PETITION APPENDIX

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APPENDIX A

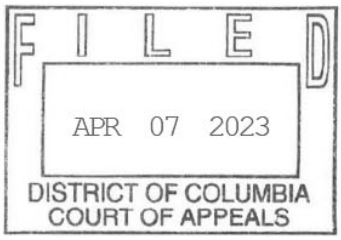
DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 13-CF-0493, 17-CO-0422 & 20-CO-0609

IRVIN HARRIS JOHNSON, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeals from the Superior Court
of the District of Columbia
(2011- CF1-017540)

(Hon. Lynn Leibovitz, Trial Judge)

(Argued January 24, 2023 Decided April 7, 2023)

Before HOWARD and ALIKHAN, *Associate Judges*, and FISHER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Irvin Johnson appeals his convictions for murder and other offenses and the denial of two motions for a new trial. He argues that the government twice violated *Brady v. Maryland*,[1] that the admission of a handwritten note violated his attorney-client relationship, and that his trial counsel were ineffective in two respects. The trial court rejected these arguments. We affirm.

I. Background

Viewed in the light most favorable to the government, the evidence at appellant's trial showed the following. On the night of June 21, 2011, appellant had a fistfight with Nick Kennedy at a local park after Kennedy learned that appellant had a dispute with some of Kennedy's friends. Kennedy testified that, not long after the fight, he saw appellant and another man talking to Kennedy's friend, Dominique Barbour. Kennedy approached these three men to tell appellant that Kennedy had no vendetta against appellant. Appellant responded "it ain't never over," or

[1] 373 U.S. 83 (1963).

something to that effect, according to Kennedy and another witness who was watching from a porch nearby. Later that night, appellant and another person fired guns at Kennedy and one of his friends. No one was injured, but bullets struck several cars and an apartment window. Authorities recovered 10mm and .45 caliber bullet casings from the scene.

A few weeks later, on July 9, 2011, three of Kennedy's friends—Barbour, Jimmie Simmons, and Anthony Thomas—were shot during an early-morning craps game. Barbour and Simmons died from their wounds but Thomas survived. One of appellant's friends, Steven Harden, rode his bike by the craps game just before the shooting. Harden testified that he saw appellant, Barbour, Simmons, and Thomas together at the game that morning before he heard, but did not see, gunshots. Harden also recognized a "brown-skinned dude with the long dreads" at the game. That description matched Richard Shores, another witness who testified about the shooting.

Shores testified that he was at the craps game to trade DVDs for crack cocaine. He had used crack, marijuana, and alcohol that morning and had not slept for 40 hours. That morning, Shores saw Barbour and Simmons at the craps game with a third man whom Shores did not know, but referred to as "the stranger." Shores watched the stranger shake hands with Simmons during the game. Moments later, Shores heard several loud pops and dropped to the ground; he soon left the scene. In court, Shores said he could not identify appellant as the stranger and conceded that he did not see the shooting or anyone with a gun that morning. Even so, a different witness testified that, within a day of the shooting, Shores told him "Irvin" was the shooter.

Police recovered a series of 10mm bullet casings from the shooting. The government's forensics expert testified that the casings from the July 9 shooting were fired from the same gun as the casings recovered from the June 21 shooting. The firearm was not recovered.

The government also called Glenn Torshizi, a radio frequency engineer at Sprint, as an expert witness. Using cellphone tower data, Torshizi placed appellant's cellphone at the time of the June 21 shooting within a roughly one-mile area that encompassed where the shooting occurred. Likewise, Torshizi testified that during the July 9 shooting, appellant's phone was again within the roughly one-mile area of that shooting. His testimony also established that the phone was typically in a different one-mile area, and that the day after the second shooting, July 10, 2011, appellant's phone went inactive.

On July 11, appellant reported to his probation officer for the last time, despite having met his reporting obligations before that date and being required to report again after. In the weeks after the shooting, appellant and his girlfriend, Sade Stephens, spent short stints living with various acquaintances and family members around Northwest D.C. Around the same time, appellant's friend Steven Harden stopped seeing appellant in their neighborhood. MPD officers visited four of appellant's known addresses on July 27, 2011, but he was not present at any of them. In late August, appellant arrived unannounced at his aunt's house in Calvert County, Maryland. Appellant stayed there until his arrest at that location on September 9, 2011. When officers arrived, appellant tried to flee out a window but was apprehended inside the house without resistance.

Appellant was detained at the D.C. Jail after his arrest. In October 2011, he met Kurtis Faison in "the hole," an area of the jail used for punitive segregation. Faison testified that he and appellant became close after appellant realized they had a mutual friend. Faison's and appellant's cells shared a solid wall, so they talked by emptying the water from their toilet bowls and speaking into them—their voices echoing through the toilet pipes. Faison told appellant about his case, and appellant did the same. Appellant told Faison that he shot two people in a failed robbery. Appellant was having a physical altercation with the man he wanted to rob, but when someone made a sudden move, appellant shot this man and then shot another man to avoid leaving witnesses. Faison also testified that appellant shared concerns that the government would have cellphone tower evidence; acknowledged that appellant went to his aunt's house in Maryland after the shooting, instead of his mother's place in Florida, to avoid detection; and said that appellant was worried about his girlfriend Sade's wellbeing.

A jury found appellant guilty of two counts of first-degree murder while armed and several other offenses, and he received an 82-year sentence. After his convictions, appellant filed two motions for a new trial and the court held a multi-day evidentiary hearing to address them. The court heard testimony from appellant and his trial counsel, Liyah Brown and Maro Robbins, as well as from two expert witnesses (one was appellant's and one was the government's) who testified about Faison's mental health and whether it impacted his trial testimony. After the hearing, the trial court denied appellant's motions in a 75-page order.

II. Analysis

Appellant raises five issues in an effort to obtain a new trial. First, he argues that the government violated *Brady* by failing to disclose evidence about Kurtis

Faison. Second, he alleges another *Brady* violation in the government's mid-trial disclosure of previously redacted portions of police reports mentioning Richard Shores. Issues three and four concern a note that appellant wrote, police seized from his cell in an unrelated investigation, and the government used as evidence at appellant's trial. Appellant argues that this note is privileged and that (A) the government violated his Sixth Amendment rights by using it at trial, and (B) his trial counsel, Liyah Brown and Maro Robbins, were ineffective in litigating the admissibility of the note. Finally, appellant claims that his trial counsel were ineffective when they decided not to call a cellphone tower expert at trial. We address these arguments in turn.

Brady **Claims**

Appellant's *Brady* claims present mixed questions of fact and law. *Mackabee v. United States*, 29 A.3d 952, 959 (D.C. 2011). We review the trial court's legal conclusions de novo and its factual findings for clear error. *Id.* A successful *Brady* claim requires proving (1) that the government suppressed evidence; (2) that the evidence was favorable to the accused; and (3) that the suppressed evidence was material, i.e., that the suppression prejudiced the accused. *Id.* Our analysis of appellant's claims will focus on the materiality or prejudice prong. "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Hilton v. United States*, 250 A.3d 1061, 1075 (D.C. 2021) (quoting *Miller v. United States*, 14 A.3d 1094, 1115 (D.C. 2011)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Mackabee*, 29 A.3d at 959).

1. Kurtis Faison

Appellant's *Brady* claims concerning Faison focus on two categories of evidence: Faison's mental health history and Faison's history of cooperating with the government in other cases.[2] Appellant has failed to prove that either class of evidence was material.

[2] Appellant also argues that the government's failure to disclose evidence about Faison using a cellphone in jail violated *Brady*. Appellant posits, without explanation, that Faison's cellphone use is relevant because it indicated "his willingness and ability to make false reports implicating others" and that the evidence Faison gathered may be false. This argument seems to imply that Faison used his cellphone, not a confession from appellant, to learn about appellant's case.

Mental Health History

Appellant argues that the government suppressed a psychiatric evaluation of Faison from 2006 (when he was a juvenile) and D.C. Jail records reflecting Faison's mental health and behavioral history from 2010-2012. According to appellant, this evidence was material because he could have attacked the credibility of Faison's testimony by using the medical records, testimony from a government expert (Dr. Patterson) who evaluated them, and testimony from his own expert (Dr. Epstein) on the same subject. It is debatable whether the prosecution possessed these records from juvenile court and the D.C. Jail. Nevertheless, like the trial court, we assume without deciding that the government should be deemed to have possessed those mental health records because we resolve this *Brady* question on materiality grounds.

Our materiality analysis draws on our recent decision in *Parker v. United States*, 254 A.3d 1138 (D.C. 2021). *Parker* is highly relevant because it concerns the admissibility of mental health records of this same witness, Kurtis Faison, who was a co-defendant in the *Parker* case "before he entered a guilty plea and agreed to testify for the government." *Id.* at 1149 (citing *McCray v. United States*, 133 A.3d 205, 231 (D.C. 2016)).

Parker's discussion of using Faison's mental health records arose outside the *Brady* context because defense counsel in that case had obtained access to Faison's juvenile medical records with the assistance of the Superior Court. *See McCray*, 133 A.3d at 231.[3] Nevertheless, *Parker*'s focus on impeachment and credibility aligns squarely with appellant's *Brady* argument that Faison's mental health history was material impeachment evidence.

We reject this brief argument as too speculative to meet appellant's burden of proving materiality. *See Mackabee*, 29 A.3d at 964 (rejecting materiality arguments based on speculation about the evidence's relevance).

[3] *McCray* involved the direct appeal of Parker and his co-defendants, including Marcellus McCray. *McCray*, 133 A.3d at 210. In *McCray*, we considered Faison's mental health records and remanded the case to the trial court for further findings. *Id.* at 230-34. *Parker* was the appeal of the trial court's rulings on remand. *Parker*, 254 A.3d at 1141.

Parker recognized that using a witness's mental health history to impeach him is "greatly disfavored." *Parker*, 254 A.3d at 1150 (citation omitted). Such evidence is inadmissible unless its proponents can show it has a "serious impact" on the witness's credibility. *Id.* at 1150-51. Appellant cannot satisfy his burden under *Parker*, meaning that Faison's mental health records would not be admissible for impeachment. Because the records would be inadmissible, their absence could not undermine confidence in the outcome of the proceeding, as is required to establish *Brady* materiality.

In *Parker*, we decided that the trial court did not clearly err in finding that Faison's credibility at the *Parker* trial in June 2012 would not have been seriously impacted by the medical records at issue here and Dr. Patterson's testimony diagnosing Faison with Antisocial Personality Disorder (ASPD) at a post-remand hearing in that case. *Id.* at 1149-51. ASPD is not a mental illness, but a "personality style" "that is exemplified by low regard for the feelings and rights of others, and being deceitful and lying." Dr. Patterson testified that "he did not believe [the ASPD] affected Mr. Faison's credibility at trial, i.e., his ability or willingness to testify truthfully." *Id.* at 1149. The trial judge in *Parker* credited that testimony. *Id.* at 1150.

Parker's conclusion that the mental health records and Dr. Patterson's ASPD diagnosis did not seriously impact Faison's credibility in June 2012 helps persuade us that here, the same records and diagnosis would not have seriously impacted Faison's credibility when he testified in February 2013 that he heard appellant confess in October 2011. Dr. Patterson's testimony in this case covered the same medical records, ASPD diagnosis, and timeframe as his testimony in *Parker*. We see no reason why the record in this case required the trial court to deviate from *Parker*'s conclusion that Faison's history and Patterson's ASPD diagnosis did not seriously impact Faison's credibility.

We recognize that the record in the instant case includes evidence that *Parker* lacked—Dr. Epstein's expert testimony that Faison suffered from bipolar disorder and could have experienced hallucinations instead of hearing appellant confess. However, the trial court's thoroughly reasoned factual findings undercut Dr. Epstein's testimony about bipolar disorder and hallucinations,[4] and the court did not

[4] For example, the trial court pointed out that Dr. Epstein never examined Faison; that he did no more than speculate or "strongly wonder" whether the confession resulted from a hallucination; that none of the records he relied on

clearly err in discounting Dr. Epstein's testimony. We therefore rely on these findings to conclude that Dr. Epstein's testimony would not have seriously impacted Faison's credibility. That means it is inadmissible as impeachment evidence and therefore not material under *Brady*.

History of Cooperation

Kurtis Faison cooperated against approximately 20 defendants in a handful of investigations, including testifying about other alleged jailhouse confessions to Faison. One confession involved communications through toilet pipes, like appellant's confession. Appellant argues that the breadth of this cooperation, plus the common thread of jailhouse confessions, demonstrated Faison's willingness to act in his own interest and make false reports—so-called "corruption bias."

Evidence is less likely to be material if it is "largely cumulative of other impeachment evidence appellant possessed and had used at trial." *Andrews v. United States*, 179 A.3d 279, 290 (D.C. 2018); *see Fortson v. United States*, 979 A.2d 643, 662-63 (D.C. 2009). Here, any missing evidence of cooperation was cumulative of documents the government produced and evidence elicited at trial during Faison's testimony. Before Faison testified, the government disclosed his plea agreement from *Parker*. The proffer of facts detailed how Faison's cooperation against his co-defendants would rely on jailhouse confessions. Also, appellant's counsel knew that Faison planned to testify about a jailhouse confession in a future trial as appellant's counsel elicited testimony from Faison to that effect. This testimony also highlighted Faison's cooperation against his co-defendants using jailhouse confessions and emphasized how cooperating was in Faison's self-interest.

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actually diagnosed Faison with bipolar disorder (the sole reference to a bipolar diagnosis was "by history"); that he took discussions of hallucinations from D.C. Jail records out of context; and that he lacked experience in detention or correctional environments. The court also credited Dr. Patterson's testimony (after examining Faison) that "Faison was not psychotic or hallucinating and that he did not suffer from a serious mental illness or disability that impacted his credibility during any of the time periods addressed by Dr. Epstein." Finally, the court noted that "independent evidence"—for example, that Faison knew appellant's girlfriend's name, knew that appellant fled to Maryland instead of Florida, and knew that appellant feared the government's cell tower evidence—corroborated Faison's testimony.

Thus, any undisclosed cooperation evidence was cumulative of previously disclosed evidence about Faison's cooperation, jailhouse confessions, and self-serving motives.[5] Therefore, it would not have "undermine[d] confidence in the verdict" and was not material under *Brady*. *Hilton*, 250 A.3d at 1078 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

2. Richard Shores

The *Brady* claims concerning Shores stem from two police reports the government disclosed in unredacted form after the trial started. The first report, dated July 20, 2011, was disclosed after the jury was sworn but before Shores testified. The second report, dated July 13, 2011, was disclosed the day after Shores testified. Appellant argues that the delays in disclosing the redacted information precluded the defense from (1) using the reports effectively at trial and (2) conducting a pre-trial investigation into whether Shores himself shot the victims while attempting a robbery.

a. The Belated Disclosures

A day or two after the trial started, the government produced an unredacted copy of a police report written eleven days after the shooting. The government had produced a redacted copy of this report at the preliminary hearing on November 18, 2011. The newly disclosed portion of the report said that "Shores stated . . . he was in the process of selling [Barbour] five dvd's in exchange for a twenty piece of crack when he heard one single loud sound." In a status hearing the day before jury selection began, appellant's counsel, Ms. Brown, had shared her belief that "witness two" was on the scene to buy drugs from Barbour or Simmons. She stated that she planned to cross-examine that witness about buying drugs from the victims. A few days later, after the disclosure, Brown did cross-examine "witness two" [Shores] and

[5] The undisclosed toilet-pipe confession is similarly cumulative. Appellant seems to suggest that claiming to have heard a confession from a fellow prisoner through toilet pipes is so novel that a jury would struggle to believe Faison did it not just once, but twice. As with the other cooperation evidence, appellant urges that the second toilet-pipe confession shows that Faison acted out of self-interest, not honesty. This second toilet-pipe confession is cumulative of the testimony about the unusual manner of appellant's confession and of the evidence of cooperation against many defendants that the jury heard, all of which appellant argues demonstrates Faison's corruption bias.

elicited testimony that he had traded DVDs to Barbour for crack cocaine just before shots rang out.

On February 13, one day after Shores testified, the government produced an unredacted copy of a police report dated July 13, 2011. In this report, Detective Anthony Brigidini recounted that, according to sources, "[i]t is also believed that Shores took money that was on the ground and possibly a gun belonging to Simmons before fleeing. Video would tend to support this allegation." After this second disclosure, appellant's counsel asked the court to preclude Brigidini from testifying because this portion of his report was disclosed late. Rather than exclude Brigidini's testimony, the court brokered a stipulation allowing the jury to hear the information in the report despite it being speculative hearsay from an anonymous caller. Appellant's counsel elicited this information when cross-examining Brigidini. Notably, appellant's counsel declined the opportunity to recall Shores and cross-examine him about the information in the report.

b. Lack of Prejudice

The delayed disclosures did not prejudice appellant because (1) appellant's counsel used both reports effectively at trial and (2) appellant's claim that his counsel could have used the reports to investigate whether Shores was the shooter is too speculative. Admittedly, appellant's counsel could not use the reports to prepare his opening statement. Yet counsel ultimately brought the content of both reports before the jury to bolster the defense. With respect to the first report, Shores admitted on cross-examination that he was buying drugs from Barbour moments before the shooting. As for the second, Detective Brigidini verified on cross-examination that he knew of information that stated Shores took money and possibly a gun from the crime scene before fleeing. As the trial court recognized, using the second report in this manner was arguably more effective than if it had been disclosed before Shores testified because Shores, unlike Brigidini, likely would have denied that he took money or a gun from a stricken victim. Counsels' strategic decision not to recall Shores after receiving the second report supports this assessment. Appellant has not shown that timely disclosure would have created "a reasonable probability of a different result." *Mackabee*, 29 A.3d at 964 (emphasis omitted) (quoting *Strickler v. Greene*, 527 U.S. 263, 291 (1999)).

Appellant also argues that the delay in disclosure prevented his counsel from investigating a theory that Shores was the shooter in a robbery gone wrong. This court has held that a delayed disclosure can amount to a *Brady* violation when the delay precludes a pretrial investigation of a defense theory. *See Miller*, 14 A.3d at

1111. Such a delay prejudices a defendant when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 1115 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). However, no prejudice exists if the defendant shows only a "mere possibility that the undisclosed information might have helped the defense, or might have affected the outcome of the trial." *Mackabee*, 29 A.3d at 964 (alteration omitted) (quoting *United States v. Agurs*, 427 U.S. 97, 109-10 (1976)).

Here, there was no reasonable probability that, had the government disclosed the report earlier, the defense would have discovered valuable evidence supporting the theory that Shores shot the victims in a botched robbery. For starters, appellant's brief recognizes that "[n]o eyewitness saw the shooting." This would make finding evidence that Shores pulled the trigger difficult at best. Moreover, the second report's information about Shores taking money from Barbour's body came from an anonymous source, making appellant's claims that he could have pursued a fruitful investigation even more speculative. Absent any prospect of "hard evidence" that Shores shot the victims, appellant's "mere speculation" about an alternative theory does not establish a *Brady* violation. *Miller*, 14 A.3d at 1116; *see Mackabee*, 29 A.3d at 961 ("[A]ppellant's mere speculation that earlier contact with Green might have led the defense to discovery of additional exculpatory evidence is insufficient to establish a *Brady* violation.").

c. The Handwritten Note

Three years after his trial, appellant filed a motion under D.C. Code § 23-110 raising Sixth Amendment claims related to a note (Exhibit 458) that the government seized from his jail cell and introduced at trial. We review the denial of this motion for abuse of discretion. *Kigozi v. United States*, 55 A.3d 643, 650 (D.C. 2012).

Appellant claims that Exhibit 458 is protected under the attorney-client privilege and work product doctrine. He then argues that the government interfered with his Sixth Amendment right to counsel by seizing the privileged note and using it at trial. He also contends that his trial counsel were deficient in failing to raise a claim of privilege until mid-trial. His arguments about Exhibit 458 thus rise and fall on whether the note is privileged.

1. Background

On December 22, 2011, police seized "personal papers" from appellant's jail cell while executing a search warrant in an unrelated case. Among those papers was

a handwritten note, Exhibit 458, with names, dates, and brief, cryptic comments related to appellant's case. Exhibit 458's most coherent line reads, "If I suppose to have on a hat and glasses, [h]ow can you recognize me." Appellant testified that this part of Exhibit 458 was a response to reading his arrest warrant affidavit, a copy of which appellant had in his cell and which Detective Brigidini adopted as part of his testimony at appellant's preliminary hearing. The affidavit referenced a statement from "witness two" [later identified as Richard Shores] that the unknown person the witness saw at the shooting was a "dude [with] a hat and some glasses on." Detective Brigidini also mentioned this statement during his testimony at the preliminary hearing.

