know that . . . somebody was in that basement when it happened? Defendant Ashby told him. There was no other basis on the evidence in this case for Melvin Thomas to have that information unless it came from someone involved. . . .
>
> [S]omehow [Thomas] knows that . . . Bolden[] was taken over to [S]outheast after they knocked him out in the basement. Again, January 11th, 2010, more than a month before the preliminary hearing. . . . So, once again, how does Melvin Thomas know that unless what he is saying is true? Defendant Ashby told him. . . .
>
> Again, how would Melvin Thomas know that the girl in the car was in [Bolden's] car?

Id. at 18, 20-21, 22.

The government's reliance on Thomas was complicated, however, by significant conflicts between his testimony and the government's other evidence. Although Thomas maintained that Ashby confessed to shooting Daniels, the cell phone evidence showed that Ashby was nowhere near 70 W Street at 7:15 p.m., when Daniels was shot. Similarly, although Thomas claimed that Ashby and Watson transported Bolden to Southeast D.C., the cell phone evidence indicated that Watson remained in Northwest D.C. from 5:21 p.m. to 9:00 p.m., and that Ashby was back in Northwest D.C. by the time Lewis heard gunshots outside his house in Southeast D.C. "between 8-ish and 8:30" p.m., according to his statement to the police the next day.[28]

Faced with this quandary, the government made only a half-hearted attempt to delineate each defendant's role in the crimes,[29] and instead urged the jury to convict all three defendants of all the charged crimes—including the shooting of Daniels; the robbery, kidnapping, and murder of Bolden; and the associated weapons offenses—based on a theory of co-conspirator liability. As the government explained to the jury in its opening statement:

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[28] Thomas's portrayal of Logan's role in the crimes also conflicted with McCray's testimony that Logan arrived at her apartment before sunset on December 30, 2009, and remained there until the next morning. *See supra* note 24.

[29] The government ultimately hypothesized that Logan lured Bolden into the basement; Ashby assaulted him there; Watson called 911 to divert the police; Logan shot Daniels; and Ashby took Bolden to Southeast D.C. and shot him there. 8/1/13 Tr. 35-36.

> If two or more people agree to do something; in this case, to rob, kidnap and kill Carnell Bolden, any crimes that come out of that agreement, it's as if every single person who was a party to the agreement committed those crimes. So the question for you to consider . . . is not who pulled the trigger on Carnell Bolden, it's not who pulled the trigger on Danielle Daniels. The question for you to consider is: Was there a conspiracy to rob, kidnap or to kill Carnell Bolden, and did these three defendants join that conspiracy and were the crimes that the government charges done in furtherance of that conspiracy? If the answer to all three of those is yes, defendants are all guilty.

7/2/13 Tr. 212. The government reiterated this theory in its closing and rebuttal arguments, emphasizing that "the most significant charge is the conspiracy charge" because "if there is a conspiracy . . . it doesn't matter where these defendants were on any particular occasion, who might not have been there when the shootings took place. That is, the alibi instruction is not going to apply if you find conspiracy." 8/1/13 Tr. 29; 8/5/13 Tr. 36.

In an effort to raise a reasonable doubt about Ashby's involvement in the crimes, Ashby's counsel sought permission to argue his theory that Thomas and Carrington, and not Ashby, were Logan's true partners in crime. 7/31/13 Tr. 64-67, 72. The trial court denied the request, ruling that Ashby had failed to establish a "substantial basis for concluding that there was some nexus" between the government's two cooperating witnesses and the crimes about which they professed such intimate knowledge. *Id.* at 71; 2/21/14 Tr. 27.[30] After the government argued in closing that Thomas could not have possessed such accurate information about the crimes if Ashby had not confessed to him, Ashby's counsel sought to respond that Thomas's source of knowledge could have been his own or Carrington's involvement, and not Ashby's supposed confession. 8/1/13 Tr. 37. The trial court denied this request as well, ruling that, although counsel could argue that Thomas "didn't have to learn that information from the defendants in this case,"

[30] The trial court ruled that the defense could argue that Hill was a third-party perpetrator, given the blood on his jacket and his presence in the area within an hour of the crimes. 7/31/13 Tr. 70, 103. As a self-imposed "sanction" for its illegal suppression of *Brady* information about Smith's use of Bolden's debit card shortly after the murder, the government did not oppose an argument that Smith was a third-party perpetrator. *Id.* at 67; *see also* 5/23/13 Tr. 74.

"[t]here is no basis for [defense counsel] to point out these other individuals as *Winfield* suspects when [the court has] already ruled that [the evidence] does not meet the standard." *Id.* at 37-38.

The jury acquitted Ashby of all charges related to the shooting of Daniels and convicted him of all other charges. R. 107. He was sentenced to a total of ninety years in prison. R. 124.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PRECLUDED THE DEFENSE FROM CROSS-EXAMINING THOMAS ON BIAS ARISING FROM HIS CONNECTIONS TO THE CHARGED CRIMES AND TWO OTHER CRIMES.

As counsel for Ashby explained in closing argument, the government's "entire theory of the case was formed on the word of Melvin Thomas." 8/1/13 Tr. 39. Because no eyewitness to the crimes could identify the culprits, and because the physical evidence implicated only Logan, the government relied extensively on Thomas's testimony to make its case against Ashby. An important question for the jury was why Thomas—a career criminal, convicted murderer, and notorious drug dealer—would become the government's chief witness in this case, especially against his best friend Logan. The government argued to the jury that Thomas had nothing to gain when he first offered his story to the police on January 11, 2010—"no pending case, no pending parole hearing," and no "possible motivation" to incriminate Logan and Ashby "unless it was true." 8/1/13 Tr. 20. Thomas himself claimed on direct examination that he divulged his best friend's guilt to the police out of respect for his wife's desire to see the perpetrators brought to justice, 7/15/13 Tr. 191-92—an explanation that was so incompatible with Thomas's criminal background that it suggested a thinly veiled attempt to conceal his true motives.

In an effort to uncover those ulterior motives, Ashby's counsel requested permission to pursue several distinct lines of cross-examination designed to show that, from beginning to end, Thomas was a biased witness with enormous interest in aligning himself with the government to protect himself from official suspicion. Defense counsel first sought to cross-examine Thomas

details of the crimes because he and Carrington were Logan's true accomplices, the trial court precluded this potentially devastating rejoinder, leaving the government's argument largely unrefuted. As a result, "the closing argument phase of the trial was not well balanced"—an "asymmetry" that itself may have contributed to the verdict. *DeLoach*, 504 F.2d at 192. Without defense counsel's alternative explanation of how Thomas could have learned the details of the crimes, the jury had no concrete reason to reject the government's argument, despite the dubious nature of Thomas's story. If defense counsel had been permitted to advance his theory in closing argument, some jurors might have been persuaded to think twice about believing Thomas, whose credibility was already in serious question. After all, defense counsel's theory was compelling, as it accounted for both Thomas's true statements about the crimes and his false statements about everything else. Because defense counsel's proposed argument could have placed the final nail in the coffin of Thomas's credibility, and because the trial court's erroneous preclusion of that argument left the jury with no realistic alternative to the government's view of the evidence, this Court cannot conclude under any standard that the error was harmless.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT INSTRUCTED THE JURY ON A *PINKERTON* THEORY OF CO-CONSPIRATOR LIABILITY THAT HAS NEVER BEEN AUTHORIZED BY THE D.C. LEGISLATURE.

Because no eyewitness placed any of the defendants at the crime scenes, and because the government lacked reliable evidence of each defendant's participation in the shooting of Daniels and the robbery, kidnapping, and murder of Bolden, the government urged the jury to convict all three defendants of all charged substantive offenses based on a theory of co-conspirator liability:

> If two or more people agree to do something; in this case, to rob, kidnap and kill Carnell Bolden, any crimes that come out of that agreement, it's as if every single person who was a party to the agreement committed those crimes. So the question for you to consider . . . is not who pulled the trigger on Carnell Bolden, it's not who pulled the trigger on Danielle Daniels. The question for you to consider is: Was there a conspiracy to rob, kidnap or to kill Carnell Bolden, and did these three defendants join that

> conspiracy and were the crimes that the government charges done in furtherance of that conspiracy? If the answer to all three of those is yes, defendants are all guilty.

7/2/13 Tr. 212; *see also* 8/1/13 Tr. 29 ("[T]he most significant charge is the conspiracy charge."); 8/5/13 Tr. 36 ("[I]f there is a conspiracy . . . it doesn't matter where these defendants were on any particular occasion, who might not have been there when the shootings took place."). At the government's request, and over defense objection, the trial court instructed the jury on a theory of co-conspirator liability based on Redbook Instruction 7.103:

> A conspiracy is kind of a partnership in crime. And its members may be responsible for each other's actions. A defendant is responsible for an offense committed by another member of the conspiracy if the defendant was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance and as a natural consequence of the conspiracy. . . . Under this theory, in order to find the defendant guilty of the murder, kidnapping or robbery of Carnell Bolden or the assault or mayhem offenses related to Danielle Daniels or the related firearm offense, . . . you must find beyond a reasonable doubt the following:
>
> One, that there was a conspiracy to kidnap or rob Carnell Bolden.
>
> Two, . . . the murder, the kidnapping or robbery of Carnell Bolden or the assault or mayhem offenses related to Danielle Daniels or the related firearm offense was committed by a coconspirator of the defendant.
>
> Three, the defendant was a member of the conspiracy to kidnap or rob Carnell Bolden at the time of the murder, kidnapping or robbery of Carnell Bolden or the assault or mayhem offenses related to Danielle Daniels or the related firearm offense.
>
> Four, that the murder, kidnapping or robbery of Carnell Bolden or the assault or mayhem offenses related to Danielle Daniels or the related firearm offense was committed during the existence of the conspiracy.
>
> Five, that the murder, kidnapping or robbery of Carnell Bolden or the assault or mayhem offenses related to Danielle Daniels or the related firearms offense was committed in furtherance of the conspiracy.
>
> And, number six, the murder, kidnapping or robbery of Carnell Bolden or the assault or mayhem offenses related to Danielle Daniels or the related firearm offense was a reasonably foreseeable consequence of the conspiracy. It is not necessary to find that the crime was intended as a part of the original plan, only that it was a foreseeable consequence of the original plan.

7/31/13 Tr. 159-61. This standard jury instruction is not based on any statute in the D.C. Code, but on the Supreme Court's decision in *Pinkerton v. United States*, 328 U.S. 640 (1946). *See*

Comment to Redbook Instruction 7.103. Unlike federal courts, and like their state counterparts, D.C. courts applying local criminal law are not required to follow *Pinkerton*, which is a part of the federal criminal law. To the contrary, a D.C. court may not instruct the jury on a theory of criminal liability unless it "forms a part of the criminal law of *this* jurisdiction." *O'Connor v. United States*, 399 A.2d 21, 25 (D.C. 1979) (emphasis added). Because *Pinkerton* liability is not authorized by any D.C. statute, and because only the legislature, and not the judiciary, has the power to create criminal liability in the District of Columbia, *Pinkerton* liability is not a valid theory of criminal liability in the District of Columbia, and the trial court's instruction on that theory requires reversal.