Appellant met with counsel, Mr. Robbins, on January 11, 2012, and the attorney's report from that day mentioned that appellant's cell had been searched and "his phone lists and written questions he had for [Ms. Brown]" were seized. Similarly, an undated note from trial counsel detailing items "seized from [defendant's] cell" lists "phone #s" for six individuals as one item. In the summer of 2012, appellant received the government's discovery material, including a copy of Exhibit 458. Appellant and Ms. Brown met to discuss the discovery materials in July 2012. In the hearing on appellant's § 23-110 motion, appellant and Brown gave conflicting testimony about whether they discussed Exhibit 458 at this meeting. In denying appellant's § 23-110 motion, the trial court credited Brown's testimony that she and appellant did not discuss Exhibit 458. The court also credited Brown's testimony that, before trial, appellant did not identify Exhibit 458 as something he wrote for her, and discredited appellant's testimony to the contrary.

Before trial, counsel unsuccessfully moved to suppress Exhibit 458 on Fourth Amendment grounds. At trial, the government introduced Exhibit 458 into evidence, prompting appellant to pass a message to Brown stating, "At time I wrote the note and when they took it I told you that I wrote it 4 you. I wrote it in response 2 the search warrant Affidavit." Counsel then objected to Exhibit 458 on hearsay grounds and, the next day, on privilege grounds. The court overruled both objections. Even so, Brown and Robbins prepared a written motion to supplement their privilege argument. Brown later testified that while drafting this motion she realized that neither she nor the defense investigator could testify that appellant wrote Exhibit 458 for counsel, that appellant told Brown he wrote it for her, or that appellant flagged it before trial. She also believed that appellant's mid-trial message ("I told you that I wrote it 4 you") was false. The trial court credited this testimony.

2. Attorney-Client Communication

To establish that a writing is an attorney-client communication, appellant must show, among other things, that it is a communication to an attorney made for the purpose of seeking legal advice. *See Jones v. United States*, 828 A.2d 169, 175 & n.3 (D.C. 2003); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014). "[A] trial court's 'findings of fact relevant to the essential elements of a claim of attorney-client privilege will not be overturned unless clearly erroneous.'" *Jones*, 828 A.2d at 174 (alteration omitted) (quoting *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997)). When, as here, those findings rely on the trial judge's determinations of witness credibility, those determinations are "virtually unreviewable" on appeal. *Walker v. United States*, 167 A.3d 1191, 1210 (D.C. 2017) (quoting *Jenkins v. United States*, 902 A.2d 79, 87 n.12 (D.C. 2006)). Thus, appellant faces a "heavy burden" of "show[ing] that the trial court's factual findings were clearly erroneous" or "plainly wrong." *Jones*, 828 A.2d at 174 (quoting D.C. Code § 17-305).

As an initial matter, we accept the trial court's factual findings (based on its credibility determinations) that, before trial, appellant did not tell Brown that he wrote Exhibit 458 for her or otherwise single out Exhibit 458 for her attention. Thus, we accept that Brown did not learn about appellant's contention that he wrote Exhibit 458 for her until appellant passed her a message mid-trial. We also accept the finding that the note's appearance did not suggest "to reasonable counsel seeing it that it was an attorney-client privileged document." The record supports this finding. A Public Defender Service case report from January 11, 2012, states that appellant told Robbins that authorities seized his "phone lists" and "written questions" for Brown from his cell. Exhibit 458 does not contain phone numbers, but a different handwritten list (which was not introduced at trial) does. The court reasonably concluded that appellant and counsel discussed this phone number list before trial. As for Exhibit 458, the court found it was "a recitation of defendant's impressions and his reactions to the information he learned at his preliminary hearing and from the affidavit supporting his arrest warrant," not a list of questions for Brown. The record supports this finding too. Brown testified, and the court credited, that appellant "frequently wrote notes to himself, that he was very smart and focused on his own case, and essentially that he knew how to relate specific concerns to her if he needed to." Yet, appellant had no meetings scheduled with counsel when Exhibit

458 was written. Further, Exhibit 458 does not, on its face, mention counsel or otherwise indicate that it was intended for their eyes.[6]

In light of the trial court's factual findings, appellant has not met his burden of showing that Exhibit 458 was an attorney-client communication. First, appellant has not shown that his note was a communication and cannot show that the trial court's findings to the contrary were clearly erroneous. Second, the trial court's findings based on its credibility determinations compel our conclusion that appellant did not meet his burden of showing Exhibit 458 was directed to counsel to seek legal advice. Accordingly, appellant did not meet his burden of showing that Exhibit 458 was a privileged attorney-client communication.

Appellant's claim that the government violated his Sixth Amendment rights cannot stand on the attorney-client privilege because he has not shown that that privilege exists here. As for his ineffective assistance of counsel claim, the deficiency appellant alleges is that trial counsel did not try to suppress Exhibit 458 on privilege grounds until after appellant prompted them to do so mid-trial. But based on the factual findings discussed above, at the time of trial appellant's counsel could have reasonably believed Exhibit 458 was not an attorney-client communication. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Accordingly, counsel reasonably failed to challenge Exhibit 458 on attorney-client privilege grounds and that decision was not deficient. *See id.* ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). Appellant's Sixth Amendment claims that rely on the attorney-client privilege do not merit reversal.

3. Work Product

"At its core, the work-product doctrine shelters the mental processes of the attorney." *United States v. Nobles*, 422 U.S. 225, 238 (1975). Given this emphasis on the attorney's mental processes, our work product case law focuses on "protect[ing] any document prepared in anticipation of litigation *by or for the*

[6] That Exhibit 458 is not, on its face, an attorney-client communication also undercuts appellant's argument that the government's taint team invaded his attorney-client privilege by sharing Exhibit 458 with prosecutors after it was seized.

attorney." *In re Pub. Def. Serv.*, 831 A.2d 890, 911 (D.C. 2003) (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986)). The doctrine thus allows attorneys to "prepare [their] legal theories and plan [their] strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

Appellant bears the burden of showing that Exhibit 458 was work product. *Parks v. United States*, 451 A.2d 591, 608 (D.C. 1982). We conclude that Exhibit 458 falls outside the work product doctrine's core because it was not prepared "by or for the attorney." *In re Pub. Def. Serv.*, 831 A.2d at 911 (quoting *In re Antitrust Grand Jury*, 805 F.2d at 163). As discussed above, appellant and Brown testified, and the court credited, that appellant's defense team did not instruct him to write questions or notes for counsel.

Nevertheless, appellant relies on non-binding authority to argue that the work product doctrine might cover documents created by a defendant on his own initiative to suggest defense strategy. We need not decide that question because, even assuming that some portion of Exhibit 458 might be entitled to work product protection, admitting the note at trial did not prejudice appellant.

"[S]ome prejudice must be shown as an element of a sixth amendment violation." *United States v. Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986) (citing *Weatherford v. Bursey*, 429 U.S. 545, 554-57 (1977)); *see Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that . . . the result of the proceeding would have been different."). Admitting Exhibit 458 did not prejudice appellant. For one thing, Exhibit 458's contents did not betray some subtle legal theory or defense strategy. The most contested part of Exhibit 458—the line, "If I suppose to have on a hat and glasses, [h]ow can you recognize me"—merely indicates that appellant wanted to challenge witness two's identification of him. The fact that witness two (Shores) described a man wearing a hat and glasses came out well before trial at the preliminary hearing. Further, it is not surprising that a defendant would want to discredit an eyewitness who placed him at a shooting. The government did not gain an unfair advantage by seeing Exhibit 458's commentary to this effect.

Appellant argues that he was prejudiced because the government portrayed Exhibit 458 as a confession in closing arguments. This argument is tenuous at best. As the trial court recognized, the jury was told that the government's statements in closing were not evidence, and Exhibit 458 itself is "cryptic, and its meaning [is] very difficult to glean from the face of the document." Steven Harden identified appellant as being at the craps game with far more certainty than any inferences to

be drawn from appellant's scrawled note. Therefore, even assuming that the trial court erred in admitting the note, any error from this admission did not prejudice appellant. Appellant's claims grounded in the work product doctrine do not merit reversal.

a. Ineffective Assistance of Counsel Claim: Cell Tower Expert

Appellant's final argument is that his counsel's decision not to consult an independent cell tower expert was deficient. To prove ineffective assistance of counsel, a defendant must show that his counsel performed deficiently and that the deficient performance prejudiced the defendant. *Barrie v. United States*, 279 A.3d 858, 863 (D.C. 2022) (citing *Strickland*, 466 U.S. at 687). Showing deficient performance requires that a defendant overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks and citation omitted). Appellant cannot rebut that presumption.

In challenging his counsel's performance, appellant produced an affidavit from an independent cell tower expert illustrating how such an expert could have testified had counsel called one. Yet appellant's attorneys made the most salient points discussed in the affidavit when one of them cross-examined the government's expert, Glenn Torshizi. For example, the attorney highlighted that Torshizi only analyzed the dates and locations the government gave him. She also raised the point that the "sectors" where appellant's cell phone was located during the shootings were large and that his phone could have been located anywhere within those sectors, or even slightly outside them, when the shootings occurred. This cross examination relied on information gleaned from meetings with two Sprint employees, including Torshizi. Counsel's notes from these meetings demonstrate the depth of information shared during them and counsel's nuanced understanding of the strengths and weaknesses of Torshizi's testimony. Moreover, the trial court recognized (and we have no reason to disagree) that deciding not to call an expert was sound trial strategy because on cross examination a defense expert would have had to agree with Torshizi that appellant's phone was within the area of the shootings when they happened.

Appellant relies on *Kigozi v. United States*, 55 A.3d 643 (D.C. 2012), to argue deficient performance, but that reliance is misplaced. There, trial counsel was deficient in failing to consult an expert about "the crucial issue at trial"—whether

"the key witness for the prosecution may have been under the influence of a mind-altering drug." *Kigozi*, 55 A.3d at 651 (alteration omitted). Here, however, the cell tower evidence was not crucial to the government's case but merely corroborative. Eyewitnesses placed appellant at both shootings with far more accuracy than Torshizi could. Given that the cell tower evidence did not anchor the government's case, appellant cannot show that counsel acted unreasonably in focusing the jury elsewhere.

III. Conclusion

For the foregoing reasons, we affirm the judgments of conviction. It is

So ordered.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Lynn Leibovitz

Director, Criminal Division

Copies e-served to:

Morgan Branch, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES	:	**Case No: 2011 CF1 017540**
	:	
v.	:	
	:	
IRVIN JOHNSON	:	**Judge Lynn Leibovitz**
	:	

ORDER DENYING MOTIONS FOR NEW TRIAL

Before the court is defendant's Motion for New Trial, filed on February 12, 2016, raising a claim of ineffective assistance of counsel and attorney-client privilege, and defendant's Supplemental Motion for New Trial, filed on November 8, 2017, raising a claim that the government violated its obligations under *Brady v. Maryland*. The government has opposed both motions. The parties have filed numerous pleadings in support of their positions.[1] After careful consideration of the evidence and testimony presented at the post-trial hearing, the written pleadings and oral arguments of counsel, the entire record of this case, and for the reasons stated below, the court will deny both of defendant's Motions for New Trial.

[1] The full set of pleadings before the court is: defendant's Motion for New Trial, filed on February 12, 2016, defendant's Supplemental Brief in Support of a New Trial on Attorney-Client Privilege Claim, filed October 2, 2017, defendant's Supplemental Motion for New Trial, filed on November 8, 2017, the government's Response to the Motion for New Trial filed on October 24, 2016, and defendant's March 24, 2017, Reply, the government's Opposition to Defendant's Supplement to Motion for New Trial, filed on March 19, 2018, the defendant's July 1, 2019, Post-Hearing Brief in Support of Motion for New Trial, the government's August 6, 2019, Response to the Defendant's Post-Hearing Brief in Support of His Motion to Vacate Convictions and for New Trial Pursuant to D.C. Code § 23-110, defendant's August 22, 2019, Reply in Support of Post-Hearing Brief in Support of Motion for New Trial, the government's September 3, 2019, Notice to the Court, and the defendant's September 13, 2019, Post-Hearing Notice.

PROCEDURAL HISTORY

On February 21, 2013, a jury found defendant guilty of two counts of first degree murder while armed, two counts of assault with intent to kill while armed, aggravated assault while armed, destruction of property and related firearms charges. These charges arose from two shooting incidents, one on June 21, 2011, in which nobody was injured, and one on July 9, 2011, in which two persons were shot and killed and a third was injured by gunfire. On April 25, 2013, this court sentenced defendant to 82 years in prison. On May 7, 2013, defendant filed a Notice of Appeal. The District of Columbia Court of Appeals has held the appeal in abeyance pending resolution of these motions.

Defendant filed the instant Motion for New Trial on February 12, 2016, claiming that counsel was ineffective for, among other claims, failing to object on attorney-client privilege grounds to the government's introduction at trial of a handwritten document collected from defendant's jail cell during the execution of a search warrant. On April 11, 2016, this court denied defendant's Motion for New Trial as to the claim that trial counsel was ineffective on the attorney-client privilege issue, and defendant moved for reconsideration.[2] On April 17, 2017, the court granted defendant's Motion for Reconsideration and for Evidentiary Hearing as to the attorney-client privilege claim and resolved other claims that are not currently before the court. On November 8, 2017, defendant filed his Supplemental Motion for New Trial stating a new claim, that the government violated *Brady v. Maryland,* 373 U.S. 83 (1963), by failing to disclose mental health records and other information regarding government trial witness, Kurtis

[2] In the interim there was litigation of post-trial claims that are not currently before the court.

Faison. The government opposed the Motions for New Trial on both claims. The parties engaged in discovery.

The court held an evidentiary hearing on the attorney-client privilege and *Brady* claims on June 15, June 21, and August 3, 2018, and April 10, and May 2, 2019. The court heard testimony from defendant and trial attorneys Liyah Brown and Maro Robbins on the attorney-client privilege issue. On the issue of the *Brady* claim, the defendant called Dr. Steven Epstein and the government called Dr. Raymond Patterson, both experts in the field of psychiatry. Numerous exhibits were entered into evidence. Both parties filed post-hearing briefs and the court heard argument from the parties on August 30, 2019.

POST TRIAL EVIDENTIARY HEARING

I. The Attorney-Client Privilege Claim

The document at issue in resolving defendant's attorney-client privilege claim was identified and admitted at defendant's trial as Government's Trial Exhibit 458. It was identified and admitted both as D Ex. 2 and D. Ex. 12(B) at the post-trial hearing. Hereinafter, it will be referred to as "Ex. 2." Ex. 2 was seized from defendant's cell during the execution of a search warrant on December 22, 2011. A copy of Ex. 2 is Attachment 1 to this Order. The court will adopt and incorporate herein its characterization of Ex. 2 at trial during its oral ruling at a bench conference on February 14, 2013. Tr. 2/14/13 at 678-679; 828-830.

Defendant's Hearing Testimony

Defendant testified that he saw the affidavit in support of his arrest warrant, Ex. 1[3], in court at his November 18, 2011, preliminary hearing and was provided a copy of it at his

[3] All post-trial hearing exhibits referred to herein are defense exhibits unless otherwise specified.

attorney's next visit on December 2, 2011. He testified that he discussed "issues" in the affidavit with his attorney, Liyah Brown, at the December 2 meeting after the detention hearing. Defendant testified that, some time subsequent to the December 2, 2011, meeting with his lawyer, though he did not know how long after, he wrote a "legal note." Defendant identified Ex. 2 as the "legal note" he had "drafted," stating that it contained "people I wanted to investigate and questions and comments I had for my attorney." Defendant testified that he planned to bring it to the next legal visit and was going to go over it with counsel, though at the time no visit was scheduled. He testified that neither his lawyer nor anyone else had told him to write any questions or notes down. He testified that he was going to use it for trial strategy. He testified that "shortly after" he created Ex. 2, his cell was raided, but could not recall the date. Items taken during the search included photographs, letters, cards and his "legal note." Mr. Johnson testified that his reason for writing Ex. 2 was that, when he met with his lawyers, he would forget what he wanted to discuss with them and that he "wanted to jot some notes down."

Defendant acknowledged that he learned at the preliminary hearing in his case that he was alleged to have committed a non-fatal shooting on June 21, 2011, and that there were shell casings found at the scene of that alleged incident. He testified that he was aware that there was possible DNA evidence at the scene of the July 9, 2011, alleged murder, although the testifying detective did not mention DNA at the hearing. Defendant acknowledged that the testifying detective had related that "W-2" in the affidavit in support of the arrest warrant had said the shooter was wearing a hat and glasses. A description of him stated that the shooter appeared to weigh 180 lbs and defendant testified that he was 210 lbs at the time.

Defendant explained the significance of the words he wrote in Ex. 2. Defendant testified as follows regarding the various words on Exhibit 2. "Jug" was someone he understood the government claimed he was beefing with, which beef defendant understood was supposed to be the motive for the initial fight and shooting that preceded the murder, and the July 9, 2011, murders. Defendant disputed this motive and believed that Jug would be able to confirm that the disagreement was over. "Chris Cuz" was an associate of Jug whom defendant was alleged to have encountered on the date of the non-fatal shooting and also therefore someone he was supposed to be beefing with, according to the government. Defendant felt could confirm that this was not so. He testified that he did not know how to find these persons but wanted them investigated. He testified that he never actually did tell Ms. Brown later why he wanted her to talk to Chris Cuz, because he did not have the note. Defendant did not explain why the arrest warrant affidavit itself could not have prompted him in the same manner, since Chris Cuz was one of the persons the government claimed was present at the time of the fight preceding the June 21, 2011, shooting.

Defendant testified that "Jay Rock" and "Jay Jay" were two people from his neighborhood and were associates of his. Jay Jay would have testified that he was with defendant at the location of the murders on Parkwood Place on July 4, days before they occurred, and that is how his DNA might have gotten on something later found there. Defendant testified he did later raise this in discussion with Ms. Brown.

"Walla" was an associate of defendant's but not as close as Jay Jay. Defendant testified that all of the people listed on the left margin of Ex. 2, inside a drawn box, were people who he thought could address the 4th of July point regarding how defendant's DNA might have gotten on

some item found in the location of the murders. "Berk" was an associate of his. Berk and the others in that box would be able to say they always gambled at that location.

Defendant testified that the notations "SC" and "thorax" meant "shell casings." The affidavit in support of defendant's arrest warrant noted that shell casings from the non-fatal shooting scene and shell casings found on the scene of the double murder three weeks later were .10 millimeter casings fired from the same firearm. He was asking how many there were. The next notation was a question "did I - or was someone else." This was intended to challenge his identification as the shooter. The item in the right hand corner of the document, regarding his own appearance, also was a question, again, intended to challenge identity.

Defendant testified that, as far as he was concerned, Ex. 2 was not a confession, though the government called it one.

Defendant testified that he telephoned Ms. Brown to leave an urgent message reporting the cell search, but did not speak with counsel again until January 2012, when Ms. Brown and co-counsel Maro Robbins visited him. Defendant testified that he informed counsel at that time that his cell had been searched and gave them a copy of the warrant affidavit. He testified that he told his lawyers that, among the things taken during the search, was a "legal note" from his property. He did not at the time of the January 2012 meeting describe the questions he had written on Ex. 2. Defendant testified that, at this and all subsequent meetings, he discussed the topics in Ex. 2 with counsel. Defendant testified that, when he informed her of the seizure of the note, Ms. Brown stated, "don't worry, I'll take care of it." In the January 11, 2012, meeting with his lawyers, defendant and counsel discussed the fact that the search warrant had been issued not in defendant's case, but in the separate case of his brother, Kier Johnson, who also had murder

charges pending at the time. Defendant informed counsel that he believed he would not be implicated in his brother's case. This was referenced in the notes of that meeting in Ex. 8.

Defendant testified that he took no further notes after this, and that failing to do so hindered his trial preparation because he becomes "brain locked."

Defendant testified that the next time he discussed Ex. 2 was in June 2012, when he and Ms. Brown went over the discovery materials the government had provided to her, which included all documents seized from his cell. Ex. 12 at the hearing contained all documents recovered from the cell and discussed with defendant at the June meeting with counsel. Exhibit 12(B) is the same item as Ex. 2, and was among the items in the packet brought to the jail. Defendant testified that at this meeting he saw Ex. 2, identified it to Ms. Brown and stated, "this is what I was telling you about."

Defendant testified that the next interaction he had with his lawyers about Ex. 2 was the day the government offered it in evidence at his trial. He testified further that his lawyers never bought it up with him again in the period between January 2012 and June 2012. At the time Ex. 2 was presented at trial, defendant testified that he was "shocked," and that he wrote a note to Ms. Brown in the courtroom, which he identified as Ex. 27 at the hearing. Defendant wrote in the note to Ms. Brown, among other things, "At time I wrote the note and when they took it I told you that I wrote it 4 you. I wrote it in response 2 the search warrant affidavit."