A. *PINKERTON* LIABILITY IS NOT AUTHORIZED BY STATUTE.

Under the *Pinkerton* doctrine of co-conspirator liability, "a co-conspirator who does not directly commit a substantive offense may nevertheless be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Wilson-Bey v. United States*, 903 A.2d 818, 840 (D.C. 2006) (en banc) (alteration omitted). To secure a conviction based on a *Pinkerton* theory, the government is "not required to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy." *Id.* Neither Congress nor the D.C. Council has ever enacted a statute authorizing such a theory of criminal liability. In 1901, Congress passed "An Act to Establish a Code of Law for the District of Columbia," 31 Stat. 1189 (Mar. 3, 1901) ("1901 Code"). In addition to codifying specific criminal offenses, such as first-degree murder, *id.* ch. 854, § 798 (codified as amended at D.C. Code § 22-2101), robbery, *id.* ch. 854, § 810 (codified as amended at D.C. Code § 22-2801), and kidnapping, *id.* ch. 854, § 812 (codified as amended at D.C. Code § 22-2001), the 1901 Code incorporated the common law in effect in

Maryland on February 27, 1801, when Maryland ceded to the United States what is now the District of Columbia.[43] Thus, a theory of criminal liability "forms a part of the criminal law of this jurisdiction" and is "available for the government to use in its theory of prosecution" only if: (1) it has been expressly adopted by statute, or (2) it was part of Maryland common law in 1801 and thus incorporated into the 1901 Code. *O'Connor*, 399 A.2d at 25; *see infra* Part III.B. Neither is true of *Pinkerton* co-conspirator liability.

The conspiracy statute punishes only the act of *conspiring* to commit a criminal offense, and does not create a theory of vicarious liability for substantive criminal offenses committed by co-conspirators. D.C. Code § 22-1805a ("If 2 or more persons conspire . . . to commit a criminal offense . . . each shall be fined . . . or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.").[44] Nor do the first-degree murder, robbery, or kidnapping statutes authorize punishment for those crimes based on a theory of vicarious liability.[45] Rather, the only statute in the D.C. Code that punishes a defendant for an offense that he did not himself commit is the aiding and abetting

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[43] 31 Stat. 1189, ch. 854, § 1 (codified at D.C. Code § 45-401) ("The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity . . . shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code."); *O'Connor*, 399 A.2d at 25 (1901 Code "provides that all consistent common law in force in Maryland at the time of the cession of the District of Columbia remains in force as part of the law of the District unless repealed or modified by statute").

[44] Nor does the legislative history of D.C. Code § 22-1805a mention co-conspirator liability for a substantive criminal offense. *See* H.R. Rep. No. 91-1303, at 143 (1970) (Conference Report); H.R. Rep. No. 91-907, at 66 (1970) (Committee Report).

[45] "By its terms, . . . the first-degree murder statute imposes felony murder liability solely on the person who does the killing. Other participants in the felony are exposed to first-degree murder liability only by virtue of the aiding and abetting statute. Hence, the felony murder liability of an accomplice must be determined in accordance with common law concepts of vicarious liability." *Christian v. United States*, 394 A.2d 1, 48 (D.C. 1978).

statute. That statute, which has never been amended since it was enacted as part of the 1901 Code, provides:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

D.C. Code § 22-1805. The aiding and abetting statute provides that accomplices may be charged and punished as principals for the crimes they assist; it does not provide that co-conspirators may be punished for all foreseeable crimes committed in furtherance of the conspiracy.

Indeed, as this Court explained in its en banc opinion in *Wilson-Bey*, "*Pinkerton* liability and aiding and abetting are distinct legal theories that require proof of different elements." 903 A.2d at 839. To be convicted under accomplice liability, the defendant must "participate in [the charged crime] as in something that he wishes to bring about" and "seek by his action to make it succeed." *Id.* at 831 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). In other words, "the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime." *Id.* at 834. To be convicted under *Pinkerton* liability, by contrast, the defendant need not "knowingly aid" or "participate in" the charged crime, or "seek by his action to make it succeed," so long as the crime "was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Id.* at 840 (citation omitted); *see id.* ("The government is not . . . required [under *Pinkerton*] to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy."). In other words, *Pinkerton* co-conspirator liability requires neither the act of "actually aid[ing] the perpetrator in the commission of the substantive crime" nor the mental state of "knowingly aid[ing] the other person with the intent that the other person commit the

charged crime," so long as the crime was committed in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement. *Id.* at 834, 840; *see also Erskines v. United States*, 696 A.2d 1077, 1080-81 & n.5 (D.C. 1997) (explaining that, whereas aiding and abetting liability requires "[s]ome affirmative conduct by [the defendant] to help in planning or carrying out the crime," the "*Pinkerton* doctrine allows conviction for substantive offenses without satisfaction of either the actus reus or mens rea element of the substantive offense"); 2 W. LaFave, *Substantive Criminal Law* § 13.3 (2d ed.) ("[O]ne is not an accomplice to a crime merely because that crime was committed in furtherance of a conspiracy of which he is a member, or because that crime was a natural and probable consequence of another offense as to which he is an accomplice.").

Co-conspirator liability, as distinct from accomplice liability, did not exist at common law, which recognized only principals and accessories as "parties to a felony." *Agresti v. State*, 234 A.2d 284, 285 (Md. Ct. Spec. App. 1967). Under Maryland common law as it existed in 1801 and as incorporated into D.C. law by the 1901 Code, "a person [could] be guilty of a felony in four capacities: as a principal in the first degree, a principal in the second degree, an accessory before the fact, or an accessory after the fact." *Osborne v. State*, 499 A.2d 170, 171 (Md. 1985) (citing 4 W. Blackstone, *Commentaries* *34-40; 2 J. Stephen, *A History of the Criminal Law of England* ch. 22, at 229-31 (1883)).[46] Principals in the first degree are "those who commit the deed as perpetrating actors." *Agresti*, 234 A.2d at 285.[47] Principals in the second degree are

[46] *See Osborne*, 499 A.2d at 171 n.2 ("Maryland retains accessoryship in virtually the same form as it existed in Blackstone's day."); *O'Connor*, 399 A.2d at 25 ("In 1776, Maryland adopted the common law of England as it then existed.").

[47] "There may be joint principals in the first degree, as where two or more cause the death of another by beating . . . or other means, in which both, or all, participate." *Owens v. United States*, 982 A.2d 310, 317 (D.C. 2009) (quoting R. Perkins, *Perkins on Criminal Law* 656 (2d ed. 1969) (omission in original).

those "who are present" for the crime and "who aid and abet the commission of a crime, but do not themselves commit it." *McBryde v. State*, 352 A.2d 324, 326 (Md. Ct. Spec. App. 1976). Accessories before the fact are those "who procure, counsel, or command" the crime, but "who are not present" during the commission of the crime. *Id.* Principals in the second degree and accessories before the fact are both considered "aiders and abettors," with the only difference being their "presence or absence during the commission of the crime." *Id.*; *see also Murchison v. United States*, 486 A.2d 77, 82 n.5 (D.C. 1984) ("[I]n the District of Columbia, the common law accessory before the fact is treated as an aider and abettor."); *Handy v. State*, 326 A.2d 189, 196 (Md. Ct. Spec. App. 1974) ("An aider is one who assists, supports or supplements the efforts of another in the commission of a crime. An abettor is one who instigates, advises or encourages the commission of a crime."). Accessories after the fact are "those who receive, comfort, or assist a felon knowing that he has committed a felony." *Agresti*, 234 A.2d at 285-86. Under D.C. Code § 22-1805, only aiders and abettors can be charged and punished as principals for the crimes they assist.[48] Neither Congress nor the D.C. Council has ever recognized any other party to a criminal offense. Thus, unlike state legislatures that have specifically amended their aiding and abetting statutes to include co-conspirator liability,[49] the D.C. legislature has never expanded vicarious liability for a substantive criminal offense to include co-conspirator liability.[50]

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[48] In the District of Columbia, accessories after the fact are punished separately, with a far less severe penalty than principals and accomplices. *See* D.C. Code § 22-1806.

[49] *E.g.*, Ky. Rev. Stat. Ann. § 502.020 (including one who "engages in a conspiracy with another person to engage in the conduct causing such result"); Minn. Stat. Ann. § 609.05 (including one who "conspires with . . . the other to commit the crime"); Ohio Rev. Code Ann. § 2923.03 (including one who shall "conspire with another to commit the offense"); Wis. Stat. Ann. § 939.05 (including one who "is a party to a conspiracy with another to commit" the crime).

[50] At common law, and prior to *Pinkerton*, a defendant was responsible for the acts of his co-conspirators in only three limited contexts: "(1) to establish as the act of all members of the alleged conspiracy the overt act required by the federal conspiracy statute, (2) to show the extent and duration of the conspiracy in relation to all the conspirators, or (3) as a rule of evidence to

B. THE JUDICIARY HAS NO POWER TO IMPOSE CRIMINAL PUNISHMENT BASED ON A THEORY OF LIABILITY NOT AUTHORIZED BY THE LEGISLATURE.

It is a basic tenet of separation of powers and due process that "the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980) ("Although the courts of the District of Columbia were created by Congress pursuant to its plenary Art. I power to legislate for the District, and are not affected by the salary and tenure provisions of Art. III, those courts, no less than other federal courts, may constitutionally impose only such punishments as Congress has seen fit to authorize. . . . The Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." (citations omitted)); *United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy

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connect all the defendants with the crime charged." *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 Yale L.J. 371, 375-76 (1947). Thus, "prior to the *Pinkerton* case, the doctrine had not, by its own force, supported an imposition of vicarious liability for substantive offenses committed by co-conspirators. Where prosecutors had sought to hold the accused on both counts, the question of guilt was apparently submitted to the jury either on evidence that he was the direct actor or that he aided and abetted the commission of the substantive offense." *Id.* at 376; *see also Lawrence v. State*, 63 A. 96, 97-98 (Md. 1906) ("the acts and declarations of each co-conspirator made during the progress of the execution of the object of the conspiracy and in furtherance of such object may be given in evidence against all the others"); *Bloomer v. State*, 48 Md. 521, 530-31 (1878) ("Before any act can be evidence against a man, it must be shown to be an act done by himself, or another, acting by his authority, or in pursuance of a common design. The text books on Evidence speaking of the acts and declarations of one of a company of conspirators, say: '. . . The connection of the individuals in the unlawful enterprize being thus shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law, the act and declaration of them all.").

embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" (citation omitted)); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983) ("Legislatures, not courts, prescribe the scope of punishments."); *McNeely v. United States*, 874 A.2d 371, 380 (D.C. 2005) ("the 'definition of the elements of a criminal offense is entrusted to the legislature'" (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

This separation of powers principle applies in the District of Columbia, under both local law and federal constitutional law. *See* D.C. Code § 1-301.44 ("The Council recognizes the principle of separation of powers in the structure of the District of Columbia government."); *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992) ("In structuring [the District of Columbia] government, Congress is not bound by the separation of powers limitations that control its powers at the national level. Nonetheless, in the District Charter, Congress chose to create, as a general proposition, the familiar tripartite structure of government for the District. . . . [I]t is reasonable to infer from this tripartite structure and the vesting of the respective 'power' in each branch that the same general principles should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level."); *Whalen*, 445 U.S. at 689 n.4 (holding that federal separation of powers principles preclude D.C. courts from imposing criminal punishments not authorized by Congress).

Accordingly, this Court has steadfastly refused to expand criminal liability beyond what the legislature has prescribed by statute.[51] For example, in *Little v. United States*, 709 A.2d 708

[51] By contrast, this Court has occasionally employed its "inherent power to alter or amend the common law" to abolish common law *rules of proof* that were originally designed to ensure the reliability of the government's evidence but that have since become "obsolete." *See, e.g.*, *United States v. Jackson*, 528 A.2d 1211, 1219-20 (D.C. 1987) (abolishing "year and a day" rule as "obsolete" in light of "advances in medical science in the proof of causation"); *Arnold v. United States*, 358 A.2d 335, 343-44 (D.C. 1976) (abolishing corroboration requirement for a "mature female victim of rape" as "crude and childish" "in the light of modern psychology").