Trial Counsel Liyah Brown's Hearing Testimony

Ms. Brown represented defendant as lead counsel from the time of the initiation of his case, and in his other cases, including about one and a half years as counsel before the case went to trial in February 2013. She had been practicing as a defense attorney at the Public Defender

Service for eight years at that time. In January 2012, her colleague Maro Robbins joined her as second chair counsel for defendant.

Ms. Brown's testimony at the hearing evolved, in the sense that she was called as a witness for defendant but was not shown any materials that would refresh her recollection as to 2011-2013 events prior to her testimony. Initially, she recalled very little about her work on defendant's case in that period, but gradually was refreshed considerably over the two hearing dates on which her testimony occurred.

Ms. Brown represented defendant at his preliminary hearing on November 18, 2011. Ms. Brown testified that she observed that defendant took notes at his preliminary hearing and that he took notes on other occasions. She further testified that she did not direct defendant to take notes or make any writings at any time. After the preliminary hearing, she met with defendant on December 2, 2011, and at that time he discussed with her his thoughts about the preliminary hearing and how to refute some of the evidence he believed the government had obtained.

The cell search occurred thereafter in December 2011, although Ms. Brown could not testify to dates. She testified that defendant had not called her and that she recalled no message from him following the search, although she testified that she always instructed clients not to call her but to let the defense investigator know if they wished to speak to her. Ms. Brown introduced defendant to second chair counsel Mr. Robbins on January 11, 2012, but did not recall remaining at that meeting. Ms.Brown testified that she did not recall being present for a conversation that day in which defendant reported that any item containing questions for her was

taken in the raid of his cell.[4] *See* Ex. 6. She did recall being informed by Mr. Robbins after the meeting of defendant's statement to this effect.

Ms. Brown testified that, at a later meeting, possibly in late January 2012, defendant told Ms. Brown his cell had been raided and that some items of his had been seized.[5] Ms. Brown recalled that defendant was upset about the search and discussed things taken in the cell search, including contact information and "persons of interest." She did not recall that defendant discussed with her the seizure of any note or questions. She testified that she did recall that defendant never stated to her that he had written any note directed *to her* or that any such note was taken.

Ms. Brown testified that she generally took notes of conversations with clients but did not specifically recall that she took notes of this meeting. One undated example of her notes, which she identified as Ex. 9, and believed were notes of this discussion, reflect that they discussed materials seized from defendant's cell, including photographs, and a paper with names and nicknames, as well as phone numbers on it. Ms. Brown listed the names of persons defendant discussed at that meeting generally and others associated with a notation "July 4th," referring to the interest he had expressed in identifying persons who were at the location of the alleged murder several days prior to the date of the shooting. Nothing in Ex. 9 reflects a discussion of any document taken in the cell search that was intended for counsel. Ms. Brown testified that if

[4] Although the PDS electronic case log for defendant's case reflected that, on January 11, 2012, Mr. Robbins, co-counsel to Ms. Brown, met with defendant, the notes do not reflect that Ms. Brown was present for any of that meeting. Ex. 8 at 7. The notes reflect that at the meeting, defendant stated that his cell had been searched and that, among the items seized, were photographs, phone lists and some written questions for Ms. Brown. Ms. Brown testified that she did not recall being present for that meeting, other than initially, to introduce Mr. Robbins to defendant.

[5] Ms. Brown could not specifically recall dates on which she met with defendant.

defendant had discussed a note written for her it would have been in her notes. Ex. 9, counsel's notes, referred to "Kay," and reflected that defendant stated that Kay's phone number had been seized from defendant's cell. In an instruction written to her investigator on January 30, 2012, Ex. 10, Ms. Brown testified that she directed the investigator to follow up on the conversation reflected in Ex. 9 by contacting Kay, defendant's cousin, and that his number was on a paper seized from defendant's cell. It should be noted that Ex. 2 contained a reference to "K," but no phone number of "K."[6]

Also in January 2012, Ms. Brown followed up on information provided by defendant, for example by asking the defense investigator, Ms. Seana Holland, to contact two persons, Donte Bethea and "J Roc." She also referred to a list of phone numbers that defendant had stated was taken in the cell search in an email to Ms. Holland on January 30, 2012. She asked Ms. Holland to follow up on defendant's identification of "Kay" as a person who could assist in his case. Ex. 10.

Ms. Brown testified that, after defendant was indicted in June 2012, she received discovery from the government. This included a file on a disc which, when printed, were the documents that the government stated were the items seized from defendant's cell. This packet was Ex. 12 at the hearing. Ex. 12(B) within the discovery packet was a copy of Ex. 2, the item defendant identified as the "note." Ms. Brown testified that Ex. 12(A) within the discovery packet identified at the hearing, another document handwritten by defendant, also was a

[6] Ex. 2, the document at issue, includes a notation "K" along side other nicknames identified by defendant. However, Ex. 2 has no phone numbers of anyone, K included. A different document recovered during the cell search, identified at the hearing as Ex. 12(A), and not admitted at defendant's trial, did have nick names and phone numbers of a number of some of the persons named on Ex. 2 , but did not appear to list Kay, or Kay's phone number.

document recovered from the cell that she described as a "note" with names on it. Ms. Brown testified that she generally recognized Ex. 12(B) and other writings in Ex. 12 as "notes" written by defendant because she knew his handwriting, but that she did not at any time understand these to be notes directed to her or any other person. She rather understood these to be notes by defendant to himself, or "musings" directed at no particular person.

Defendant was provided with all discovery materials shortly after their receipt by her, although Ms. Brown testified that she did not make it a practice to leave a client's whole files of discovery at the jail, and instead would leave portions at a time and take others back. In July 2012, Ms. Brown went to the jail to discuss the discovery materials received with defendant. This was not a discussion focused in particular on the jail cell documents, but generally on all discovery provided. She testified that defendant did not identify during the pre-trial phase any document within Ex. 12 as a note or list of questions that he had written for counsel, or refer to any "note."

On December 7, 2012, shortly before trial, Ms. Brown had a "face to face" meeting with defendant in which he stated a wish to have the entirety of Ex. 12, the discovery packet of materials seized in the jail cell search, copied and brought to him. Ex. 14, 15. Ms. Brown's notes of this meeting reflect that at this meeting defendant did not discuss any particular item within that file that was a note directed to counsel.

During the period before trial, Ms. Brown directed Mr. Robbins to prepare a motion to suppress the jail cell evidence on Fourth Amendment grounds. Ex. 20. She also directed him to prepare other motions, including a motion to suppress identification, and discussed filing a motion to sever. Ex. 16. In January 2013, she discussed trial evidence with the government, but

was not told until February 6, 2013, in pre-trial proceedings, that the government intended to introduce an item seized from the jail search. The government did not specify which document from the packet it intended to offer. Ms. Brown's notes and the emails between her and others on the defense team reflect that at no time in discussions with defendant about pretrial motions was an attorney-client privilege issue raised.

Ms. Brown testified that it was not until mid-trial, when the government identified its enlargement of Ex. 2 as trial Exhibit 458, that defendant informed her by note, Ex. 27, that Exhibit 458 was an item he stated was written for her. In his mid-trial note to counsel, defendant stated that he had written the note in response to the "search warrant" affidavit and that "when they took it I told you that I wrote it 4 you." Ex. 27. Ms. Brown testified that, until that time, she knew generally, because defendant had so stated to Mr. Robbins in January 2012, that defendant claimed there was a note containing questions to her seized in the jail cell search. But there had been no conversation between herself and defendant that she could recall about this. She testified that, until the time that the government presented Exhibit 458 as a trial exhibit, she had "no understanding" that Ex. 2 was an item defendant claimed constituted questions meant for her.

Initially, Ms. Brown objected to the admission of Exhibit 458 (Ex. 2) on foundation and hearsay grounds. After defendant passed Ex. 27 to her, in the cell behind the courtroom, Ms. Brown and defendant discussed his assertion in Ex. 27 and Ms. Brown stated to defendant, "my bad," for not having been aware that that Exhibit 458 (Ex. 2) was a note. Ms. Brown testified that she was very surprised by defendant's statement regarding the exhibit. After this discussion, on February 14, 2012, based upon defendant's assertion, Ms. Brown objected in court to

introduction of Exhibit 458 (Ex. 2), making an attorney-client privilege objection for the first time. At that time, for reasons stated at the bench, the court overruled her objection.

Over the next few days, which included a weekend hiatus in the trial, she and Mr. Robbins prepared a written motion opposing the introduction of Exhibit 458 (Ex. 2) on grounds of privilege. Ex. 32. Ms. Holland went to the jail to visit defendant. Ms. Brown and Mr. Robbins specifically discussed who could testify at an evidentiary hearing on the issue of attorney-client privilege if one were held, and whether to have either their investigator or the defendant testify to his purposes in creating the document. Ex. 31. Ms. Brown testified that she believed Ms. Holland could not provide testimony that would enable the defense to meet its burden in seeking exclusion of the note. Ms. Brown concluded at the time that she herself could not provide testimony because she could not state under oath that defendant wrote a note to her, or that he had ever told her that he wrote a note to her, or that "this is the note."

Ms. Brown testified that she understood that, in order to prevail on the motion to exclude Exhibit 458 (Ex. 2), testimony as to defendant's state of mind would be necessary. Ms. Brown decided against having defendant testify. She also chose not to consult defendant on this issue. When asked for her reasons, Ms. Brown testified that when, mid trial, defendant stated in his note passed to her in court that he had written Exhibit 458 (Ex. 2) and that "when they took it, I told you that I wrote it 4 you," she believed his statement to her was false. She testified that defendant's position in this regard was a "revelation" to her.

Ms. Brown further testified that, after discussing the issue with defendant in the cell behind the courtroom, she felt that he was "asking her, or tacitly suggesting, that I go along with an account which is that he told me about the note beforehand, and I was not comfortable going along with that." Ms. Brown testified that, prior to that moment, she had believed the contents of

the notes defendant had written in the packet of materials seized in the cell search were "musings" or notes of defendant directed at no one in particular, and had no understanding or belief that Exhibit 458 (Ex. 2) was a note written *to her*.

Ms. Brown testified that, after the weekend break, she felt "pretty strongly" that she did not want defendant to testify at an evidentiary hearing on the attorney-client issue, for two reasons. First, she felt any testimony regarding Ex. 2 would be self-inculpatory. Second, she believed she would be sponsoring and having to correct false testimony before the court. She concluded for these reasons that the "cons" outweighed the "pros" and that it was her ethical obligation "not to make things worse" for defendant. Ms. Brown testified that her concerns about creating any sworn statements by defendant concerning the facts of the case existed even though the testimony would be outside the presence of the jury. Ms. Brown further testified that she did not consult defendant about the facts and circumstances underlying his preparation of the note, or whether he wished to testify about it, because she did not want to create a conflict of interest arising from an assertion by him that they had had a prior discussion about a note he had prepared for her or written to her and a contradictory assertion by her that she had a different recollection. She further testified that she believed his mid-trial claim that the document was a note written to her was untrue because she and defendant had discussed a lot of things over their relationship since 2011, that he was "pretty sharp and savvy," that he had flagged many things for her and Ms. Holland to do in his case, had made good use of the discovery and had advocated for himself throughout, and that despite all this had never said anything to her about the note.

Ms. Brown identified notes and to-do lists she created for herself and for the defense investigator Ms. Holland while representing defendant and as the result of face to face meetings with him. *See e.g.* Ex. 14, 15, 40, 41. None of her notes or lists of tasks reflect conversations or

tasks related to a claim that a note written to counsel had been taken from defendant's cell in the search or any claim of attorney-client privilege.

Trial Counsel Maro Robbins' Hearing Testimony

Mr. Robbins was assigned to be Ms. Brown's second chair on defendant's case in January 2012. He testified that at that time he had just completed a one-year rotation as a juvenile defense attorney and had just begun handling adult cases. He had a limited role in Mr. Johnson's case because he had other cases and was frequently in court in this period on a number of matters. Ms. Brown was responsible for all decision making in defendant's case.

Mr. Robbins recalled that he visited defendant for the first time on or about January 11, 2012, at which meeting he believed Ms. Brown introduced him to defendant. Mr. Robbins did not recall whether Ms. Brown remained at that meeting for the whole time.

Mr. Robbins recalled that, at the January 11, 2012, meeting, he and defendant discussed the search of defendant's cell, but recalled no focus on any particular note. Mr. Robbins recalled that he visited defendant again in 2012, and testified that he visited defendant more often than was reflected in the DC Jail Visitors' Log in evidence, which appeared therefore to be an incomplete record of visits. Ex. 7.

The defendant stated in his meetings with Mr. Robbins that defendant wanted counsel to move for suppression on Fourth Amendment grounds of all of the items recovered during the execution of the warrant on his cell, which he considered to have been an invasion of his privacy. Defendant did not focus on any particular item seized from his cell in these discussions and did not discuss any "note" he had written for counsel. Ms. Brown assigned preparation of a motion to suppress evidence to Mr. Robbins. Ex. 17. There was no discussion between them about

making an attorney-client privilege claim regarding any of the items seized from the cell. D. Ex. 18.

Mr. Robbins testified that he had no discussion with defendant about Ex. 2 prior to seeing it presented in trial as an exhibit. After the government stated mid-trial that it was offering Exhibit 458 (Ex. 2), and after defendant wrote the note to counsel that is Ex. 27, Mr. Robbins testified that he had a vague memory of a discussion between defendant and counsel in the cell behind the courtroom, but could not provide details. He also recalled that the court held a bench conference in which it overruled an objection to the admission of Exhibit 458 (Ex. 2) on attorney-client privilege grounds.

Ms. Brown thereafter asked Mr. Robbins to research the attorney-client privilege issue. This research continued over a weekend break in the trial, and he and Ms. Brown exchanged emails discussing how they should proceed. Ex. 31. Mr. Robbins could not recall the discussions, but identified emails exchanged between Mr. Robbins and Ms. Brown during that weekend discussing how to proceed. In the emails, Ms. Brown acknowledged that, in addition to filing and arguing a written motion, an evidentiary hearing was possible, but stated that she did not feel that defendant or the defense investigator, Ms. Holland, were sufficiently prepared to testify at an evidentiary hearing on a motion to exclude Exhibit 458 on the attorney-client privilege issue. *Id.* Mr. Robbins could not independently recall whether he or Ms. Brown had any discussion about whether defendant could testify at a hearing on the motion to exclude the exhibit on attorney-client privilege grounds.[7]

Mr. Robbins drafted a motion to exclude Exhibit 458 on grounds of privilege which was filed with the court. Ex. 32. In the motion, Mr. Robbins made assertions of fact that defendant

[7] Mr. Robbins did recall that trial counsel discussed with defendant his decision not to testify at trial. Defendant decided not to testify.

had written Ex. 2 for the purpose of sharing its contents with counsel. Robbins believed this information had been learned by one of the defense team from discussions with defendant but could not recall whether it came from the defense investigator, who visited defendant that weekend, or some other source. He testified that Ms. Brown must have directed him to prepare the motion because he would not have done it without her go-ahead.

II. The *Brady* Claim

At the post-conviction hearing on the *Brady* claim, the defendant called as a witness Dr. Steven Epstein, an expert in general psychiatry, and the government called Dr. Raymond Patterson, an expert in forensic psychiatry. Numerous defense Exhibits including Mr. Faison's DC Jail Medical Records and a 2006 psychiatric report were admitted. Ex. 55, 59.

Dr. Steven Epstein's Hearing Testimony

Dr. Epstein testified on April 10, and May 2, 2019. He has been practicing general psychiatry for 29 years. He has served as Chair of the Department of Psychiatry at Georgetown University School of Medicine for eighteen years, where he teaches and directs the Psychosomatic Medicine fellowship. Dr. Epstein also is the Physician Executive Director for Behavioral Health at MedStar Health. Dr. Epstein is board certified in general psychiatry and specializes in consultation liaison psychiatry, which is psychiatry related to persons with medical illness. Dr. Epstein has experience in the diagnosis of mental illness generally and in the diagnosis specifically of bipolar disorder.

Dr. Epstein described bipolar disorder as a lifelong disorder that may manifest with periods of mania, periods in which a person is "normal," or asymptomatic, periods of depression, and can also manifest in some persons with periods of psychosis. He defined psychosis as "disorganized behavior," possibly involving delusions and/or hallucinations.

Dr. Epstein provided psychiatric opinion testimony regarding trial witness Kurtis Faison. He did not examine Mr. Faison, and reviewed medical and clinical records in forming his opinions, including Mr. Faison's records from the DC Jail, Ex. 55, transcripts of Faison's 2013 grand jury and trial testimony in this case, his plea and grand jury testimony in another case, and records of juvenile evaluations. Dr. Epstein reviewed these materials with a focus on three time frames to "decode" Mr. Faison's mental state at those times. These time frames were (1) October to November 2011, the period in which Mr. Faison later testified at trial that defendant made certain statements to him; (2) the period in Summer 2012 when Mr. Faison was interviewed by prosecutors; and (3) the period in early 2013 when Mr. Faison testified before a grand jury and at defendant's trial. Dr. Epstein testified that, based upon these materials, it was his opinion to a reasonable degree of medical certainty that Kurtis Faison suffered from bipolar disorder as a lifelong condition, and that there was "very strong evidence" that Faison was experiencing psychosis during the October-November 2011 period when he was housed next to defendant at the D.C. Jail. As a result, Dr. Epstein concluded Mr. Faison was "significantly impaired" in the October- November 2011 time frame.

Dr. Epstein further testified that, based upon his review of the DC Jail records going through 2012, and the transcripts of Faison's grand jury and trial testimony in 2013, there is no evidence that Faison displayed symptoms of any phases of bipolar disorder or of psychosis in 2012 and 2013. Dr. Epstein's opinion that Faison was psychotic and hearing voices in 2011, although he was not in 2013, was the basis for Dr. Epstein's testimony that he would "very very strongly wonder" if Faison's 2013 trial testimony that defendant made statements to him was not the result of an auditory hallucination instead of an actual memory. He explained that persons who are asymptomatic can recall prior hallucinations, fully believing they were actual events,

and he opined that Faison was doing this in his 2013 testimony regarding statements made to him by defendant.

In reaching his opinions, Dr. Epstein relied in detail upon entries in Faison's DC Jail records reflecting medical and mental health treatment and certain incidents from 2010-2012. Ex. 55. Dr. Epstein's foundational opinion, to which he testified and which he stated in his Report, Ex. 51, is that "Faison has a bipolar diagnosis." Ex. 51 at 4. He cited record entries in May 2010 by treating medical and mental health staff and a form filled out by Faison's attorney as his basis for an opinion that Faison had been diagnosed at the DC Jail with bipolar disorder, but was cross-examined by the government regarding the substance of the entries he relied upon.[8] In concluding that Faison suffered from bipolar disorder in 2011, Dr. Epstein also relied on a 2006 psychiatric examination of Faison performed in aid of decision making in a juvenile delinquency matter when Faison was age 14, authored by Dr. Michael Kronen. Ex. 59.

Dr. Epstein relied upon other behaviors of Faison documented in his DC Jail records to reach his conclusion that Faison suffered from bipolar disorder and/or that he was psychotic in 2011, including several suicide attempts and suicidal gestures, incidents of public masturbation, reports that he was hearing voices, and other "bizarre" and inappropriate behavior. For example, in June 2010 and April 2011, Faison masturbated in public locations or in front of others within the jail. Dr. Epstein opined that this "is likely a symptom of psychosis" because it was "disturbing and odd" behavior.

In August 2010, Faison reported suicidal thoughts and in November 2010, reported that he took 10 or 11 Tylenol, and 10 other pills causing himself to vomit. In September 2010 Faison reported hearing voices telling him to kill himself and was placed in a safe cell for 24 hours. In

[8] See, *infra,* the court's more detailed discussion of the record entries regarding Faison's mental health diagnosis at the jail.

November 2010 he threw his own feces and was reported to be spitting out his medication. Also in November 2010 he displayed symptoms of PTSD and stated there were people talking to him in his cell and was given an additional medication. Also in November 2010, Faison reported that he was only sleeping 2-4 hours per night and that this had gone on for months. Dr. Epstein testified that inablility to sleep that went on for long periods was a symptom of bipolar disorder in its manic phase. In January 2011, Faison attempted suicide. Ex. 55 at 225-226.

Later, in September 2011, Dr. Epstein reported that Faison expressed "extreme anxiety" in that he feared that people were trying to kill his mother, and during that period requested to be put in a "safe" cell. *Id.* at 99. In November 2011, he threw a chair at an adjustment officer. Dr. Epstein also testified that the records stated that, in December 2011, Faison was "responding to internal stimuli." *Id.* at 70.

Dr. Epstein testified that the medications prescribed for Faison at the DC Jail were medications indicated to treat serious mental illness including bipolar disorder and psychosis.