(D.C. 1998), this Court rejected the government's invitation to repeal the common law rule that "a defendant may not be convicted as an accessory after the fact to murder unless the victim was dead at the time the defendant committed the acts of assistance." *Id.* at 712. The Court reasoned that this rule was in effect when the accessory after the fact statute was enacted in 1901, and that the statute has not been "amended in any pertinent respect in the near-century that has elapsed since then." *Id.* at 712-13. Although the rule had been repealed by statute in many jurisdictions, this Court was "not persuaded . . . that [its] construction of a 1901 statute, the text of which has remained unchanged in pertinent respects for almost a century, should be affected by legislative developments in other jurisdictions." *Id.* at 714. This Court held:

> Assuming, without deciding, that this court's "inherent power to alter or amend the common law" permits us to expand, by judicial decree, the scope of a statutory criminal offense, our authority to do so must be exercised with restraint, lest we intrude upon the prerogatives of the legislative branch and the liberties of the citizen. Accordingly, we decline the government's invitation to amend the venerable common law rule . . . . Sharing the Supreme Court's "instinctive distaste against men [and women] languishing in prison unless the lawmaker has clearly said they should," we conclude that the legislature, and not the court, should decide whether the common-law rule, which is by no means a "capricious obstacle to a prosecution," should be retained or revised.

Id. at 714 (alteration in original). *See also United States v. Heinlein*, 490 F.2d 725, 736 (D.C. Cir. 1973) (refusing to expand the felony murder doctrine beyond what was incorporated from Maryland common law in the 1901 Code); *O'Connor*, 399 A.2d at 25 (holding that the common law doctrine of transferred intent was "available for the government to use in its theory of prosecution" only if the doctrine had been recognized in the Maryland common law in 1801 and thus incorporated into D.C. law by the 1901 Code).

Because no statute in the District of Columbia provides that a defendant may be punished for the crimes committed by his co-conspirators in furtherance of the conspiracy, and because only the legislature, and not the judiciary, may create or expand criminal liability in the District of Columbia, the trial court erred in instructing the jury on a *Pinkerton* theory of co-conspirator

liability. Although the validity of the *Pinkerton* instruction as part of D.C. law is an issue of first impression,[52] state courts that have considered the issue have held that, in the absence of a state statute authorizing co-conspirator liability, the *Pinkerton* doctrine is not a valid part of the state's criminal law and may not be used in state criminal trials. As the New York Court of Appeals has persuasively reasoned:

> In rejecting the notion that one's status as a conspirator standing alone is sufficient to support a conviction for a substantive offense committed by a coconspirator, it is noted that the Legislature has defined the conduct that will render a person criminally responsible for the act of another. Conspicuously absent from [the aiding and abetting statute] is reference to one who conspires to commit an offense. That omission cannot be supplied by construction. Conduct that will support a conviction for conspiracy will not perforce give rise to accessorial liability. True, a conspirator's conduct in many instances will suffice to establish liability as an accomplice, but the concepts are, in reality, analytically distinct. To permit mere guilt of conspiracy to establish the defendant's guilt of the substantive crime without any evidence of further action on the part of the defendant, would be to expand the basis of accomplice liability beyond the legislative design.
>
> The crime of conspiracy is an offense separate from the crime that is the object of the conspiracy. Once an illicit agreement is shown, the overt act of any conspirator may be attributed to other conspirators to establish the offense of conspiracy and that act may be the object crime. But the overt act itself is not the crime in a conspiracy prosecution; it is merely an element of the crime that has as its basis the agreement. It is not offensive to permit a conviction of conspiracy to stand on the overt act committed by another, for the act merely provides corroboration of the existence of the agreement and indicates that the agreement has reached a point where it poses a sufficient threat to society to impose sanctions. But it is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant, to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate. We refuse to sanction such a result and thus decline to follow the rule adopted for Federal prosecutions in *Pinkerton v. United States*. Accessorial conduct may

[52] Although *Pinkerton* liability is a familiar concept in this Court's case law, this Court has never expressly adopted the doctrine as a matter of D.C. law, much less considered whether it has the authority to do so. Thus, this Court's decisions upholding convictions based on co-conspirator liability do not constitute precedent on the question presented here. *See Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. The rule of *stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question. A point of law merely assumed in an opinion, not discussed, is not authoritative." (citations and internal quotation marks omitted)).

> not be equated with mere membership in a conspiracy and the State may not rely solely on the latter to prove guilt of the substantive offense.

People v. McGee, 399 N.E.2d 1177, 1181-82 (N.Y. 1979) (citations omitted).[53] Numerous other state courts have held the same. *See, e.g.*, *State ex rel. Woods v. Cohen*, 844 P.2d 1147, 1151 (Ariz. 1992) (in banc) ("[T]he [accomplice liability] statute defines the universe of vicarious liability. *Pinkerton* liability is not within the statutory universe. Therefore, *Pinkerton* liability is not the law of Arizona."); *State v. Nevarez*, 130 P.3d 1154, 1158 (Idaho Ct. App. 2005) ("We need not decide whether application of the *Pinkerton* theory would be advisable as a matter of public policy because we find it to be inconsistent with Idaho statutes. It is the province of the Idaho legislature, not the courts, to define the elements of a crime. Therefore, Idaho courts are not free to add or subtract elements at will." (citations omitted)); *Bolden v. State*, 124 P.3d 191, 200 (Nev. 2005) ("The power to define crimes and penalties lies exclusively within the power and authority of the Legislature. No statutory underpinning for the *Pinkerton* rule exists in Nevada. In the absence of statutory authority providing otherwise, we conclude that a defendant may not be held criminally liable for the specific intent crime committed by a coconspirator simply because that crime was a natural and probable consequence of the object of the conspiracy."); *State v. Small*, 272 S.E.2d 128, 135 (N.C. 1980) ("It is for the legislature to define a crime and prescribe its punishment, not the courts or the district attorney. Accordingly, we join the ranks of those who reject the rule in *Pinkerton*." (citations omitted)"); *State v. Stein*, 27 P.3d 184, 188 (Wash. 2001) (en banc) (rejecting co-conspirator liability as not authorized by the conspiracy statute or the accomplice liability statute); *see also Commonwealth v. Stasiun*, 206 N.E.2d 672, 680 (Mass. 1965) ("It . . . cannot be held that a conspirator is as matter of law an