Finally, Dr. Epstein testified to his opinion regarding the effect of his mental health diagnosis of Faison upon Faison's 2013 testimony at defendant's trial. Upon the foundation of his opinion that Faison was bipolar, psychotic and experiencing auditory hallucinations in October and November 2011, Dr. Epstein opined that, "if Mr. Faison was suffering from psychosis such that he heard non-real voices in the fall of 2011, even if he was not suffering from psychosis in 2012 or 2013, the validity of his testimony that the voices were indeed real would nonetheless be highly questionable." Ex. 51 at 8. Dr. Epstein concluded that "there's very strong evidence that [Mr. Faison] was psychotic around that time [in 2010 and 2011] and hearing voices, so I would very, very strongly wonder if in fact what he said he heard was a voice, not — a psychotic symptom, an auditory hallucination, not an actual statement from another person."

4/10/19 Tr. at 34-35. Dr. Epstein testified that this was his opinion even if the 2011 psychosis was not related to bipolar disorder, but some other mental illness.

Dr. Raymond Patterson's Hearing Testimony

Dr. Patterson testified on April 10, and May 2, 2019. Dr. Patterson has been a psychiatrist for 38 years. He is an expert in forensic psychiatry, and is board certified in that field and in general psychiatry. He has practiced general psychiatry in private practice and general and forensic psychiatry within the District of Columbia Department of Corrections and at St. Elizabeths Hospital and related programs in the District of Columbia for many decades, has served in other states' correctional systems' forensic and mental health programs and has examined or interviewed several thousand prisoners nationwide.[9]

Dr. Patterson examined Kurtis Faison in 2016 at the direction of the government. He relied upon his examination of Faison as 80% of the basis for his opinions and diagnosis of Faison, and upon the Faison DC Jail records, Ex. 55, the 2006 psychiatric report, Ex. 59, the report of Dr Epstein, Ex. 51, and the 2016 psychiatric report of Dr. Ramie Gupta (obtained in connection with post-conviction proceedings in the *Parker* case, *see infra,* an unrelated case in which Faison also testified at trial) as 20% of the basis for his opinion. He testified that, in his opinion, to a reasonable degree of medical certainty, Faison does not suffer from bipolar disorder and did not at any time between 2009 and 2016.

[9] Dr. Patterson served as the Director of Forensic Services at the DC Commission on Mental Health Services from 1998-2001, he served as the Chief Psychiatrist at the DC Jail from 1996-1997, he served as Senior Psychiatric Consultant at the Maryland Department of Public Safety and Correctional Services, as Superintendent and State Forensics Director at the Clifton T. Perkins Hospital Center, Maryland's forensics psychiatric hospital, and served in various roles at St. Elizabeths Hospital from 1979-1980 and 1981-1987, including the positions of Medical Director of the Division of Forensics and Associate Superintendent for General Clinical Programs. Dr. Patterson also served as the California court system's suicide and psychiatric monitor for 18 years, visiting the statewide correctional facilities and interviewing inmates, administrators and mental health professionals.

Dr. Patterson testified that Faison was alert, well oriented and cooperative at his examination and there was no evidence of any type of psychotic disorder. He further testified to his opinion that Faison was not psychotic or hallucinating and that he did not suffer from a serious mental illness or disability that impacted his credibility during any of the time periods addressed by Dr. Epstein, in particular in October and November 2011, or at the times of his 2012 and 2013 grand jury and trial testimony, including at the time of his testimony at defendant's trial. Dr. Patterson expressly disagreed with Dr. Epstein's diagnosis of bipolar disorder and opinion that Faison was psychotic at any time, and instead diagnosed Faison, to a reasonable degree of medical certainty, with antisocial personality disorder and, secondarily, with substance abuse disorder.

Dr. Patterson testified that antisocial personality disorder is not a mental illness, but is rather a "personality style," a "way of dealing with the world" that is exemplified by low regard for the feelings and rights of others, and being deceitful and lying. The behavior is known to the person, however, and the result of choice; it is not driven, for example, by hearing voices or by delusions. Dr. Patterson agreed that a person with antisocial personality disorder may "lie repeatedly for personal profit or gain."

Regarding Faison's behaviors at the DC Jail, Dr. Patterson opined that Faison was malingering, meaning faking symptoms, at times when he threatened suicide or stated he was hearing voices telling him to kill himself in 2010-2012. He testified that, in his experience, persons who are incarcerated learn how certain behaviors, particularly those that can appear "crazy," will be responded to by jail staff in ways that are favorable to the prisoner. In Faison's case, Dr. Patterson testified that the records showed that Faison engaged in self harming behaviors or threats of such action, for example, to avoid being put in "the hole," which was

segregated status for disciplinary reasons, or to get himself placed in a "safe cell," or to be allowed a phone call. His other behaviors also were common in jail settings, and not necessarily symptoms of mental illness, including throwing feces (called "gassing"), public masturbation or masturbation in front of female corrections officers or clinicians, and angry behaviors like spitting or throwing of a chair. In Faison's case, Dr. Patterson testified, many of his outbursts were responsive to what he felt was disrespect or challenging behavior by others. Dr. Patterson asked Faison in his 2016 evaluation about these behaviors, as well as the suicide attempts and claims that Faison heard voices while at the jail, and Faison stated to him that he was faking symptoms for the numerous purposes described above.

Dr. Patterson relied upon his personal familiarity with the DC Department of Corrections and its practices with respect to mental health treatment of prisoners at the DC Jail in testifying that, at the DC Jail, the doctors are "treaters," not evaluators. For this reason, they respond to self-reporting by prisoners in managing and treatment of their apparent or reported mental health conditions, behavior and symptoms, regardless of whether they "believe" the reported symptoms or thoughts are real. He further testified to his opinion, based upon his review of the DC Jail records in Ex. 55, that Faison was never diagnosed at DC Jail by any doctor or mental health professional with bipolar disorder. He agreed that the DC Jail had received a reported history of a diagnosis of bipolar disorder, *see, eg,* Ex. 55 at 296, by Faison himself and from a "Medical Alert," form filled out by Faison's lawyer in the courtroom when he was first remanded to the Jail stating he had a history of bipolar disorder and suicide attempts, in addition to other records of Faison's.

Dr. Patterson testified that it was his opinion upon review of the DC Jail records that Faison's diagnosis at the Jail was never bipolar disorder, but was set forth in the DC Jail record

as Mood Disorder NOS, PTSD, and ADHD. He explained that Mood Disorder NOS is a diagnosis that could encompass bipolar disorder, or other mood disorders ranging from schizophrenia to mere adjustment disorder which resolves with a change in circumstances, and that the "NOS" designation indicated that there were some symptoms consistent with a mood disorder but not enough information or symptoms to decide which mood disorder diagnosis would be correct. Dr. Patterson therefore disagreed that Faison had been diagnosed with bipolar disorder at the Jail. He also disagreed with the diagnosis of mood disorder NOS, which was the diagnosis at the DC Jail, acknowledging that his diagnosis of antisocial personality disorder would not be encompassed within the diagnoses of the DC Jail clinicians.

Regarding the medications prescribed by the DC Jail over time, Dr. Patterson noted that Faison discontinued use of every medication after very few doses, but acknowledged that medications such as Prolixin, which was administered by injection once but was discontinued after that, are to treat serious mental illness more complex than mere depression.

Dr. Patterson based his diagnosis of antisocial personality disorder in part upon Dr. Kronen's 2006 psychiatric report questioning whether a "true" bipolar diagnosis was warranted. He noted that Dr. Kronen opined that the conduct that brought Faison into the justice system might also be attributed to organic neurological factors reported by Dr. Blake in a 2004 neurological examination, and/or by a diagnosis of conduct disorder, rather than bipolar disorder. Dr. Patterson testified that conduct disorder diagnosed in a youth under 18 is understood to be a forerunner of antisocial personality disorder, which is not diagnosed until after age 18, and that this diagnosis of Faison in his adolescence was a basis of Dr. Patterson's opinion that Faison after 18 should properly have been diagnosed with antisocial personality disorder, not a mood disorder.

Dr. Patterson noted in his testimony that in rejecting a bipolar diagnosis of Faison he was aware that Dr. Ramia Gupta, who examined Faison in connection with post-trial proceedings in *Parker,* also concluded that Faison did not suffer from bipolar disorder.

ANALYSIS

I. Privilege Claim

Defendant claims trial counsel were ineffective for their failure to object sufficiently to the admission of Ex. 2, which was Government's Exhibit 458 at trial, a document recovered from defendant's jail cell during the execution of a search warrant, on the basis that the document was subject to attorney-client privilege or, in the alternative, to the work product privilege. *See* Att.1. He also claims that the government's "taint" process was a basis to vacate defendant's conviction in that the taint team of prosecutors that examined the seized materials should have recognized Ex. 2 as a privilege protected document and that they made it available to the trial prosecutors in violation of defendant's attorney-client privilege and Sixth Amendment right to counsel. Defendant's claims fail.

A. The *Strickland* Standard

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's conduct was deficient, and such deficiency actually had an adverse effect on the defense. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984). To prove that counsel's performance was deficient, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel 'guaranteed the defendant by the Sixth Amendment." *Id*. at 687. The standard "is that of reasonably effective assistance . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. at

687-88. "In any given case," there may be "a wide range of reasonable professional assistance." *Id*. At 689. Even where a defendant shows deficient performance by counsel, prejudice must also be found. To establish prejudice, a defendant "must show that there is a reasonable probability that…absent the claimed errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 694-95.

When the court evaluates the performance of counsel, trial counsel must be given sufficient latitude to make tactical decisions and strategic judgments which involve the exercise of professional abilities. *Woodard v. United States*, 738 A.2d 254, 257 (D.C. 1999). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Mere errors of judgment and tactics as disclosed by hindsight do not, by themselves, constitute ineffectiveness. *Lane v. United St*ates, 737 A.2d 541, 549 (D.C. 1999) (quoting *Curry v. United States*, 498 A.2d 534, 540 (D.C. 1985). A decision by counsel not to take a particular action on a client's behalf may not be considered a tactical choice to which the court will defer, where trial counsel's decision was uninformed by adequate investigation or justification. *See, e.g., Young v. United States,* 56 A.3d 1184, 1198 (D.C. 2012). "It is objectively unreasonable for defense counsel to make an uninformed decision about an important matter without a justification for doing so." *Cosio v. United States,* 927 A.2d 1106, 1123 (D.C. 2007).

B. **Attorney-Client Privilege**

The attorney-client privilege applies only in the following circumstances: "(1) where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8)

except the protection be waived." *Jones v. United States*, 828 A.2d 169, 175 (D.C. 2003) (citation omitted). The attorney-client privilege "applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.* (hereinafter "*KBR*"), 756 F.3d 754, 757 (D.C. Cir. 2014) (citation omitted).

The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Wender v. United Srvcs. Auto Ass'n*, 434 A.2d 1372, 1373 (D.C. 1981) (internal citation omitted). However, "the privilege should be narrowly construed to protect only the purposes which it serves." *Adams v. Franklin*, 924 A.2d 993, 998 (D.C. 2007).

"The burden of proving that the attorney-client privilege shields a particular communication from disclosure rests with the party asserting the privilege." *Jones v. United States*, 828 A.2d at 175 (citations omitted); *see also, F.T.C. v. TRW, Inc.*, 628 F.2d 207, 213 (D.C. Cir. 1980); *see also United States v. LeCroy*, 348 F.Supp. 2d 375, 381 (E.D. Pa. 2004).

The privilege protects not only communications from client to attorney but also from attorney to client, provided that the latter communication "is based on confidential information provided by the client." *Loftin v. Bande*, 258 F.R.D. 31, 34 (D.D.C. 2009)(quoting *Brinton v. Dep't of State*, 636 F.2d 600, 603-04 (D.C. Cir. 1980)). However, "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." *Brinton*, 636 F.2d at 604.

Additionally, because the privilege only applies to communications made for the purpose of obtaining legal advice, "communications made by and to a lawyer with respect to business

matters, management decisions, or business advice are not protected." *United States v. Motorola*, 1999 WL 552553 at *3 (D.D.C. May 28, 1999). Nevertheless, obtaining legal advice need not be the sole purpose of the communication. Rather, the D.C. Circuit has concluded that the privilege will apply to a document if obtaining or providing legal advice was "one of the significant purposes" of the communication. *KBR*, 756 F.3d at 758-59. The Second Circuit has extended the attorney-client privilege to include client-made notes that have been written in anticipation of a discussion with an attorney. *United States v. Defonte*, 441 F.3d 92, 96 (2d Cir. 2006). No decision of the DC Court of Appeals or any other court in the District of Columbia has extended the privilege in the manner adopted in *Defonte*. The government has conceded that the court may nevertheless apply the *Defonte* analysis here, although it disputes defendant's factual assertion that he created Ex. 2 for purposes that would bring it within the holding of that case.

Here, defendant argues that one of the significant purposes for which defendant created Ex. 2 was to obtain legal advice, and/or that it was a note made in anticipation of a discussion with his attorney, such that it was protected by attorney-client privilege.

C. **Work Product Doctrine**

The work product doctrine was established in *Hickman v. Taylor,* 329 U.S. 495 (1947). The doctrine created qualified protection of "written materials lawyers prepare 'in anticipation of litigation.' … By ensuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials, the privilege protects the adversary process." *In re Sealed Case* (1998), 146 F.3d 881, 884 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 26(b)(3) and *In re Sealed Case* (1997), 107 F.3d 46, 51 (D.C.Cir.1997)). In *United States v. Nobles,* 422 U.S. 225 (1975), the Supreme Court recognized the applicability of the work product doctrine to criminal cases and extended its

coverage to "material prepared by agents for the attorney as well as those prepared by the attorney himself." *Id. at 238-39*. The Court recognized that:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But . . . attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

Id. at 238-39.

To qualify as "work product material," an item must be the work product of an attorney, or a person acting as the attorney's agent, such as clerks, investigators or the client. Edward J. Imwinkelried & Daniel D. Blinka, *Criminal Evidentiary Foundations* § 7.06 (2017). While D.C. Crim. R. 16(b)(2) does shield from disclosure materials created by the defendant in anticipation of litigation, where the defendant is not acting as the attorney's agent in creating those materials, it is difficult to establish work product protection from disclosure. *See* David M. Greenwald, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and Work Product Doctrine* SL081 ALI-ABA 889 (Section IV, *Work Product Doctrine*) (2006). Under the rationale in *Nobles,* "work product includes material prepared 'by or for a party's representative 'as long as the agent is assisting in preparing for litigation." *Id.; Nobles,* 422 U.S. at 238-39. *See also, e.g., In re Conti Community Servs., Inc.Sec. Litig.,* 123 F.R.D. 574 (N.D. Ill. 1988)(work product doctrine did not prevent discovery of tax refund claim form prepared by an accountant, but documents prepared by the accountant as an agent for the lawyer would be protected.); *In re Grand Jury Proceedings,* No. M-11-189, 2001 WL 1167497at *19 (S.D.N.Y. Oct. 3, 2001)(holding that work conducted by an

investigator was protected by the work product doctrine when conducted under the direction and control of a party's counsel, but not when the same investigator acted independently); *In re Public Defender Serv.,* 831 A.2d 890, 895-96 (D.C. 2003)(where confession was extracted from a witness at knifepoint by associates of criminal defendant and confession was provided to attorney for use at trial, work product doctrine would not shield confession from disclosure to the government where the document was not prepared by attorney or his agents).

D. **Findings of Fact and Conclusions of Law**

The court makes the following findings of fact and conclusions of law as to the privilege claims.

The court credits Liyah Brown and Maro Robbins' testimony in full. Both had difficulty initially recalling events and details, but the court finds that both testified truthfully to their recollections and stated when they could not recall. Mr. Robbins had a limited role in defendant's case and therefore his testimony was less informative on many issues. Ms. Brown recalled little at the outset of her testimony, largely because she was presented with none of the exhibits or material that would refresh her recollection as to events that occurred six years prior to her testimony before she took the witness stand. Once she was refreshed, Ms. Brown's testimony, which occurred on two hearing dates two months apart, evidenced specific recollections and was credible. Throughout, Ms. Brown was self-effacing and handled difficult questions without defensiveness. In total, especially once she became refreshed as to long past events, Ms. Brown's testimony.

The court does not credit defendant's testimony as to his purpose in creating Ex. 2, or to the extent that he testified inconsistently with Ms. Brown and Mr. Robbins as to any facts, for reasons the court will state below.

1. Attorney Client Privilege

The court finds that 1) defendant did not write Ex. 2 for the purposes or with the intent he testified to at the hearing, or for any purpose that rendered Ex. 2 privileged; 2) Ex. 2 is not a document defendant ever discussed, described, referred to or identified in discussions with counsel prior to trial in February 2013; 3) Ex. 2 was not a privileged document; 4) documents defendant did reference in discussions with counsel, if they existed, were not the one admitted at trial; and 5) Ex. 2 did not appear to be a privileged document on its face, and no reasonable defense attorney or taint team prosecutor seeing it in the circumstances of this case would have believed it to be so.

The court does not credit defendant's testimony that his purpose, or one of his purposes, in writing Ex. 2, was to write a note or set of questions to counsel or to aid his memory in anticipation of meeting with or seeking advice from counsel. The court credits both defense counsel that defendant never identified Ex. 2 as a note intended for counsel and never described any document to them with any specificity that identified Ex 2 as a document created for purposes of seeking legal advice. Rather, the court finds that Ex. 2 was a recitation of defendant's impressions and his reactions to the information he learned at his preliminary hearing and from the affidavit supporting his arrest warrant. The court finds that, in writing Ex. 2, defendant was not directing his reaction to counsel or to any person in particular, but only to himself, and not for any purpose related to a future meeting with counsel. Ms. Brown testified persuasively that defendant frequently wrote notes to himself, that he was very smart and focused on his own case, and essentially that he knew how to relate specific concerns to her if he needed to. If he meant to write questions he knew how to.

There was no scheduled meeting with counsel at the time of the writing and the writing followed closely upon the preliminary hearing and the defendant's exposure to his arrest warrant affidavit. Defendant testified that Ex. 2 was responsive to information learned from those sources. In writing the document, the court finds that defendant was continuing a process begun at the hearing, writing notes that referenced information he had learned in the past, including persons of interest to him in relation to information gathered at his preliminary hearing and in his arrest warrant affidavit, and reactions and rhetorical questions directed to himself regarding that information. While defendant did also discuss some of these reactions with counsel both before and after he wrote Ex. 2, the court finds that this document in particular was not meant to aid those future discussions, but to record his thinking to himself. Ex. 2 therefore was not protected by attorney-client privilege from disclosure to the government or at trial.

The court does not here find that defendant *never* created a note or list of questions or other document designed to prompt defendant at a future meeting. The court finds that, if there ever was such a note authored by defendant, defendant has not established that Ex. 2 is that item, or that Ex.2 is an item he had in mind when he complained to counsel that a list of questions or note for counsel was taken from him during the cell search. The court bases this on a comparison of defendant's descriptions of items taken from his cell when talking to counsel with the appearance of Ex. 2. Defendant stated to Mr. Robbins at the January 11, 2012, meeting that a list of "written questions for L. Brown" was seized from his cell in the search. Ex. 8 at 7. On its face, Ex. 2 is not a list of written questions. *See* Attachment 1. There is nothing about its appearance that would suggest that it is or was intended by its author to be a list of questions or set of notes written to or for counsel. This was the court's finding at the bench mid-trial and remains the court's finding.

In one corner of Ex. 2, defendant wrote, "If I suppose to have a hat and glasses how can you recognize me." This is a rhetorical question to or about one of the witnesses identified in the arrest warrant affidavit, not a question to counsel. Ex. 2. Defendant essentially acknowledged this in his testimony when explaining to the court the meaning of the words he wrote. Under this was written an assertion, not a question, about defendant's appearance. Alongside a list of nick names on the left side of the document, defendant asks "where was the sc located and how many thorax" and then, "did I- or was someone else." Defendant testified that "sc" and "thorax" referred to shell casings. Otherwise, the document included ten nick names and the date "June 20" written inside various hand drawn boxes, and outside the boxes, the date "4th July," and approximately three assertions of fact that were not questions. Defendant testified that these notations reflected his thoughts about how to refute the government's DNA, firearms and witness identification evidence. There is thus no interpretation of Ex. 2 that would make it a list of questions.

Moreover, defendant also repeatedly emphasized to counsel that the item, or an item, seized in the cell search was a list of phone numbers. In particular, defendant referenced the phone number for his cousin "Kay" or "K." Ms. Brown's testimony and supporting records corroborate that a document containing phone numbers, not questions, was a subject of discussion with defendant. She directed the defense investigator after the January 2012 meeting to follow up on "Kay—client's cousin. . . . His # was on paper seized from client's cell." Ex. 10. Ex. 2 lists the name "K" but has no phone number for anyone, including "K." In his meetings with counsel, defendant also named several others not listed at all in Ex. 2 whose phone numbers he stated were taken during the search.

In the same meeting, defendant discussed July 4th and named certain persons who were relevant to that date, some but not all of whom were listed on Ex. 2 in relation to the date July 4th. Ex. 9. Ex. 12(A), another handwritten document of defendant among the items seized from defendant's cell but not introduced by the government at trial, was a list of phone numbers of some, but not all, of the persons listed in Ex. 2, and of some but not all of the persons discussed with Ms. Brown at her January 2012 meeting with defendant, as are reflected in Ms. Brown's notes and directions to her investigator. Ex, 9, 10, 12(A). The court therefore finds that Exhibit 12(A), never introduced at trial, was an item or the item defendant discussed with counsel at their 2012 meetings, but that Ex. 2 was not.

In addition, there is evidence that materials related to defendant's criminal case were lost or taken by jail officials by means other than the cell search in the same time period. Within Ex. 12, the full set of documents recovered in the December 22, 2011, cell search, and provided to defendant in discovery by the government, are copies of two documents entitled "Inmate Complaint-Informal Resolution," which are hand written grievance forms filed by defendant on December 6 and December 18, 2011, prior to the December 22, cell search.[10] In the December 18 complaint, defendant complains that "I was sent to the hole for fighting and your officers sent my property to North 1. Once we found out were (*sic*) my property was located they had only recovered 1 bag of my property. I lost food, case law and my hygiene products. I have a very serious case and now my whole defense could be at risk." The December 6 complaint is almost identically worded, also referencing "case law." It appears therefore that, shortly before his cell

[10]These forms are unnumbered items within Ex. 12. Defendant incorrectly dated one of them 2012 when he authored it, but the dates were corrected on the document and defendant received responses from Department of Corrections in documents dated December 7 and December 21, 2011. Ex. 12

was searched, defendant realized that he had lost some of the property, including documents, when his property was misrouted after he was transferred from his cell to the "hole" and back. Defendant did not address this possibility in his testimony or state how he could know when the document he had in mind was lost. He did not state with specificity when he authored the purported note or how he knew when a note with questions – as distinguished from his other handwritten documents with nick names and phone numbers on them – was created in relation to his meetings with counsel, his preliminary hearing and other events. The court finds that, if defendant ever authored a note with questions for counsel, there is a reasonable alternative inference that such a note was lost by jail staff when defendant was transferred to the "hole," rather than taken in the cell search.

The court therefore finds that, even if defendant ever authored a list of questions or a note he intended to give to counsel, discuss with counsel or use as an aid to prompt him in a meeting with counsel, he has not established that Ex. 2 was such a document or that it was created with such intent. The court also therefore finds that defendant has not established that any document(s) defendant did discuss with counsel or describe to them in 2012-13 prior to trial as being seized from his cell and being of importance to him, were admitted in evidence at trial.

The court further finds that there would have been no reasonable basis on which either trial counsel could have seen Ex. 2 in the discovery materials in June 2017 and believed it was a document defendant had ever referenced to them, much less a "note" defendant wrote with questions for counsel, or for the purpose of seeking legal advice from them. Because they could not reasonably have recognized or believed Ex. 2 to be a privileged document, they were not deficient for failing to assert that it was protected by attorney-client privilege before trial.

Both counsel knew that defendant had reported to Mr. Robbins on January 11, 2012, that a note stating questions to Ms. Brown had been taken. The court finds that, in June 2012, Ms. Brown saw and was aware of the presence of handwritten documents of defendant in the discovery packet received from the government purporting to include the items seized in the cell search. These included Ex. 12(A) and 12(B). Ex. 12(B), which was Ex. 2, ultimately was the document that was marked and admitted at trial as Exhibit 458. Trial counsel would have had no reason to believe that Ex. 12(B) was a document defendant had reported was taken in the cell search, or that it was any item ever referenced by defendant to her or co-counsel as a note written to her, for the purpose of seeking advice from her, or containing questions for her, and did not understand it to be such. The court credits that Ms. Brown did perceive Ex. 2 to be notes or musings written by defendant to himself, or to nobody in particular, and finds that this perception or understanding by Ms. Brown was reasonable. In other words, nothing about Ex. 2 suggested or should have suggested to reasonable counsel seeing it that it was an attorney-client privileged document.

The court does not credit defendant's testimony that he ever identified Ex. 2 within the discovery materials to either counsel or the investigator during meetings at which discovery was discussed, as "the note" of questions or any other items taken that he had discussed previously. To the contrary, the court credits Ms. Brown's testimony that she expressly recalled that defendant did not do so. Ms. Brown was diligent in following up on matters defendant did raise with her, by making notes and issuing instructions to the investigator and her co-counsel, and there was no reflection in any document that defendant ever did identify Ex. 2 to counsel in any way until mid-trial. When defendant expressly asked counsel to move to suppress the documents seized from his cell, he complained of a privacy or Fourth Amendment violation, but he never

made reference to Ex. 2 in particular, or to a challenge based on privilege, or to facts that would support an assertion of privilege.

In addition, based on her conversations with defendant in January 2012, Ms. Brown was aware of defendant's claim that lists of certain phone numbers and photos had been seized in the search, and that these documents included a "paper" with a phone number of "Kay," someone relevant to her investigation on his behalf. Ms. Brown upon seeing Ex. 2 in the discovery materials had no reason based upon its appearance to believe it was one of the items containing photographs or phone numbers that defendant had discussed. In fact, for reasons stated *supra,* counsel could reasonably have concluded that Ex. 12(A), a handwritten document never admitted at trial that contained phone numbers, was the document that defendant had referenced.

For these reasons, until defendant passed them Ex. 27 mid trial, after the government offered Exhibit 458 in evidence, neither of defendant's trial attorneys had reason to move for its exclusion on attorney-client privilege grounds.[11]

Once the court overruled counsels' objection on attorney-client privilege grounds for reasons stated at the bench, Ms. Brown directed Mr. Robbins to file a written motion to exclude on privilege grounds. The court finds that Ms. Brown, who was the attorney making decisions in the case, provided effective assistance of counsel in that she made professionally reasonable decisions with respect to the litigation of the written motion and the presentation of the motion to the court. She understood that, to succeed on the motion to exclude on the basis of privilege, she

[11] Defendant argues that trial counsel's statement to defendant after he told her his position on Ex. 2 mid-trial that she "messed up" should govern the court's analysis here and lead to a determination that she acknowledged that she should have known that Ex. 2 was privileged and had provided deficient representation. The court disagrees. Ms. Brown explained that she said this to defendant because she was sorry for not being aware of defendant's position prior to that moment. This apology to defendant by his trial counsel was not an admission of deficient performance, simply of her lack of awareness of a position defendant was taking.

had to establish defendant's state of mind in writing Ex. 2. Ms. Brown reasonably concluded that the defense investigator could not provide helpful testimony and that she herself could not truthfully do so. Defendant has challenged the reasonableness of trial counsel's decision not to present defendant's testimony at a hearing on the motion, or give him the choice to do so. The court concludes that counsel's decision in this regard was a reasonable ethical and strategic decision. The court credits that Ms. Brown did not agree with defendant's factual assertion mid-trial that she and he had discussed the exhibit previously or that he had ever asserted to her that it was "the note" or any list of questions he had referred to in discussions with counsel about items taken in the cell search. She in fact believed his mid-trial assertion to this effect was false. The court finds that counsel reasonably chose not to discuss with defendant whether he should testify as to his purpose in creating Ex. 2, to avoid creating a conflict of interest between them, and not to have him testify to facts she reasonably believed were false.

Defendant argues that counsel did not reasonably conclude that presenting defendant's testimony would be inculpatory of him, because such testimony would be outside the presence of the jury. Counsel testified that she was aware that the hearing would be outside the presence of the jury, but that she felt that any testimony regarding the note, which she felt was "damning," would inculpate him unreasonably. The court credits this testimony and finds that this was a reasonable professional decision by counsel. At the hearing of this matter, defendant testified in detail to aspects of his defense and to knowledge of individuals and facts referenced in Exhibit 458 that inculpated him with respect to both shootings. Defendant argues this could have been done with a taint team of prosecutors rather than the trial prosecutors such that the trial prosecutors would be shielded from his testimony. Although this is true, the court concludes that

the decision to keep defendant from inculpating himself on the record and under oath to anyone in the circumstances, was not unreasonable professional decision-making.

Defendant claims that Ex. 2 is privileged pursuant to the analysis in *United States v. Defonte*, 441 F.3d 92, 96 (2d Cir. 2006), because he wrote it to prompt him or aid his memory in future meetings with counsel. He claims in support that he did, in fact, discuss the items in the note with counsel later. He also claims, somewhat inconsistently, that he failed to discuss the items in the document later because he could not recall them without the aid of the note. The court does not credit defendant's testimony that he created Ex. 2 for this purpose for the reasons stated above. The court further does not credit defendant's testimony that he needed the note because his mind or memory would freeze up when he spoke to counsel such that he could not recall the things he needed to discuss with counsel. Defendant pursued and discussed many matters of fact and strategy during meetings with counsel throughout 2012 and prior to trial in 2013. He did not need Ex. 2 to prompt him. If he needed an aid, he had his warrant affidavit. There is no basis to believe that defendant could not, and did not, rely on the affidavit itself to prompt him, if prompting was necessary.

Defendant has established that he discussed many, though not all, of the items in Ex. 2 with counsel over time. This does not render the document privileged, even under the reasoning in *Defonte,* however. That defendant reacted to facts asserted at events prior to the writing of Ex. 2, such as his affidavit and preliminary hearing, and wrote Ex. 2 in response to those factual assertions, does not make the document privileged. This is so even if defendant returned to those facts in future discussions with counsel, where Ex. 2 itself was not created for the purpose of aiding those future discussions.

The court finds that counsel were diligent and attentive overall in their representation of defendant. Ms. Brown visited defendant at the jail at least eight times according to the DC Jail Log. Ex. 8. She may have visited him more often, because this log was incomplete according to Mr. Robbins, who testified that he visited defendant more than the one time reflected in the exhibit. In addition, counsel spoke to defendant behind the courtroom at hearings. Ms. Brown's investigator also frequently visited defendant and attended to many issues and requests on his behalf. Ms. Brown directed the filing of a number of pretrial motions and considered defendant's wishes carefully in doing so. Her notes and directions to her investigator demonstrate her diligence.

The court finds for all of these reasons that trial counsel were not deficient in their representation of defendant as to an attorney-client privilege claim regarding Ex. 2.

2. Work Product Privilege

Defendant additionally claims that the document was protected from disclosure by the work product privilege, and that counsels 'performance was deficient in that they did not argue this on defendant's behalf. The record does not support defendant's claim. Defendant acknowledged in his testimony that counsel never asked or directed him to make notes or any writing in aid of her investigation of the case or her representation of him. Ms. Brown testified, and the court credits, that she never instructed him to take notes or write Ex. 2. She testified that she was careful not to leave discovery materials at the jail and encouraged clients not to make calls directly to her, all to protect against breaches of confidential information they shared, though she was aware that defendant took notes of his own accord. The court finds that Ex. 2 was not protected by the work product privilege. Even if the court were to credit defendant's

hearing testimony as to the circumstances of the writing of the document, the defendant fails to establish that Ex. 2 was protected by work product privilege.

For the reasons stated above, the court also finds that there is nothing on the face of Ex. 2 that suggests it was a writing done at counsel's direction or directed to counsel or created by defendant acting as counsels' agent. For these reasons, it was not deficient performance to fail to assert work product privilege as to Ex. 2.

The court concludes, for all of these reasons, that trial counsel provided reasonably effective assistance of counsel, as is contemplated by the holding in *Strickland,* with respect to the defendant's claims of attorney-client and work product privilege.

3. Prejudice

Assuming, without finding, that counsels' representation was constitutionally deficient, there was no prejudice in any event. First, for the reasons articulated at the bench during trial and herein, Ex. 2 is cryptic, and its meaning very difficult to glean from the face of the document. The court had difficulty understanding the meaning of the notations, nick names and statements on the note even after the defendant explained them in detail at the post-trial hearing, and without his assistance the jury would have had little to help it understand the significance, if any of the note. Although the government discussed Ex. 2 in closing, the government's statements were not evidence and did little to enlighten the jury as to the ways in which it might be incriminating.

Additionally, the court incorporates by reference the discussion of the weight of the evidence presented by the government at trial in Section II (B)(3) below. Because the government's evidence against defendant was overwhelming, there is no reasonable probability

that the fact finder would have had a reasonable doubt respecting guilt absent counsel's deficient performance.

4. Taint Team

Defendant finally claims that the taint team of prosecutors responsible for preventing the trial prosecutors from seeing privileged material disclosed Ex. 2 to the trial prosecutors in violation of defendant's attorney-client or work product privilege and his right to counsel. Because the court finds that the document was not in fact privileged, and because there was nothing on the face of the document that would have alerted the members of the government's taint team that it was a privileged document or that defendant would claim that it was, this claim also fails. *See Hicks v. Bush,* 452 F. Supp.2d 88, 103 (D.D.C. 2006).

II. *Brady* Claim

Defendant claims that the government violated its disclosure obligations under *Brady* v. *Maryland*, 373 U. S. 83, (1963), by failing to disclose to the defense at trial certain impeachment information concerning cooperating witness Kurtis Faison. This information included mental health and medical records and other information regarding his conduct while housed at the DC Jail, as well as other juvenile mental health records. In addition, the defendant claims that the government failed to disclose the full extent of information concerning Faison's cooperation in other cases. Defendant argues that, had the defense been able to use this information to impeach Mr. Faison, there is a reasonable probability that the result of the trial would have been different. Defendant proffers that, had the defense been in possession of the undisclosed information, it would have called at trial an expert to provide testimony that Faison's trial testimony was unreliable because of mental illness, in addition to presenting all of the undisclosed records and information to the jury and impeaching Faison on cross examination with the information.

The government concedes that it failed to disclose voluminous DC Jail and other mental health records at trial. The government argues that it satisfied its disclosure obligations with respect to Faison's cooperation, and initially argues that it had no duty to disclose the DC Jail mental health and other records because the records were not within the government's custody or control. In any event, the government argues that the undisclosed information in total was not material within the meaning of *Brady.*

A. *Brady v. Maryland*

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the government violates the Constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith* v. *Cain*, 565 U. S. 73, 75, (2012)(summarizing *Brady* holding); *Vaughn v. United States*, 93 A.3d 1237 (D.C. 2014). The Government must disclose evidence that is "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler* v. *Greene*, 527 U. S. 263, 281-282 (1999). The Confrontation Clause of the Sixth Amendment "guarantees a defendant in a criminal case the right to confront witnesses against him." *Longus v. United States*, 52 A.3d 836, 849 (D.C. 2012) (internal quotation marks omitted). That right is violated if the defense is precluded "from pursuing a line of examination that is necessary to enable the jury to fully evaluate the witness's credibility." *Id.* at 850-51.

"[E]vidence is 'material 'within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner v. United States,* 137 S. Ct. 1885, 1892-3 (2017) (*citing Cone* v. *Bell*, 556 U. S. 449, 469-470 (2009). "A 'reasonable probability' of a different result" exists where the

suppressed evidence '"undermines confidence in the outcome of the trial.'" *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). In other words, defendant is entitled to a new trial only if he "establis[hes] the prejudice necessary to satisfy the 'materiality 'inquiry." *Strickler*, *supra*, at 282. Here, therefore, the court must examine the trial record, "evaluat[e]" the withheld evidence "in the context of the entire record," *Agurs*, *supra*, at 112, and determine in light of that examination whether "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone, supra*, at 470.

B. Findings of Fact and Conclusions of Law

The court makes the following findings of fact and conclusions of law on the *Brady* claims.

The court finds that the government failed to disclose voluminous impeachment materials concerning Faison's mental health while at the jail. The court concludes, however, that there is no reasonable probability that a reasonable jury presented with all of the impeaching evidence and testimony proffered by the defendant regarding Faison's mental health would have rejected Faison's testimony on the basis that it was a product of mental illness or disability, or a remembered hallucination. The court further finds that the government made sufficient disclosure of the information concerning the scope and manner of Faison's cooperation with the government to satisfy the requirements of *Brady* and *Giglio v. United States,* 405 U.S. 150 (1972). Finally, the court concludes that, in any event, the totality of the government's nondisclosure of the mental health and behavioral information, as well as any failure sufficiently to disclose records and information concerning Faison's cooperation, was not material within the meaning of *Brady v. Maryland*, because there is no "reasonable probability that, had the

evidence been disclosed, the result of the proceeding would have been different." *Turner v. United States,* 137 S. Ct. 1885, 1892-3 (2017).

Kurtis Faison was a government witness at defendant's trial. He testified pursuant to a cooperation agreement with the government by which he pleaded guilty to second degree murder, conspiracy and other offenses in an unrelated case, in exchange for providing information and testimony in a number of cases.

Faison testified at defendant's trial that, in October and early November 2011, he and defendant were housed in cells next to one another while they were both in the "hole" (a term for segregated placement in the DC Jail), and that they talked to one another about their cases in a series of conversations. Faison testified that they spoke to one another by emptying the water out of the toilets in their cells and speaking into the toilets, such that their voices traveled to each other through the toilet pipes. Faison testified that defendant told him he had shot two persons, that he initially intended to rob one of them and the person made a movement, so he fired at him, and that he shot the second person so there would be no witnesses. Faison also testified that defendant told him that, after the murders, he fled the jurisdiction because he knew he was wanted and was eventually caught by police at his aunt's home in Maryland. Faison testified that defendant also discussed his concerns about his baby's mother, and stated that he was concerned that cell phone information could inculpate him in his case.

1. Evidence of Mental Illness or Disability

Faison was housed at the DC Jail from 2010-2012, incarcerated elsewhere for a period, then returned to the DC Jail by the time of his testimony in 2013. During his time at the DC Jail, Faison saw medical and mental health staff on numerous occasions, and engaged in other conduct that was memorialized in DC Jail records. The government did not disclose to defense

counsel at the time of trial the DC Jail records reflecting Faison's mental health and behavioral history. These records are defense Exhibit 55. The government also did not disclose Faison's juvenile mental health history. Faison was disciplined for having a cellphone at some point while at the jail, and information and/or records of this also were not turned over. Defendant argues that the failure to disclose all of this information, on its own and together with the claimed failure to disclose cooperation information described below, was a *Brady* violation.

As an initial matter, the government was aware at the time of trial that Faison had a juvenile record and juvenile mental health history. *See, e.g., Government's Opposition to Supplement to Motion for New Trial,* Att. W. The defendant has not established that the government was aware at the time of defendant's trial of the records in Ex. 55 or Faison's mental health history and behavior at the DC Jail. This information did not come to light until the post-trial proceedings in *United States v. Timothy Parker, et al.,* 10-CF2-12342. The defendant claims the government had full knowledge of the DC Jail mental health history, but provides no basis for this assertion. *See Defendant's Supplemental Motion for New Trial* at 5.

The government has argued first that it did not have an obligation to disclose the DC Jail records because the records were in the possession of the Department of Corrections, which was not a part of the "prosecution team" in this case and therefore possession of the records should not be imputed to the government. *See Vaughn v. United States,* 93 A.3d 1237 (D.C. 2014). In the alternative, if possession of the DC Jail mental health records is imputed to the government, the government concedes that some or all of the DC Jail records were subject to pre-trial disclosure but argues that its failure to disclose the records was not material pursuant to *Brady v, Maryland*, because the outcome of the case would not have been altered by the resulting impeachment.

The court will assume, without deciding, that possession of the DC Jail records in this case would have been imputed to the government. The court further concludes that the government would have been required to disclose the DC Jail records concerning Faison's mental health and conduct, because these records would have put the defendant in a position to persuade the court that he could call at trial an expert to testify regarding Faison's mental capacity to perceive and accurately recall the events of October and November 2011, and to impeach Faison's testimony that defendant made statements to him at the jail. The court concludes that it would have permitted the defense to use the mental health information before the jury as proffered. The court would have done so even weighing Dr. Patterson's testimony that Faison never suffered from bipolar disorder or psychosis. The court notes that it would have credited Dr. Patterson's testimony and opinions had they been presented prior to trial, and would have been unpersuaded for reasons stated below that Faison was bipolar or psychotic in 2011, but that it would have permitted the defendant to offer Dr. Epstein's testimony to impeach Faison so as to allow a jury to fully assess Faison's mental state and ability to perceive events both at the time of the perceptions, in 2011, and at the time of the testimony in 2013.