[53] The New York Court of Appeals' reasoning is particularly persuasive because the D.C. conspiracy statute "is modeled on the New York [conspiracy statute], rather than Federal law." H.R. Rep. No. 91-907, at 66 (1970) (Committee Report).

aider or abettor in the perpetration of the crimes whose commission he has agreed with others to accomplish. We are mindful that a different rule now prevails in the Federal courts as a result of the decision in *Pinkerton v. United States*, although prior to that decision the views of the lower Federal courts were conflicting. . . . With deference, we are not persuaded to follow the *Pinkerton* case."); 2 LaFave, *supra*, § 13.3 ("Although the *Pinkerton* rule never gained broad acceptance, the opposition to it has grown significantly in recent years. It was rejected by the draftsmen of the Model Penal Code and of the proposed new federal criminal code. Most of the state statutes on accomplice liability require more than membership in the conspiracy, and the language in these statutes has been relied upon by courts in rejecting the conclusion that complicity is coextensive with conspiracy."). In deciding this question of first impression, this Court should follow the sound reasoning of its sister courts and conclude that, because *Pinkerton* liability is not authorized by D.C. statute, it cannot form the basis of a D.C. criminal conviction.

C. REVERSAL IS REQUIRED.

Because the trial court instructed the jury on a legally invalid theory of criminal liability, and because it is impossible to discern from the general verdicts whether any of the jurors relied on that invalid theory to convict Ashby of the charged offenses, reversal is required. *See Yates v. United States*, 354 U.S. 298, 312 (1957) ("[W]e think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."); *Thomas v. United States*, 806 A.2d 626, 631 n.10 (D.C. 2002) ("Under *Yates*, we need not conduct a harmlessness analysis under *Chapman v. California*. Where it cannot be determined whether the conviction rests on legally invalid grounds, 'it is impossible to say that the error in submitting the legally inadequate ground to the jury was harmless beyond a reasonable doubt.'" (citations omitted)); *Coghill v. United States*, 982 A.2d 802, 808 (D.C. 2009) ("[W]henever various alternative

theories of liability are submitted to a jury, any one of which is later determined to be [legally] improper, the conviction cannot be sustained. This is because of the possibility that the verdict might have rested entirely upon the improper theory.").

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT POLICE COULD SEARCH ASHBY'S CELL PHONE WITHOUT A WARRANT.

On January 9, 2010, police seized a cell phone from Ashby during a search incident to his arrest. 7/2/13 Tr. 292; 7/16/13 Tr. 469. Two days later, on January 11, 2010, Detective Greene retrieved the cell phone from the property clerk's office, where it had been stored as "prisoner's property." 7/17/13 Tr. 486-89. Although Greene initially testified that he did not turn on or look inside the phone because he would need a search warrant to do so, he later admitted that, prior to obtaining a search warrant, he turned on the phone and used it to call himself in order to discover Ashby's phone number. *Id.* at 494-96; 7/29/13 Tr. 52-53.[54]

The defense moved to suppress the fruits of Greene's warrantless search of Ashby's cell phone, citing the First Circuit's decision in *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013). R. 93. Relying on the Seventh Circuit's opinion in *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012), the government argued that, because Greene merely "opened the phone to figure out what the phone number was," and did not "look at pictures or text messages or anything of that nature," such a limited search did not require a warrant. 7/30/13 Tr. 31. The trial court agreed with the government, ruling that the warrantless search of Ashby's cell phone did not violate the Fourth Amendment because its scope was limited to "the telephone number for the phone," and did not extend to the "other inner workings of the phone," such as "past calls, call history[,] call logs, [and] text messages sent and received." *Id.* at 32-33.

[54] According to the prosecutor, "it is not unusual, that detectives will, when they recover a cell phone, call their own cell number to try to get the number on the caller I.D. of their own phone, what the number is of the phone they've recovered." 7/17/13 Tr. 646.

CONSOLIDATED BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 14-CF-414, 14-CF-424, and 14-CF-669

PAUL ASHBY,
KEITH LOGAN,
MERLE WATSON — Appellants,

v.

UNITED STATES OF AMERICA, — Appellee.

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

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Cr. Nos. 2010-CF1-3069, 2010-CF1-21619, and 2011-CF1-23411

the case. This is the essence of *Winfield*. Moreover, this line of argument incorporated the claim Ashby now claims that the trial court precluded him from arguing, namely that Thomas's knowledge about the case was not from his conversation with Ashby, but rather from his own involvement. In light of Ashby's closing argument, any error the trial court committed by placing limits on his argument was harmless under any standard of review.

VI. The Trial Court Did Not Abuse its Discretion by Giving the *Pinkerton* Instruction

A. Additional Background

At the close of the case, during the parties' discussion of final jury instructions, Ashby requested that the trial court not provide the jury with the so-called *Pinkerton* instruction regarding co-conspirator liability,[122] because the theory of liability "ha[d] not been codified in the District," and, more specifically, that

> what the Government is asking the Court to do is to have a standard of guilt where Mr. Ashby could be found guilty of any offense charged if . . . it was reasonably foreseeable that someone else did it. And it is just way too expansive. It is way more expansive than the law in the District allows. (7/31/13 Tr. 7.)

Over Ashby's objection, the trial court instructed the jury as follows:

> A conspiracy is kind of a partnership in crime. And its members may be responsible for each other's actions. A defendant is responsible for an offense committed by another member of the conspiracy if the defendant was a member of the conspiracy when the offense was

[122] *See Pinkerton v. United States*, 328 U.S. 640 (1946).

committed and if the offense was committed in furtherance and as a natural consequence of the conspiracy. (*Id.* at 159-60.)[123]

B. Standard of Review and Applicable Legal Principles

"A trial court generally has broad discretion in fashioning jury instructions, as long as the charge, considered as a whole, fairly and accurately states the applicable law." *Holloway v. United States*, 25 A.3d 898, 903 (D.C. 2011) (internal quotation marks and citation omitted).

"As articulated by this court, the *Pinkerton* doctrine provides that a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Wilson-Bey v. United States*, 903 A.2d 818, 840 (D.C. 2006) (en banc). *See also Collins v. United States*, 73 A.3d 974, 981 (D.C. 2013) ("To establish liability for the acts of co-conspirators, the government had to demonstrate that an agreement existed, that a substantive crime was committed by a co-conspirator, and that the substantive crime was a reasonably foreseeable consequence of the agreement between the co-conspirators."). Imposing liability on members of a conspiracy for certain acts of co-conspirators is a way of recognizing the "especially dangerous circumstances" posed by criminal agreements. *Wilson-Bey*, 903 A.2d at 841. For this reason, unlike for aiding-and-abetting liability, the

[123] *See also* Instruction 7.103, Co-Conspirator Liability, Criminal Instructions for the District of Columbia, Fifth Edition, Release 10, August 2012.

government need not prove that a co-conspirator personally aided in the substantive crime; it is sufficient that the crime was committed "in furtherance of the conspiracy." *Id.* at 839. The government also need not prove that the crime was contemplated as part of the original agreement, so long as it was a "reasonably foreseeable" consequence of the conspiracy based upon "the essential nature of the plan." *Collins*, 73 A.3d at 983-84.

C. Discussion

The doctrine of co-conspirator liability has been settled law in the District of Columbia for over a century, far pre-dating *Pinkerton* itself. *See, e.g., Patten v. United States,* 42 App. D.C. 239, 247 (D.C. Cir. 1914) ("when two or more persons combine or conspire to commit a criminal offense, each is responsible for the acts of the others in furtherance of the common purpose, if the act done either is within the scope of that purpose, or is the natural or probable consequence of the act intended."); *see also, e.g., Tann v. United States*, 127 A.3d 400, 455 (D.C. 2015) (to prove *Pinkerton* liability, the government must show "that an agreement existed, that a substantive crime was committed by a co-conspirator in furtherance of that agreement, and that the substantive crime was a reasonably foreseeable consequence of the agreement between the conspirators") (citing *Collins*, 73 A.3d at 982); *Richardson v. United States*, 116 A.3d 434, 442 (D.C. 2015) ("the *Pinkerton* doctrine provides that a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably

foreseeable consequence of the conspiratorial agreement"); *Harrison*, 76 A.3d at 826 (same definition of *Pinkerton* liability); *Collins*, 73 A.3d at 980 (same); *Snowden v. United States*, 52 A.3d 858, 864 (D.C. 2012) (same); *Castillo-Campos v. United States*, 987 A.2d 476, 486 & n.12 (D.C. 2010) (same); *Tyree v. United States*, 942 A.2d 629, 635 & n.2 (D.C. 2008) (same); *Neal v. United States*, 940 A.2d 101, 103 (D.C. 2007) (same); *Gatlin v. United States*, 925 A.2d 594, 599 (D.C. 2007) (same); *Wilson-Bey*, 903 A.2d at 840 (same); *Baker v. United States*, 867 A.2d 988, 1005 (D.C. 2005) (same); *Bruce v. United States*, 379 F.2d 113, 118 (D.C. Cir. 1967) (same). Indeed, this Court has upheld *Pinkerton* jury instructions even where the crime of conspiracy is not separately charged in the indictment. *See, e.g., Thomas v. United States*, 748 A.2d 931, 934 (D.C. 2000) ("Although we have never decided the specific issue presented here -- i.e., whether, when there is no conspiracy charge in the indictment, the *Pinkerton* instruction may be given to prove a criminal defendant's participation in an underlying criminal offense -- every federal court that has decided this question has held that such an instruction is proper.") (collecting cases).

Ashby asks this Court to overturn its decades of *Pinkerton* jurisprudence, because, he claims, *Pinkerton* liability is not authorized by D.C. statute, nor was it present in the Maryland common law as of 1801 (Ashby at 54, 63). He goes even further to contend that this Court's legion *Pinkerton* cases are not binding precedent, because the question of *Pinkerton's* applicability has always, before this

case, "lurk[ed] in the record" (*id.* at 61 n. 52) (citing *Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994)). Neither claim has merit.

First, Ashby's contention that *Pinkerton* liability must be statutory rests on a basic misunderstanding of the nature of D.C. common law, namely, that the common law applicable to D.C. was "frozen in time" as the Maryland common law of 1801 (Ashby at 54). This Court has repeatedly rejected this notion. *See e.g., Tann,* 127 A.3d at 449 n.35 ("As the highest court of this jurisdiction, we of course have the power[ ] [and the responsibility] to develop the common law for the District of Columbia.") (citation and internal quotation marks omitted); *Gallimore v. Washington,* 666 A.2d 1200, 1208 (D.C. 1995) ("the common law is not frozen in time, but instead is a system of law not formalized by legislative action, not solidified but capable of growth and development at the hands of judges") (citations and internal quotation marks omitted); *Williams v. United States,* 569 A.2d 97, 100 (D.C. 1989) ("[w]e have held . . that by incorporating the common law of Maryland . . . Congress did not intend to freeze the common law as it existed in 1801").