However, to complete the analysis of a post-trial *Brady* claim, the court must determine whether the undisclosed information, and any resulting omitted impeachment, was material to the outcome of the case. If it was not then, notwithstanding the government's failure to disclose the information, defendant has not met his burden to establish a *Brady* violation warranting the requested relief. *Turner v. United States,* 137 S. Ct. 1885, 1892-3 (2017) (*citing Cone* v. *Bell*, 556 U. S. 449, 469-470 (2009).

a. Competency

Defendant argues first that, had the undisclosed mental health records and information concerning Faison's mental health history been available at trial, he would successfully have challenged Faison's competency to testify and Faison's testimony would have been excluded. The court disagrees. "In assessing the competency of a witness, a trial judge must evaluate the [witness's] ability to accurately perceive, recall, and relate purported facts, as well as testify truthfully. " *Dorsey v. United States*, 935 A.2d 288, 294-295 (D.C. 2007); *Vereen v. United States*, 587 A.2d 456, 457 (D.C.1991). The defense and government experts agreed, and defendant concedes, that Faison exhibited no evidence of mental illness at the time of his February 2013 trial testimony, and that no records evidenced current symptoms or mental incapacity. Defendant's expert, Dr. Epstein, testified that he "wondered" whether Faison was recalling prior hallucinations when relating events of 2011 in his trial testimony, but agreed that Faison was not symptomatic in 2013.

A diagnosis of a serious mental illness alone does not render a witness incompetent to testify. In *Dorsey*, the Court of Appeals held that the trial court did not err in finding a witness competent to testify after observing the witness during a pre-trial hearing at which the witness testified, without ordering an independent medical examination, though the witness had been diagnosed with paranoid schizophrenia and recently hospitalized. In concluding that this determination was not error, the Court emphasized that, absent "ongoing manifestations" of mental illness at the time of the witness' testimony, the determination that the witness was competent without an examination was within the court's discretion.

> [The witness] did not display the kinds of mental impairments that would suggest testimonial incapacity. . . . Competency 'concerns certain basic, prerequisite capabilities necessary to give testimony,' and thus is not to be confused with witness credibility or

> co-operativeness. Overall, [the witness] demonstrated an understanding of what it means to testify truthfully; she was oriented in time and place; she understood the functions of judge and jury, and (ultimately) she complied with directions and courtroom procedure. . . . Given the absence of manifest impairments and the witness's demonstrated ability to perceive, recall and relate facts, we hold that the court did not abuse its broad discretion in finding Carter competent to testify.

Id.; See also, *Bryant v. United States*, 859 A.2d 1093, 1102 (D.C. 2004); *Velasquez v. United States*, 801 A.2d 72 (D.C. 2002); *Collins v. United States*, 491 A.2d 480, (D.C. 1985). Applying the reasoning in the above authorities to this case, the court finds that Faison was competent to testify in 2013.

b. Impact on the Jury of Evidence of Dr. Epstein's Testimony

Defendant argues next that, had the challenge to competency been rejected and had Faison testified, the jury upon hearing Dr. Epstein's testimony and being presented the mental health and other DC Jail records, would have rejected Faison's testimony on the basis that it was a product of mental illness or a remembered hallucination. The court concludes that defendant has failed to meet his burden to establish this claim.

The court concludes that defendant has failed to establish a reasonable probability that a jury presented with the proffered impeachment testimony and records regarding Faison's mental condition would have rejected Faison's testimony on the basis that mental illness or disability at the time of his testimony impaired his ability to perceive or report events, or to disbelieve Faison's testimony on the basis that he was reporting a hallucination or misperception arising from mental illness in Fall 2011. For this reason, the defendant has failed to establish its materiality under *Brady*.

Dr. Epstein's opinions would not have gone undisputed by the government at trial. Dr. Epstein never examined Faison. Dr. Epstein testified that he had no records or evidence suggesting that Faison exhibited symptoms of mental illness or psychosis when he testified at

trial in 2013, or in the preceding period in 2012, and that the transcript of Faison's trial testimony also was free of any such evidence. The court heard Faison's trial testimony and has reviewed it in these proceedings. His testimony was free of any appearance of mental illness or disability, and he was fully oriented and coherent. As an initial matter, therefore, a reasonable juror hearing Dr. Epstein's testimony and reviewing all of the proffered records would not likely have found Faison to be impaired at the time he testified in 2013.

Dr. Epstein testified that, based upon the 2010-11 DC Jail records, Ex. 55, and other prior record materials, including Dr. Michael Kronen's psychiatric evaluation of Faison in 2006, Ex. 59, it was his opinion to a reasonable degree of medical certainty that Faison suffered from bipolar disorder as a lifelong condition, and that he was experiencing psychosis during the 2011 period when he was housed next to defendant at the D.C. Jail. As a result, Dr. Epstein testified that he would "strongly wonder" whether Faison's 2013 trial testimony that defendant made incriminating statements to him in 2011 from the adjoining cell was the product of remembered hallucinations. 4/10/19 Tr. at 34-35. This opinion was speculative even in its articulation. Combined with Dr. Epstein's concession that Faison experienced no symptoms of mental illness at all in 2013, and Faison's presentation at trial, which was without any suggestion that he was impaired by mental health issues, the court concludes that there is no reasonable probability that jurors would have rejected Faison's testimony for reasons of mental health impairment at the time of the testimony itself. Additionally, defendant has not established a reasonable probability that a jury would have rejected Faison's testimony upon Dr. Epstein's theory that Faison's 2013 testimony was a remembered hallucination resulting from a psychotic episode arising from bipolar disorder in October and November 2011.

Initially, a reasonable juror would likely question Dr. Epstein's bipolar diagnosis. Dr. Epstein never examined Faison himself, and Faison's DC Jail records contain no diagnosis by any jail personnel of bipolar disorder. The records at the pages cited by Dr. Epstein for this diagnosis reflect instead that, on May 4, 2010, at what appears to have been a mental health intake examination at the Jail immediately after Faison was initially incarcerated, Faison gave a health history that included that he previously had been diagnosed with bipolar disorder and been given medication while in a residential facility and at Psychiatric Institute of Washington ("PIW") in 2009 at age 17. Ex. 55 at 347. This did not constitute a diagnosis by Jail mental health staff. The record of a physical examination on the same date in May 2010, states under a heading "Minor Assessments," "bipolar disorder" with no record indicating that this was anything other than the product of the same history provided by Faison. Faison reported the same history of a 2009 diagnosis of bipolar disorder to DC Jail medical staff during a May 17, 2010, sick call on a complaint of sore throat and congestion. *Id* at 340. The final document relied upon by Dr. Epstein in reaching his opinion to a reasonable degree of medical certainty that Faison was diagnosed with bipolar disorder at the Jail was a form generated by Faison's lawyer in court on May 4, 2010, called a "Medical Alert," stating the words "bipolar/prior suicide attempt." *See* Ex. 51, Report of Dr. Epstein. Thus, none of the documents Dr. Epstein cited in support of his diagnosis, or any of the other records in Ex. 55, actually include a diagnosis of bipolar disorder rendered by the medical and mental health professionals Faison saw at the Jail in May 2010, or at any other time during his incarceration there.

The DC Jail records in Ex. 55 instead reflect that Faison's mental health diagnosis by DC Jail mental health staff, stated on September 26, 2010, was "Posttraumatic stress disorder (Axis 1); Mood Disorder NOS [not otherwise specified] (Axis 1); Alcohol Abuse (Axis 1)." Ex. 55 at

298. On this date, the examining doctor made a note to "R/O" [rule out] Psychotic depression, and prescribed medication "for mood/depression and psychosis" (bracketed definitions inserted by the court based upon the hearing testimony), but did not diagnose Faison with bipolar disorder, and did not ever confirm a diagnosis of any psychotic depression or other disorder. No reference to psychotic depression or psychosis appeared again in Faison's records thereafter.

The next day, September 27, 2010, Faison was seen for psychiatric follow-up and the notes reflected that Faison's mental health diagnosis was again: "Posttraumatic stress disorder (Axis 1); Mood Disorder NOS (Axis 1; Alcohol Abuse (Axis 1)." *Id.* at 292. On November 17, 2010, at a mental health visit at which Faison reported that he was not sleeping well and "seeing things and talking to people in his cell as if they were there," *id.* at 280, the psychiatrist's report listed PTSD, mood disorder NOS and alcohol abuse as his prior diagnoses at the jail, and stated his diagnosis at that time was PTSD, without reference to bipolar disorder or any psychosis. On the following day, the diagnosis stated in records of a mental health assessment after Faison threw feces at someone, was again PTSD, mood disorder NOS and alcohol abuse, with again no reference to bipolar disorder or psychosis. *Id.* at 273. Faison's DC Jail diagnosis remained the same in January 2011 and April 2011. *Id.* at 174, 225, 230.[12]

Nor did Dr. Epstein review or cite directly any report of examination in 2009, when Faison was placed residentially in his juvenile matters, or any other time by any mental health professional, diagnosing Faison with bipolar disorder. In reaching his conclusion that Faison was

[12] While both parties' post-trial experts testified that "Mood disorder NOS" could encompass a diagnosis of bipolar disorder in that bipolar disorder is a "mood disorder," many conditions satisfy the definition of a "mood disorder." It remains that no mental health professional at the DC Jail ever diagnosed bipolar disorder or otherwise specified the type of mood disorder Faison had. While both parties' post-trial experts testified that "Mood disorder NOS" could encompass a diagnosis of bipolar disorder in that bipolar disorder is a "mood disorder," it remains that no mental health professional at the DC Jail ever diagnosed bipolar disorder or otherwise specified the type of mood disorder Faison had.

bipolar, or had previously been diagnosed bipolar, Dr. Epstein testified that he relied upon a report of a 2006 psychiatric examination performed by Dr. Michael Kronen when Faison was age 14. Ex. 59. Dr. Kronen's Report is clear that he never did diagnose Faison with bipolar disorder, however. *Id*. Dr. Kronen noted that, while placed at a residential facility, Faison was diagnosed with Disruptive Behavior Disorder NOS, PTSD and concerns that ADHD was present, and for a brief period at the end of his stay, there were indications of a mood disorder such that his diagnosis changed to "bipolar disorder NOS" in addition to the other diagnoses. *Id.* at 4. This was reported in Faison's prior history, not as a diagnosis by Dr. Kronen.

In fact, Dr. Kronen stated later in his report that, while it was clear that Faison suffered from a "mood disorder" based on observations at his residential placement, "the symptoms discussed may not neatly fit into the adult schema of bipolar disorder and it may be that whatever mood disorder Kurtis has is not true 'bipolar disorder.'- Nonetheless, a mood disorder is present." *Id* at 11. The hesitation Dr. Kronen expressed regarding whether Faison should be diagnosed with "true" bipolar disorder resulted in part from his conclusions that drug use was a factor complicating the diagnosis and that the results of a 2004 Neurological examination showed organic abnormalities that might also be a factor. In conclusion, Dr. Kronen ultimately diagnosed Faison with "bipolar disorder NOS ('by history')", and with ADHD, cannabis dependence and "adolescent antisocial behaviors." *Id.* Dr. Kronen thus did not diagnose Faison with bipolar disorder, and noted only the diagnosis "by history," without adopting it. The court concludes, therefore, that Dr. Epstein's reliance upon Dr. Kronen's Report as a basis to reach a conclusion to a reasonable degree of medical certainty that Faison suffered from bipolar disorder undermines the weight a reasonable juror would have given Dr. Epstein's diagnosis.

It remains as well that in *Parker* post-trial proceedings, regarding another of the cases in which Faison provided testimony, a post-trial opinion was sought from Dr. Ramie Gupta by the defense, and she also opined that Faison was not bipolar. Dr. Epstein acknowledged this opinion in his testimony.

Dr. Epstein also relied on what he termed "bizarre" behavior at the Jail to conclude Faison was bipolar over his lifetime and experiencing a psychotic episode specifically in October and November 2011. The court concludes that a jury would have had many reasons not to give weight to Dr. Epstein's opinion that the conduct relied upon, despite the seriousness of much of it, indicated that Faison was psychotic and hallucinating in Fall 2011. As a threshold matter, Dr. Epstein conceded that not all persons who are bipolar experience psychosis, and that persons who are bipolar can be asymptomatic. Dr. Epstein opined, however, that Faison's behavior from May 2010 until approximately 2012 showed that he was psychotic at the time of Faison's claimed observations in October and November 2011.

Dr. Epstein accurately testified that the DC Jail records reflect that Faison attempted suicide on a number of occasions, masturbated in public, threw feces, and reported that he was hearing voices. A jury would have had strong evidence to support a finding that Faison engaged in these acts for manipulative purposes, however, to be moved in and out of safe cells, to be moved out of the "hole," to get phone calls with his mother or attention from Jail mental health staff, and that he was distressed or agitated arising from his charges, and the circumstances of his incarceration. All of these explanations, many stated by Faison himself and many supported by observations of staff, are reflected in the records themselves.

Dr. Epstein's opinion that Faison was experiencing a psychotic episode arising from bipolar disorder or any other mental illness at the specific time he was housed next to defendant

in late October and early November 2011 was not supported by Faison's behavior as described the DC Jail records from that period. Records from that period do not anywhere state that in that time frame Faison was experiencing psychosis. The records from that time frame describe all manner of self-harming, angry, and highly manipulative behavior but would not have persuaded a reasonable juror that Faison was psychotic.

In his report, Ex. 51, Dr. Epstein details the following record entries between May 2011 and December 2011 as supportive of his opinion that Faison was psychotic in October-November 2011:

"May 2011: Faison ties sheet around his neck - claims he just wanted to make a phone call to his mother." (Citing Ex. 55 at 160-161 and 425)

"June 2011: Faison ties a sheet around his neck and hangs himself - claims he just wanted attention to talk to someone." (citing Ex. 55 at 140-141, 145-147)

"September 2011: Faison displays extreme anxiety and reports that he believes someone is trying to kill his mother [veracity unknown]" (citing Ex. 55 at 99)

"October 2011: Faison indicates distress due to a new murder charge against him and asks to be placed in a safe cell." (citing Ex. 55 at 92)

"November 2011: Faison throws a chair at an adjustment officer." (Citing Ex. 55 at 84)

"December 2011: Faison was "responding to internal stimuli, (citing Ex. 55 at 70), ie responding to non-real voices."

Report, Ex. 51, at 5-6.

The September 2011 record entry Dr. Epstein cited above reporting Faison's anxiety regarding his mother actually states that Faison reported on September 27, 2011, that he was experiencing distress because he had learned when in court that day that someone had pulled a gun on his mother. Ex. 55 at 99. In other words, this was not a hallucination or an expression of anxiety based on unreal events, but a report by Faison that real events were causing him distress.

Similarly, in the October 2011 record cited by Dr. Epstein, the month in which the defendant allegedly made incriminating statements to Faison which Faison testified about in 2013, Faison reported the fact that he was charged with another murder and was "doing bad," asking to be put in a safe cell "to think." Dr. Epstein did not testify to a basis for concluding that this reflected psychosis rather than true events which reasonably caused Faison distress. In the above-cited November 2011 incident, Faison threw a chair at an adjustment officer after being informed that he was being given more time in "the hole." That Faison was in "the hole" is consistent with his testimony in 2013 that he was located there with defendant in November 2011, and was corroborated at trial. This behavior included no evidence of psychosis, but was evidence of inappropriate violent behavior at the decision of the officer that he would be placed in the "hole." Ex. 55 at 84.

Faison engaged in apparently serious self-harming behavior in January, May and June 2011, when he attempted to hang himself by tying a sheet around his neck in his cell. However, a juror examining the records Dr. Epstein relied upon would have reason to give little weight to the opinion that these efforts reflected psychosis. After the January 2011 attempt, Faison explained that he intended to harm himself because he had been charged with first degree murder. *Id* at 230. At this time he also reported that he was not sleeping and asked to be given Benadryl to help him sleep, *id,* but the notes from that time frame also stated that Faison was reported to have "malingered" to get medication for sleeping. Ex. 55 at 228. After the June 2011 suicide attempt, cited by Dr. Faison above as reflecting psychosis, Faison explained he had done this so he could get attention and talk to the mental health staff. *Id* at 140-141. The attempt was described in the record as "manipulative behavior." *Id.* at 145-147.

Dr. Epstein testified that Faison's December 2011 records stated he was "responding to internal stimuli," meaning, Dr. Epstein testified, that he was "responding to non-real voices." This testimony omitted significant portions of the record entry. In fact, the single page of the record Dr. Epstein relied upon for this opinion was a note taken at a December 2011 Comprehensive Mental Health Assessment that actually stated that the "patient prented [sic] to be responding to internal stimuli when asked his name. He later asked to use the phone and appeared normal." Ex. 55 at 70. Given the staff's recorded observation that Faison was "pretending," it is not probable that a reasonable juror would conclude from this entry that Faison was psychotic at the time. Faison presented with no hallucinations, delusions or abnormal speech or thought at this examination, according to the same record. *Id.*

Dr. Epstein also relied upon Faison's mental health and other records of his behavior from as much as a year prior to the October/November 2011 period to support his opinion that Faison was psychotic in October and November 2011. In August and September 2010 Faison reported suicidal thoughts and in November 2010 he reported ingestion of 10 or 11 Tylenol, and 10 other pills, a gesture Dr. Epstein suggested "could be" a suicide attempt. Dr. Epstein's opinion that these incidents, troubling though they must be, were evidence of psychosis in October and November 2011, a year later, or at all, was not supported by the DC Jail records. Medical observers noted at the time of the November 2010 incident that Faison vomited a small amount of food but noted no pills. Ex. 55 at 277-278. In other words, the report that he ingested pills was not supported by the observations. Faison informed them at that time that he did not like the cell he was in. *Id.*

Although Dr. Epstein testified to an opinion that, in October and November 2011, Faison was psychotic, the government established on cross examination that the records he relied upon

stated throughout that Faison was not hallucinating. In November 2010, on observation, Faison displayed "encapsulated delusions" but no hallucinations.[13] Ex. 55 at 273 & 278-280. In January 2011, after a suicide attempt, the record stated Faison was experiencing neither delusions nor hallucinations. *Id.* at 229-231. The entry in Faison's record in April 2011, Ex. 55 at 173, reported no hallucinations or abnormal thought, but stated that at this time Faison again suffered from "encapsulated delusions."

Dr. Epstein acknowledged on cross examination that he had no experience in detention or correctional environments or understanding of the kinds of stressors that affect incarcerated persons. This lack of experience with the detention setting would have been a reason for a jury to find Dr. Epstein's opinions regarding Faison's "bizarre" behavior to lack context. The records themselves would have provided a reasonable juror strong reason to conclude that Faison's behavior did not reflect psychosis, but instead reflected antisocial behavior in a detention setting.

c. Impact of Dr. Patterson's Testimony

Defendant argues that, even if a jury rejected Dr. Epstein's opinion, it would have heard Dr. Patterson's testimony that Faison had an antisocial personality disorder and would have rejected Faison's testimony on the basis that he was a liar and manipulative. First, although the government represented at the post-trial hearing that it would have called Dr. Patterson at trial, this representation is speculative. For purposes of the court's analysis here, it cannot be assumed that Dr. Patterson would have been available or would have been a government witness. In any event, Dr. Patterson would have testified that Faison was not bipolar or hallucinating, but that he instead had an antisocial personality disorder, which is not a mental illness or disability, but rather a "personality style." Dr. Patterson testified that persons with antisocial personality

[13] Encapsulated delusions are fixed, untrue beliefs. They are not hallucinations.

disorder are manipulative and selfish and would lie, all volitionally. None of this would have supported the bipolar diagnosis or Dr. Epstein's opinion that Faison's behavior at the DC Jail was a product of psychosis, and would rather have supported a juror's conclusion that Faison was engaging in his various behaviors in order to get what he wanted at the jail, and in reaction to circumstances of his incarceration and criminal charges.

Dr. Patterson's opinions thus would have gone to Faison's character, not any mental illness affecting capacity to perceive. Although this might have persuaded the jury that Faison was not likable, or that he had a character for untruthfulness, it would not have persuaded a juror that Faison was ever psychotic. Dr. Patterson's testimony was based on a wealth of experience in forensic psychiatry and observation of people in detention settings, and the court concludes that a reasonable juror hearing it would have been even less likely to reject Faison's testimony on the basis of mental incapacity with respect to perception or reporting either in 2011 or in 2013 when he testified.

d. Independent Corroboration of Faison's Testimony

In addition, the court concludes that defendant has failed to establish that a reasonable juror who credited Dr. Epstein's diagnosis of Faison would have been bound to reject Faison's testimony. Dr. Epstein never opined that a person hallucinating in 2011 could not have later recalled accurately an actual conversation he had during that period. Here a reasonable juror would have had ample evidence upon which to conclude that whatever mental illness affected Faison in 2011 or over his lifetime, his testimony regarding defendant's statements was not a remembered hallucination.