Ashby's heavy reliance on *O'Connor v. United States,* 399 A.2d 21 (D.C. 1979), is therefore misplaced. *O'Connor* merely noted the unremarkable proposition that the Maryland common law provided the foundation for the District's common law at the time of cessation, in 1801. *Id.* at 25. *O'Connor* did not hold, however, that the District's legitimate common law was cabined to the Maryland common law of

1801.[124] To the contrary, *O'Connor* cited with approval *Linkins v. Protestant Episcopal Cathedral Foundation of the District of Columbia*, 187 F.2d 357 (D.C. Cir. 1950), which explicitly rejected the "frozen in 1801" argument. *O'Connor*, 399 A.2d at 25 (citing *Linkins*).

Linkins explained:

> The common law, particularly as derived from the common law of Maryland, is the fundamental part of the law in this jurisdiction to which we look in the absence of statutory enactment. The gist of the argument by appellants is that the common law of 1801 (or of 1901) became by act of Congress statutory law in this jurisdiction. As such it could not change except by legislative enactment. *But the very term 'common law' means a system of law not formalized by legislative action, not solidified but capable of growth and development at the hands of judges. The distinguishing characteristics of the common law would be destroyed by appellants' view.* We are of clear opinion that Congress did not so intend. When the statute provided that the common law should remain in force, it meant that *the system of the common law, unwritten and dynamic, not its then-current pronouncements on specific problems, should remain in force.*

Linkins, 187 F.2d at 360-61 (emphasis supplied).[125]

Ashby's related contention (at 54, 59-63) that this Court overstepped its authority by establishing a "theory of criminal liability" is similarly easily dispatched. Logically, Ashby's "overstepping" contention is no different than saying

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[124] Indeed, Ashby wholesale adds the words "only if" to his *O'Connor* parenthetical (Ashby at 60). Those words appear nowhere in *O'Connor*, and neatly summarize Ashby's misreading of the case. Ashby similarly misunderstands *Little v. United States*, 709 A.2d 708, 714 (D.C. 1998) (Ashby at 60). *Little* actually "assum[es]" – albeit "without deciding" that this Court does in fact have the "inherent power to alter or amend the common law." *Id.* at 714.

[125] If Ashby's "frozen in 1801" logic were correct (which it is not), defendants would presumably also be deprived of common-law *defenses* not either present in the Maryland common law in 1801 or codified since.

the Supreme Court overstepped in *Pinkerton* itself vis-a-vis Congress and the President – but *Pinkerton's* central holding has been reaffirmed by the Supreme Court as recently as May 2, 2016. *Ocasio v. United States*, 136 S. Ct. 1423, 1442 (2016) ("[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward") (quoting *Pinkerton*, 328 U.S. at 647).

This Court's manslaughter jurisprudence is instructive. In *Comber v. United States*, 584 A.2d 26 (D.C. 1990) (en banc), the Court explained that the common law, and not statute, defined the crime of manslaughter, said expressly that

> by incorporating the common law of Maryland, Congress did not intend to freeze the common law as it existed in 1801. Rather, Congress meant to incorporate the "dynamic" common law, not merely "its then-current pronouncements on specific problems." As a consequence, [we have] concluded that D.C. Code § 49-301 is not a bar to the exercise of our inherent power to alter or amend the common law.

Id. at 35 & n.5. *See also, e.g., Hager v. United States*, 791 A.2d 911, 912 n.1 (D.C. 2002). If the contours of this Court's common-law authority extend to defining whole crimes, as the *Comber* en banc court held, then they certainly encompass mere theories of liability.

Finally, Ashby's claim that this Court's *Pinkerton* jurisprudence is not binding precedent is not even colorable. Quite to the contrary, this Court has "passed upon the precise question," *Debruhl*, 38 A.3d at 298, many times, to include the en banc rehearing in *Wilson-Bey*. 903 A.2d 841-42 (citing *Pinkerton*). *See also Wheeler v. United States*, 977 A.2d 973, 984 (D.C. 2009) (holding that *Wilson-Bey* "acknowledged" the "validity" of *Pinkerton* liability). At the least, a division of this

Court is bound by its *Pinkerton* jurisprudence. *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (division of this Court bound by prior precedents).[126]

VII. Logan's Convictions for the Daniels Shooting Were Supported by Ample Evidence

Logan challenges the sufficiency of the evidence for his convictions "related to the Daniels shooting" (Logan's Brief at 51). These included convictions for AWIK while armed, aggravated assault while armed, and mayhem while armed, and the related PFCV counts (R.L. 72 (verdict form)).[127]

A. Standard of Review and Applicable Legal Principles

In reviewing a challenge to sufficiency of the evidence, this Court views the evidence "in the light most favorable to the government, giving full play to the right of the [fact-finder] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and mak[es] no distinction between direct and circumstantial

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[126] Even assuming *arguendo* that the trial court erroneously instructed the jury on Pinkerton liability any error was harmless, because the verdict was not "substantially swayed" by the error. *Kotteakos,* 328 U.S. at 765; *see also Brooks v. United States*, 599 A.2d 1094, 1101-02 (D.C. 1991) (instructional error is subject to harmless error analysis under *Kotteakos*). The government's case did not rise or fall on *Pinkerton* liability; to the contrary, the government presented ample evidence (see, e.g., pp. 45-46 *supra*) to convict appellants under a principal theory of liability, an aiding-and-abetting theory, or both; and the jury was instructed on all three theories. *Cf. Wheeler*, 977 A.2d at 987 (finding erroneous aiding-and-abetting instruction harmless where jury could have convicted on *Pinkerton* theory, on which it also was instructed).

[127] The jury also convicted Logan of FIP, but this count did not necessarily relate to the Daniels shooting (R.L. 72).