Faison's testimony was substantially corroborated by other, independent evidence. Exhibit 12, the documents seized in the cell search, show that defendant complained in writing in

November 2011 that his property was not returned to him after he was moved from his general population cell to "the hole." Faison testified that he met defendant on October 25, 2011, when in "the hole" in cell 44, had been asleep and awakened to hear defendant, who was housed in the adjoining cell, complaining to a correctional officer that defendant had not been given his property when they moved him. Tr. 2/13/13 560-561. Faison noted that this failure to transfer property of prisoners placed in the hole was common, and that he interceded with the correctional officer at that time on defendant's behalf. That this interaction was a true perception and in no way affected by distorted perceptions, hallucination or psychosis is clear from the transcript itself and from the corroboration of this in defendant's own records.

The next thing Faison related was that the correctional officer left them, and defendant asked defendant whether a person named "Fontay" (sic), a person who was a close associate of defendant's brother, also was in the hole with them. The prosecutor noted without objection that defendant was smiling at Faison's reference to "Fontay" at this point. Lafonte Carlton, also known as "Fonte," was in fact a co-defendant of defendant's brother Kier Johnson and four others in the conspiracy and murder case known as the "14th and Gerard" case. *United States v. Lafonte Carlton, et al.,* 09-CF1-2319. Carleton was arrested in early 2009, and eventually charged in a number of superseding indictments with his codefendants. He was incarcerated at the DC Jail at the time of Faison's conversations about him with defendant. Faison testified that after defendant referred to "Fontay," he sent "Fontay" a "kite," which is the DC Jail term for unauthorized written correspondence transmitted from prisoner to prisoner within the jail, to confirm that Faison and defendant could trust one another. A reasonable juror would have had a strong basis to reject the claim that Faison's testimony regarding this conversation was a product

of hallucination and to find that this conversation actually occurred between defendant and Faison.

Faison testified that he and defendant interacted daily while in the hole until November 2, 2011, when Faison was moved to a different location. The government corroborated Faison's location within the jail and in the cell adjoining defendant's at the time. Faison testified that defendant introduced himself by a nickname "Gotti," and other trial witnesses established that defendant was known by that nickname.

While in adjoining cells in this period, Faison testified that defendant and he discussed among other things, defendant's baby's mother "Shade", (*sic*, Tr. 2/13/13 at 567), who was a real person and whose name was spelled "Sade" according to mail matter in defendant's Exhibits, *see eg*. Ex. 12, and other witness testimony. Deputy United States Marshal Chris Coles testified at trial that one place he searched for defendant while his arrest warrant was pending was an address on 14th and Gerard Street, N.W., the home of Sade Stevens, who identified defendant as a former boyfriend, and which was defendant's address of record on his driver's license. When Coles ultimately arrested defendant at defendant's aunt's home in Maryland, Sade Stevens was there. A juror would reasonably reject an expert opinion that Faison's testimony regarding defendant's statements about his baby's mother was a product of hallucination.

Faison's testimony that defendant told him he went to an aunt's house after the murders, Tr. 2/13/13 at 576, also was firmly corroborated by other evidence at trial. There was no evidence that Faison could have known this other than from defendant. It is notable that the arrest warrant and affidavit listed only defendant's mother's Fairmont Street address as defendant's. Defendant also told him he had considered fleeing to Florida but rejected that idea because it would be the first place authorities would look for him. *Id*. at 576. Deputy Marshal

Coles testified at trial that he had gotten a "lead" on defendant's whereabouts that he could be found in Miami Florida, went there but did not locate defendant there.

Faison testified that he and defendant both opened up to one another about their cases. Specifically, Faison testified that defendant related he had shot two people, not one, that he had shot the second person to prevent there being a witness, and that the shooting had occurred in a location he called "thirty five double 0" Tr. 2/13/13 at 574. There was and is no evidence that Faison had reason to know that defendant was charged with a double murder, or where it occurred. He testified he was not from that area and only knew of "3500" as referring to a building "uptown." In fact, "3500" referred to the apartment building 3500 14th Street, NW, a block from Pigeon Park where the fight between Kennedy and defendant occurred and was the name used to describe the neighborhood encompassing the blocks where the fight and both shootings occurred, as corroborated by numerous witnesses. Faison testified that defendant stated he was concerned about cell phone evidence in possession of the government. The government's evidence in fact included cell phone evidence which defendant knew at the time, and there was no evidence Faison knew this independently.

Faison's testimony, including the specific and unique nature of the details related and their corroboration at trial, were strong evidence before the jury that Faison was speaking from actual experience hearing defendant's words, and not from a recollection of a recalled auditory hallucination. Faison testified on direct and cross examination that he did not know defendant prior to their October 2011 meeting and that he knew none of his family other than that he "knew of" defendant's brother and had read none of defendant's case materials. *Id.* at 586. There is no evidence to the contrary.

For all of these reasons, the court concludes that the defendant has not established a reasonable probability that a jury presented with all of the proffered impeachment regarding Faison's mental health and behavior would have rejected Faison's testimony on the basis of mental illness or disability affecting perception.

2. Information Regarding Faison's Cooperation

Defendant argues that the government withheld information regarding the extent of Faison's cooperation with the government pursuant to his cooperation agreement, including information that Faison reported confessions made to him by others at the DC Jail, and other impeaching information, in violation of *Brady*. The government maintains that its disclosure of information at trial regarding Faison's cooperation met the strictures of *Brady* and *Giglio v. United States,* 405 U.S. 150 (1972).

Defendant argues that, had the government more fully disclosed details about Faison's cooperation with the government, this information would have been used to impeach Faison, first, as to the breadth of the cooperation, in that Faison cooperated against numerous persons in numerous cases, and second because Faison was reporting that many of the persons against whom he was providing information had confessed to him at the jail or elsewhere. Defendant argues that the similarity of Faison's reports as to numerous persons' jailhouse confessions is evidence of "corruption bias," and that, had it been fully presented to a jury, the outcome would have been different. *See, Longus v. United States*, 52 A.3d 836, 852 (D.C. 2012); *Vaughn v. United States*, 93 A.3d 1237, 1266 n.33 (D.C. 2014).

a. Scope of Faison's Cooperation

The scope of Faison's cooperation with the government as of the time of defendant's trial is summarized in an email sent by AUSA Laura Bach to defense counsel in the case referred to

as the *Spriggs* case, *United States v. Spriggs, et al.,* 10-CF1-12705, on February 12, 2013, stating in bullet form the cases in which Faison was cooperating, along with general description of his cooperation in other matters without identifying the cases. *See Government's Response to Defendant's Post-Hearing Brief* at 14, *citing Defendant's Supplemental Motion for New Trial*, Ex. 34. The defense relies on this email (hereinafter the "Bach email") and additional discovery post-trial in support of the assertion that Faison cooperated against "at least **twenty** separate defendants in at least **thirteen** different cases," *Defendant's Reply in Support of Post-Hearing* Brief at 6 (emphasis in original).

Among the cases as to which Faison provided cooperation was the case in which Faison himself was charged, involving nine persons, referred to in the Bach email as the "Circle defendants." The case was referred to in these proceedings as the *McCrae* case below, *United States v. Marcellus McCrea, et al.,* 10-CF1-4749, and as the *Parker* case post trial. *United States v. Timothy Parker, et al.,* 10-CF2-12342. The *McCrae* case went to trial in 2012, before defendant's trial. Faison pleaded guilty mid-trial pursuant to the plea agreement disclosed to the defense in this case and provided information and testimony against his codefendants. The four "Avenue" defendants, against whom Faison also provided information according to the Bach email, were rivals of the "Circle" defendants, and Faison's cooperation against them was part and parcel of his testimony and cooperation in the *McRae* case. Thus, in the *McRae* case alone, it appears that Faison provided information concerning thirteen persons.

Faison also was scheduled to testify in a trial that was to occur after defendant's trial, referred to during this proceeding as the *Spriggs* case. *United States v. Spriggs, et al.,* 10-CF1-12705. The *Spriggs* trial involved three defendants and the government asserts that an additional defendant pleaded guilty prior to trial.

Not specified in the Bach email was that Faison testified in the grand jury regarding the "14th & Girard" case, the street gang and multiple murder case in which defendant's brother, Kier Johnson, along with Lafonte Carlton and four others, were charged and in which the search warrant for defendant's cell was issued. Including Faison's cooperation against defendant in this case with all of the above matters, the number of persons as to whom Faison provided information totaled approximately 19. The remaining cooperation provided by Faison as summarized in the Bach email involved six other unspecified murders, two of which would have been those which defendant was charged with in this case, and an obstruction of justice that was never further identified, *see Government's Response to the Defendant's Post Hearing Brief* at 14.

The number of persons against whom Faison provided cooperation or information as encompassed by these matters thus appears to be approximately twenty, as the defense claims, and encompassed numerous murders, and other offenses and cases.

b. Sufficiency of Disclosure

Defendant claims that the government failed to disclose that Faison provided cooperation against 20 persons in thirteen separate cases. The government disagrees, and asserts that it provided sufficient information to satisfy its disclosure obligation pursuant to *Brady* and *Giglio* as to substantially all of the persons and matters as to which Faison had cooperated. Defendant further claims that the government withheld information that Faison claimed that many of the persons against whom he provided information had confessed to him at the jail. The government argues that in fact trial counsel was aware that Faison was reporting other jailhouse confessions. The court finds that the government did sufficiently disclose all of this information to trial counsel.

The court has had difficulty identifying the specific documents and information turned over to the defense in satisfaction of its *Giglio* obligations at trial. The parties disagree as to what documents and information the government turned over to the defense in defendant's case prior to trial in satisfaction of its *Giglio* and *Brady* disclosure obligations regarding Faison. The government represents in this post-trial proceeding that it turned over to the defense prior to trial, Faison's plea agreement and plea transcript, and a transcript of his grand jury testimony in defendant's case. In addition, the government asserts that the transcript of Faison's trial testimony in in *United States v. Marcellus McCrea, et al.,* 10-CF1-4749, the case in which Faison was charged and started trial as a co-defendant, pled guilty mid-trial and testified against his co-defendants, which preceded defendant's trial by a half-year, was publicly available to defendant, and put defendant on notice of the full extent of his cooperation in that case. This proffer is unrebutted, and apparently undisputed, by the defense since the material was raised in Ms. Brown's cross examination of Faison.

The government further proffers that it disclosed a copy of a discovery letter sent in June 2012 by the government to defendants in the *McRae* case detailing information about Faison's history and cooperation in other matters,[14] and a transcript of Faison's grand jury testimony in the "14th and Girard" case, the case in which defendant's brother was charged and in which the warrant for the search of the defendant's cell was issued. *Government's Response to the Defendant's Post Hearing Brief* at 13. The defense disputes these representations, asserting that there is no "evidence" that these items were disclosed. *Defendant's Reply in Support of Post-Hearing* Brief at 7-8.

[14] This letter is Attachment W to the *Government's Opposition to Defendant's Supplement to Motion for a New Trial*. It was authored by AUSA Laura Bach, trial counsel in the *McRae* case. It was identical in content to the email sent to counsel in the *Spriggs* case, referred to *supra* as the "Bach email," in which Faison was a trial witness three months after Faison testified in defendant's trial.

The court has reviewed the docket of this case and there are in fact no docketed Notices of Filing prior to or during the defendant's 2013 trial that establish or make a record of what specific documents or information were provided to the defense as *Giglio*[15] or other disclosure regarding Faison or any witness by the government at trial. Nor did the government make an oral record of its disclosures at trial. Defendant does not dispute that the defense was provided with information and documents reflecting Faison's plea of guilty mid-trial in the *McRae* case, his plea proceeding and written plea and cooperation agreement, the potential sentence he was facing and his grand jury testimony against defendant. Trial counsel's cross examination of Faison, discussed more fully below, makes clear that the government provided documents and information to the defense beyond these items, but it appears that whatever disclosure was made was handed over without memorialization. The government represented in this proceeding that it was relying on the contents of the government's trial file in making its proffer as to what had been turned over. *Id.* at 7, n.8.

The court finds that the record that has been made on the question of what was turned over, derived from the submissions of the parties, the entire record of this matter, and the content of Ms. Brown's cross examination, discussed more fully below, supports the government's proffer as to its disclosure regarding the scope of Faison's cooperation. The government's proffer as to what was disclosed has not been rebutted by counter-proffer by the defense, which bears the burden in this proceeding, either from the defense review of defense counsel's trial file it obtained in this proceeding, or any inquiry of trial counsel herself. Defendant's claim that the government's proffer is incorrect is speculative.

[15] *Giglio v. United States*, 405 U.S. 150 (1972).

The court finds that defendant's trial counsel were informed of Faison's cooperation and provision of information in the matters described above, amounting to disclosure regarding close to twenty persons. Faison's cooperation against nine persons in *McRae* was fully disclosed to trial counsel in this case. The transcript of his testimony was, as the government asserts, public record and available to trial counsel prior to defendant's trial. Because it was incorporated into his provision of information and testimony in *McRae,* Faison's cooperation against the four "Avenue" defendants also was disclosed to defense counsel. The disclosure of Faison's grand jury transcript in the "14th & Girard" case covered the fact that Faison provided information regarding six more persons. As is discussed more fully below, defense counsel explored Faison's cooperation in these cases on cross examination.[16] These cases encompassed numerous murders and other offenses. Finally, of course, defendant's case accounted for one more person and two more murders.

The court thus finds that the information the government provided prior to trial revealed the scope of Faison's cooperation against numerous persons, and in numerous murder investigations, such that any undisclosed details were not material, in that defense counsel was in a position to impeach Faison at trial on the scope of his cooperation.

The defense further argues that Faison provided information that many persons confessed to him, in many instances at the jail, and that the full extent of these reports was undisclosed. The court finds that the defense was apprised that Faison had testified or would testify that numerous persons at the jail with him and elsewhere had made self-incriminating statements. In the *McRae* case alone, it is correct that Faison testified that his former co-defendants had all

[16] The court will not speculate as to counsel's strategic decisions in proceeding with cross examination, but notes that counsel covered all of the major matters in which Faison was providing information, and that the only matter she did not explore was the 14th and Girard Street investigation, in which defendant's brother was a defendant.

made self-incriminating statements to him, many or most at the jail. This testimony was available to the defense and the court finds based upon the content of the cross examination that it was known to the defense. Defense counsel elicited at trial on cross examination that Faison had cooperated against his codefendants in his own case. Tr. at 603. Defense counsel elicited from Faison on cross examination the fact that he was "testifying in several cases that inmates at the jail confessed to you." Tr. at 600, 602. During a bench conference, the government disclosed that Faison had provided information and testified, or would be testifying, that other inmates at the jail had confessed to him in three different cases. Tr. at 599-600. The court finds that the government's disclosure to trial counsel of the nature of the information Faison provided against others and the fact that Faison had reported many statements made to him at the jail and in other settings was sufficient to put counsel in a position to explore "corruption bias" on cross examination, and that counsel did do so.

In addition, the jury was aware of Faison's plea agreement and cooperation, his guilty pleas to second degree murder, conspiracy to commit murder, obstruction of justice and an unrelated assault Faison committed while at the DC Jail. Tr. at 580. Jurors were informed that Faison was a crew member, that his conspiracy involved a murderous dispute with the "Avenue" crew, *id,* and that he was hoping to get out of 70 years in prison in exchange for his cooperation in numerous matters. Tr. At 603. They were aware that he pled guilty in the middle of his own trial, indicating the *McCrea/Parker* case, and cooperated against codefendants in his own case, unrelated to the defendant's case, and was scheduled to testify in other upcoming cases, indicating the *Spriggs* case. Tr. at 582, 599. In addition, the defense elicited on cross examination that Faison claimed to have heard defendant's statements to him though they were not in the same cell, were separated by a wall, and conducted through the toilets, from which

Faison testified they both removed all the water and put their faces in to communicate through the pipes for privacy. Tr. at 589. Thus, the matters that the defendant now claims he would put before the jury by impeachment using the undisclosed material were, in all material ways, presented to the jury by impeachment and other means at defendant's trial.

For all of these reasons, the court concludes that the defendant has not met his burden to establish that government's disclosure to the defendant at his trial of information concerning Faison's cooperation failed to satisfy the requirements of *Brady* and *Giglio*. Defense counsel aggressively cross-examined Faison utilizing the disclosed materials and information to impeach him. The court concludes that any undisclosed information was not material to the outcome of the trial.

3. Weight of the Evidence

To the extent that the government withheld documents and information regarding Faison's mental health and the extent of his cooperation, and the other material identified by defendant, the court finds that the government's failure to disclose the information at issue was not material under *Brady*. The government presented overwhelming evidence proving defendant's guilt of the charged offenses at trial. Even if the defendant's proffered use of the undisclosed impeachment material caused a jury to reject Faison's testimony, there is no reasonable probability that the outcome of the trial would have been different.

The government presented overwhelming evidence of motive to kill and identity, including through presentation of numerous eyewitnesses who identified defendant as involved in both the June 21, 2011, shooting and the July 9, 2011, double murder and shooting of the surviving victim. The evidence established that defendant had an ongoing dispute with a group that included the two murder victims, Dominique Barbour and Jimmie Simmons, and the

surviving victim, Anthony Thomas. All three victims were from the 3500 14th Street, NW neighborhood known as "3500," or 3500 14th Street, NW, which included the swath of 14th Street spanning Otis Place, Parkwood Place, Spring Road and Spring Place. On June 21, 2011, defendant encountered Nick Kennedy, an associate of Barbour, Simmons and Thomas, in a park at 14th and Otis Place, known in the 3500 neighborhood as "Pigeon Park," and the two got into a fist fight. Defendant sustained a bloody cut to his face in that fight. Later that night defendant went to Kennedy's block, the 1500 block of Spring Place, a location where Barbour and Simmons also were known to stay, and told Kennedy and others that "it ain't never over." Defendant returned a short time later that night with associates and fired at least ten shots at Kennedy, Barbour and others who were on the block. Kennedy testified at trial and identified defendant as the person who fought him and later came to Spring Road and fired shots.

Darius Young lived in the 1500 Block of Spring Place and testified that Dominique Barber and Jimmie Simons lived on the block as well. He knew Anthony Thomas from the neighborhood. He also knew Nicholas Kennedy from the neighborhood. He knew defendant from the area and had gone to the same elementary school with him and with defendant's brother but was not close with him. On June 21, 2011, he saw Kennedy with his eye messed up and Kennedy told him that defendant had caused the injury. Later that night, Young was in the 1500 Block of Spring Place and defendant came to the block with two others. Defendant and Barbour exchanged words. Young heard one of his own friends say "we thought this was over," and defendant or one of the others in his group state that "this shit ain't over." Defendant and his friends left the block and Young went into his house. Later that evening he heard gunfire on the block but did not see the shooting.

Among the shell casings recovered from the June 21, 2011, shooting scene were numerous casings fired from a .10 millimeter semi-automatic firearm. The fact of the fight in the park, the injuries to defendant and Kennedy resulting from it and the June 21 Spring Place shooting were corroborated by other witnesses, and a large amount of video and physical evidence.

Eighteen days later, at 5:30 a.m. on July 9, 2011, a group of persons including defendant were playing an all-night craps game that frequently gathered in the 1400 block of Parkwood Place, NW. At about 5:35, Stephen Harden, who knew defendant and knew the victims, Barbour, Simmons and Thomas, rode into the 1400 Block of Parkwood Place on his bicycle. He encountered Barbour, Simmons and Thomas at the corner of 14th and Parkwood, then rode down Parkwood, observed the craps game going on mid-block, observed defendant participating in the craps game, rode by twice and then heard gunshots and fled. Harden identified defendant at trial as the person he knew and who was participating in the craps game, and his presence riding through the block on his bike was corroborated by surveillance video recovered from the corner of 14th and Parkwood.

Richard Shores, who knew Barbour, Simmons and Thomas, also testified that he went to the 1400 Block of Parkwood at about 5:30 a.m. He went to a location mid-block where there was a craps game going on. He observed that in the group playing craps there was a person whom he did not know, whom he referred to at trial as the "stranger." After he arrived, Barbour, Simmons and Thomas arrived at the location of the game, which was just about to end. Shores stood between two parked cars by the craps game talking to Barbour, with whom he was exchanging some movies for drugs, and observed as Simmons stood nearby on the sidewalk talking to the "stranger." Shores testified that he then heard gunshots but did not see who fired,

but saw Barbour and Simmons wounded on the ground, saw the "stranger" cross the street away from the bodies then return to them, looking at them and the surrounding scene, and then walk away from the scene. Shores later was shown a photo array and selected a photo of defendant as being the one who most closely resembled the shooter. He told a detective afterward that the person in the photo he selected in fact was the shooter on July 9.

Witness James McEachern testified that he spoke with Shores on 14th Street and Spring Road the morning after the murders and that Shores told him that he had been on the scene of the murders and had seen "Irvin" shoot Barbour and Simmons.

.10 millimeter shell casings from the murder scene were recovered, and a firearms examiner testified that the casings fired on the July 9 murder scene were fired from the same .10 millimeter firearm that expelled the casings found on the June 21 shooting scene.

The government also presented strong evidence of consciousness of guilt. After the murders, defendant, who lived on 14th and Fairmont Streets, NW, in both his mother's and his girlfriend's apartments and gave those locations as his addresses, was no longer seen in that neighborhood or around the 14th and Parkwood neighborhood. With the assistance of his girlfriend, Sade Stevens, he moved from place to place in July and August. Defendant's Aunt, who lived in Lusby, Maryland, testified that defendant showed up at her house without any notice to her in the last week of August 2011 with his girlfriend at approximately 10 pm when she was asleep. She had never met defendant's girlfriend. She had last seen defendant six years earlier. On September 9, 2011, defendant was arrested by police at her home after they surrounded the house. When US Marshals arrived, defendant attempted to flee out a window, but was ordered to return inside the home.

Defendant also was required to meet with a probation officer eight times per month beginning in May 2011. His probation officer, Ms. Lopez, who was allowed only to testify that she was a federal employee to whom defendant was required to report on pain of arrest, testified that defendant reported to her regularly in May, June and early July about 13 times. He gave her a new phone number on July 6, 2011, and then on July 11, two days after the murders and the last time the defendant reported to her as directed, he directed her to return to his old phone number. At the July 11 meeting, defendant was wearing a hat and sunglasses, contrary to policy, and when Ms. Lopez asked him to remove his glasses, he spent the meeting looking down at the ground. He did not report to his next required meetings on July 12 or 13, or thereafter, and became a loss of contact until his date of arrest in September 2011.

Uninvolved witnesses, police witnesses, video evidence, cellphone evidence and physical evidence from the scene corroborated the time of the murders, the locations of the victims after they were shot as described by the government's eyewitnesses, defendant's presence in the areas of both shootings, the location of the craps game, the location and intended victims of the shooting and the other details provided by the identifying witnesses.

The defendant argues that the fistfight in the park on June 21 did not provide a credible motive to kill. Defendant himself established that it did, by hunting Kennedy down on Spring Place the same night, stating it "ain't never over," and firing approximately 10 shots at him and Barbour, who was with Kennedy at the time. Defendant argues that the eyewitness testimony from Parkwood Place was weak, but the court disagrees. There was no evidence that the identifying witnesses had animosity toward him or a reason to lie about defendant's involvement.

The defendant's identity as the shooter also was corroborated by the firearms evidence that the gun fired on June 21, 2011, on Spring Road was the gun that fired in the July 9 shootings

on Parkwood Place. Defendant's flight from the neighborhood and other behavior indicating consciousness of guilt also was powerful corroborating evidence. The jury thus had overwhelming evidence upon which to find beyond a reasonable doubt that defendant was guilty of the charged offenses, without Faison's testimony.

The defense has asserted that the fact that Faison was disciplined for having a cellphone was information that should have been disclosed at trial and would have been evidence Faison had access to information from outside the jail. This would have added little to evidence he had access to information from others. Faison himself testified he was in communication with others by "kite," and with or without a cellphone would have had access to the jail's phones. In addition, defense counsel elicited on cross examination that Faison had access to television, radio and newspapers, and suggested that there had been news coverage of the murders on Parkwood, although Faison denied knowing that. Tr. 2/13/13 at 90.

4. Materiality

For all of these reasons, the court concludes that the defendant has failed to establish that he is entitled to relief pursuant to the holding in *Brady v. Maryland* and its progeny, as a result of the government's failure to disclose the DC Jail records in Exhibit 55, the other records concerning Faison's mental health evaluations, his conduct at the DC Jail and additional details of Faison's cooperation prior to his trial testimony, because there is no reasonable probability that, had the defense presented to the jury the proffered expert testimony, impeachment of Faison and records, the outcome of the trial would have been different.

III. Cumulative Effect

Finally, the court concludes that, cumulatively and taken together, the claimed ineffectiveness and *Brady* violation did not alter the outcome of the trial.

CONCLUSION

For all of the foregoing reasons, the court will deny defendant's Motions for New Trial.

Accordingly, it is this 24th day of September 2020, hereby

ORDERED, that defendant's Motion for New Trial, filed on February 12, 2016, is **DENIED** as to all remaining claims; it further is

ORDERED, that defendant's Supplemental Motion for New Trial, filed on November 8, 2017, is **DENIED.**

LYNN LEIBOVITZ
ASSOCIATE JUDGE
(signed in chambers)

Copies to:

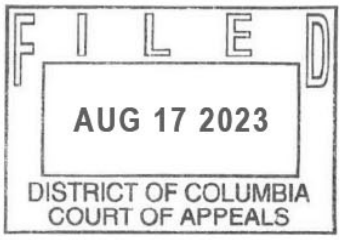
Margaret Chriss
Pamela Satterfield
Special Proceedings Division
United States Attorney's Office

Jeffrey Green
Joshua Fougere
Counsel for Defendant

ATTACHMENT 1

APPENDIX C

District of Columbia
Court of Appeals



Nos. 13-CF-0493, 17-CO-0422 & 20-CO-0609

IRVIN HARRIS JOHNSON,

Appellant,

v.

2011-CF1-017540

UNITED STATES,

Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith, Easterly, McLeese, Deahl, Howard,* AliKhan* and Shanker, Associate Judges, and Fisher,* Senior Judge.

O R D E R

On consideration of appellant's petition for rehearing or rehearing en banc, and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED by the merits division* that appellant's petition for rehearing is denied. It is

FURTHER ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM

Copies emailed to:

Honorable Lynn Leibovitz

Director, Criminal Division

Copies e-served to:

Morgan Branch, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

APPENDIX D

Nos. 13-CF-493, 17-CO-422 & 20-CO-609

DISTRICT OF COLUMBIA
COURT OF APPEALS

IRVIN H. JOHNSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Consolidated Appeals from the Superior Court for the District of Columbia
Criminal Division, No. 2011-CF1-17540
Honorable Lynn Lebovitz

APPENDIX TO THE BRIEF OF APPELLANT IRVIN H. JOHNSON
(Appointed Counsel Appendix (See Rule 30(f)))

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Criminal Action Number:
	:	2011-CF1-17540
IRVIN H. JOHNSON	:	
	:	
Defendant.	:	

Washington, D.C.

Tuesday, February 19, 2013

The trial in the above-entitled action was resumed before the Honorable LYNN LEIBOVITZ, Associate Judge, and a jury duly-impaneled and sworn, in Courtroom Number 213, commencing at approximately 9:53 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:

GLENN KIRSCHNER, Esquire
ERIN LYONS, Attorney-at-Law
Assistant United States Attorneys

On behalf of the Defendant:

LIYAH BROWN, Attorney-at-Law
MARO ROBBINS, Esquire
Public Defender Service
Washington, D.C. 20004

because he was found there on September 9, two months after the murders.

The Defendant also tells Curtis about how he is worried about the evidence, the cell site evidence in particular, evidence that, as you heard, links him or puts him in the relevant spots for all the relevant incidents in this case.

We also know that the Defendant is worried about the evidence in the note that was found in his jail cell. And this is Exhibit 458, that you will have back with you. And it shows that he is familiar with some of the relevant details.

On the left side of the note, it says: "That beef was SQ." That beef was squashed. He knows that there was a beef.

Now, you heard Detective Brigidini testify that in November of 2011, there was a preliminary hearing in this case, in which Detective Brigidini testified about, among other things, a description of the assailant and other evidence in the case. And the Defendant was present for that hearing.

Now, one thing Detective Brigidini testified about was hat and glasses. As you recall, this is something that we talked about with Mr. Shores. He said that the assailant was wearing a hat and glasses. He was

wearing those two things, but those didn't affect his ability to see the person that day. And we know that the Defendant actually does sometimes wear personality glasses. There's a photo that you will have back in the deliberation room with you that was found in the Fairmont Street apartment, showing the Defendant wearing personality glasses.

But what's interesting about this note is that the Defendant's writing about the shooter, and he's referring to that individual in the first person: I, I, me. And you have to ask yourselves, if you were innocent, you were not the shooter, would you be referring to the shooter in the first person?

After the shooting on July 9th, the Defendant goes on the run, immediately after the shooting on July 9th, before the warrant is issued -- that doesn't happen until July 23rd -- before the Defendant's photo is in the paper. That doesn't happen until August 11th.

On July 10th, the Defendant dumps his cell phone. There's no more records for the number he has been using than those that you will receive. They end -- the calls end, I think in the middle of the day on July 10th of 2011.

July 11th of 2011, the Defendant reports to Ms. Lopez, the government official he needs to see, but

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES, Plaintiff,	:	Criminal Action No. 2011 CF1 17540
v.	:	
IRVIN JOHNSON, Defendant.	:	

Washington, D.C.
June 15, 2018

the above-entitled action came on for a hearing before the Honorable Lynn Leibovitz, Associate Judge, in Courtroom Number 102, commencing at 11:30 a.m.

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

APPEARANCES:

On behalf of the Government:

Pamela Satterfield, Esquire
Assistant United States Attorney

On behalf of the Defendant:

Spencer Driscoll, Esquire
Morgan Branch, Esquire
Washington, D.C.

NICOLE SESTA (202) 879-1484
Official Court Reporter

THE COURT: Are you asking was he there when it was done?

Q Who signed this affidavit?

THE COURT: If it's stuff that's on here that we can all agree to he doesn't have to testify about it.

MR. DRISCOLL: Understood.

THE COURT: It's stuff within his personal knowledge.

BY MR. DRISCOLL:

Q Was this affidavit raised at your detention hearing, Mr. Johnson?

A Yes.

Q And after your detention hearing did you meet with your attorney, Liyah Brown?

A Yes.

MS. SATTERFIELD: Objection. Assumes facts not in evidence, Attorney Liyah Brown. I think we're dismissing foundation.

THE COURT: Overruled.

Q Did you meet with your attorney after this detention hearing?

A Yes.

Q What did you discuss?

A The issues with the arrest warrant affidavit.

Q And what did you do after that meeting?

A Draft a legal note in reference to the arrest warrant.

THE COURT: I need you to keep your voice up and maybe put the mic towards you. Thank you.

Q I'm now showing you Exhibit 2, which at trial was admitted as Exhibit 458. Do you recognize this?

A Yes.

Q What is it?

A A legal note I drafted.

Q So you indeed wrote these?

A Yes.

Q And in general terms can you describe what is in these notes?

A People I wanted to investigate and questions and comments I had for my attorney.

THE COURT: People you wanted to investigate and questions and comments?

THE WITNESS: People I wanted to have investigated, questions and comments I had for my attorney at the time.

BY MR. DRISCOLL:

Q As you wrote these were you commenting on or referencing anything in particular?

A Yes.

Q What was that?

A It was issues that was in the arrest warrant

affidavit.

Q When you say arrest warrant affidavit, you're referring to Exhibit 1 that you have before you?

A Yes.

Q Let's pause there and consider the two documents together to make the record clear on this. Did you use that arrest warrant affidavit as you wrote your legal notice?

A Yes.

Q You list June 20th here on the left in one of the boxes; is that correct?

A Yes.

THE COURT: Are you asking him whether it's correct he put that there?

Q Is that a correct representation of what you intended to put there?

A No, I meant to put June 21st.

Q And you list some names down at the side here. Can you explain some of these? Who is Jay Rock?

A Juwan Johnson.

Q Woo?

A Darrell Whiler.

Q Burke?

A Eric Morris.

Q Kai?

A My cousin, Kayvon Glover.

Q D-Tay?

A Deante Bethea.

Q What is the reason for writing these names down?

A People I wanted my investigator to talk to.

Q And in the year before trial and after you wrote these notes did you speak with your attorneys about these individuals?

A Yes.

Q And, again, please tell the Court who did you make these notes for?

A My attorney at the time, Liyah Brown.

Q Why did you prepare these notes, what was your purpose and intent?

A Because every time I have a legal visit I always forget questions and wanted to ask her something. I just wanted to jot some notes down.

Q What happened shortly after you started writing these notes?

A The detectives came and they raided my cell.

THE COURT: When you say -- when you ask questions can you put actual dates into them, please?

MR. DRISCOLL: Sure, yes.

THE COURT: Because shortly doesn't help me that much. So he wrote notes down. Have you asked him when this note was made?

MR. DRISCOLL: Yes, I'll clarify that for the record, Your Honor.

BY MR. DRISCOLL:

Q Your detention hearing was in November 2011, correct?

A Yes.

Q And then shortly --

THE COURT: That had an actual date though, right?

Q Yes. November 18, 2011, correct?

A I believe so.

Q And then you met with your attorney, Mr. Liyah Brown, on December 2, 2011, does that sound accurate?

A Yes.

Q After this meeting is when you say you wrote these notes?

THE COURT: So are you giving -- are you asking him how long after meeting her or is that not something you want me to know?

MR. DRISCOLL: I'm getting to that, Your Honor.

Q After this meeting with Ms. Brown how long after that did you write these notes?

A I'm not sure offhand.

Q What happened after you, shortly after you started writing these notes?

A Detectives came. They raided my cell and took my

property.

THE COURT: When you say shortly after, are you saying it was the same day that you wrote the notes that the detectives came or a different day after that?

THE WITNESS: It was somewhere. I'm not sure exactly.

THE COURT: You're not sure?

THE WITNESS: No.

THE COURT: You could have written the notes and it was the next day or three days later or five days later or a week later?

THE WITNESS: Yes.

THE COURT: You have no idea?

THE WITNESS: I have no idea.

BY MR. DRISCOLL:

Q When they came and took these notes from your cell did they leave any of your things behind?

A Yes, they left my arrest warrant affidavit.

Q And did they give you anything?

A They left the search warrant.

Q Did you let your attorney, Ms. Brown, know about what happened?

A Yes.

Q Can you tell us how you first let her know?

A It's protocol that we have. I have to call and let

her know if I wanted to see her and let her know it's urgent.

Q Can you describe how you made that call?

A I called from a case manager's phone and left a message.

Q You left a message for Ms. Brown?

A Yes.

Q Did she come to meet you?

A Yes.

THE COURT: I'm sort of back at you're not telling me times. I have to assume you're doing that on purpose.

MR. DRISCOLL: No, Your Honor.

THE COURT: I find it important.

BY MR. DRISCOLL:

Q Shortly after you wrote these notes, the notes were seized, correct? Do you remember what date those were seized?

A No.

Q Does the date December 22, 2011 sound accurate?

A I know it was in December because I seen her after the holidays.

MS. SATTERFIELD: Objection, leading.

THE COURT: Overruled. You have been leading but on this subject I'm asking you to elicit, if you can, his knowledge of the timing.

Q When did you meet with Ms. Brown?

A Sometime in January.

Q January 2012?

A Yes.

Q And during this visit what did you discuss?

A I gave her the search warrant and told her that they took my property and -- I told her that they left a search warrant and they took a legal note, my property.

THE COURT: Took a what?

THE WITNESS: A legal note I drafted in my property.

Q More generally beyond this meeting in January of 2012, did you have other conversations with Ms. Brown about the topics discussed?

THE COURT: Honestly I really want you to put time frames on your questions. That's what I'm saying.

MR. DRISCOLL: Okay.

THE COURT: Thank you.

BY MR. DRISCOLL:

Q After this January 11th -- do you remember when this meeting occurred?

A I don't remember the date.

Q But January 2012?

A I know it was sometime after I got indicted.

Q After the January 2012 meeting were there conversations that you had with Ms. Brown about the topics in your notes between that January 2012 meeting and trial?

A Yes.

Q How often did you speak with Ms. Brown about the topics in your notes?

A Every time we had a visit.

Q And what about meetings with the PDS investigator?

A Yeah.

THE COURT: What was the question?

Q Did you also have meetings with the PDS investigator about the topics in your notes?

A Yes.

Q Going back here to this meeting in January 2012, you say you tell Ms. Brown about the notes and what did Ms. Brown tell you?

A She said don't worry about it, she'll take care of it.

Q Did you give Ms. Brown anything during this meeting?

A Yes.

Q What was that?

A The search warrant.

Q A copy of the search warrant?

A Yes.

Q Did you take any more notes after the government seized these notes?

A No.

Q Did this impact your trial preparation in any way?

A Yes.

Q Can you explain that a little more?

A It hindered my investigation because like I said, I was being brain locked when I do have questions to ask. So sometimes I just forgot.

Q After this January 2012 meeting did you discuss specifically these notes that you wrote, Exhibit 1, did you discuss these, sorry, Exhibit 2, did you discuss these again with Ms. Brown?

A Yes.

Q When did you discuss them next?

A Sometime after I got indicted.

Q And do you recall when that was?

A I want to say June.

THE COURT: You really need to speak up.

A I would like to say around June 2012.

Q Around June 2012?

A Yes.

Q And as best you recall at that meeting with Ms. Brown what happened?

A We was going through the discovery and I seen the note. I showed her this is what I was telling you about.

Q Let's move forward a little bit now to January 2013 before trial started. Do you recall Ms. Brown or Mr. Robbins ever talking with you again about the jail cell notes

specifically?

MS. SATTERFIELD: Objection.

THE COURT: So do you recall who?

MS. SATTERFIELD: He's adding.

THE COURT: Do you recall who talking with her?

MR. DRISCOLL: Your attorneys.

THE COURT: Ms. Brown and?

MR. DRISCOLL: And Mr. Robbins.

THE COURT: What's the objection?

MS. SATTERFIELD: We have not heard about Mr. Robbins yet. It assumes facts not in evidence.

THE COURT: It's a foundational question?

MS. SATTERFIELD: Correct.

THE COURT: Can you lay the foundation?

MR. DRISCOLL: Yes, Your Honor.

BY MR. DRISCOLL:

Q Who were your attorneys on this matter?

A Liyah Brown and Maro Robbins.

Q Do you recall meeting with your attorneys, Ms. Brown or Mr. Robbins -- fast forwarding a bit to January 2013, before trial started do you recall Ms. Brown or Mr. Robbins ever talking with you again about these notes that you drafted?

A No.

Q Did they speak with you about an attorney-client

privilege or work product objections specifically?

A No.

Q Did they ever discuss with you any decision not to raise a privilege or work product objection?

A No.

Q Moving forward a bit, Mr. Johnson, to the trial. It took place a month later in February of 2013. Do you recall what day the note was admitted?

A I believe --

THE COURT: That's a matter of record. He doesn't have to remember that.

Q How did you react when the Government first tried to introduce the note at trial?

A I was shocked. I wrote a note and passed it to Liyah Brown.

Q Do you remember specifically what you wrote in that note?

A I know it was basically reminding her about the time when I warned her about the note.

Q Mr. Johnson, I'm showing you what's been admitted as Exhibit 27. Do you recognize this?

A Yes.

Q What is this?

A It's a note that I wrote to Liyah Brown real quick at trial.

Q On the day you wrote this note did the Government use your jail cell notes that you wrote in any particular way that stood out?

A Yes.

Q Can you explain that?

A They blew it up on the poster board and used it as a confession.

MR. DRISCOLL: No further questions, Your Honor.

THE COURT: I just have a couple of questions just about the notes you wrote, so going back to Exhibit 2. I know you said some of this on direct but I wanted to go back over it. So, Jug, tell me who Jug is.

THE WITNESS: It's somebody I wanted to be investigated.

THE COURT: You don't know his real name?

THE WITNESS: No.

THE COURT: And you wanted him to be investigated why? What was it that he was going to add to the case or not add to the case.

THE WITNESS: They was saying there was a beef and there wasn't.

THE COURT: He would have said that?

THE WITNESS: That's what they were saying.

THE COURT: So the Government was saying that you had a beef but it was squashed?

THE WITNESS: But we had no beef.

THE COURT: You're saying you had no beef and Jug --

MR. DRISCOLL: Your Honor, I would object. We have a scope of the waiver argument here in terms of the discussing the reason behind drafting certain aspects of the note.

THE COURT: To the extent that I don't learn what he meant and why, I guess it's up to you to decide whether I should have that in the record.

MR. DRISCOLL: No, Your Honor. There are perfectly reasonable and absolutely legitimate questions to ask about the reason why he wrote these notes.

THE COURT: In my mind he could write Jug down because he's hoping Jug will bring him some money for his canteen the next time he visits him at the jail. So Jug could be on there for any number of reasons. Jug could be on there because I want him to call my mom. How am I supposed to know what's in his mind unless he tells me?

MR. DRISCOLL: The scope of the waiver, as the case law goes, is narrowly tailored to the --

THE COURT: That may be but what I'm saying is in my view the scope of the waiver goes to the reasons why he wrote what he wrote on this page, because you say it's central to my decision making what he intended by this note.

MR. DRISCOLL: Correct. The purpose and intent in

drafting the note itself.

THE COURT: I need to know why he wrote the word Jug down there, in other words, what his thought process is. What you're saying is the waiver I have ordered has taken place doesn't reach that. I disagree with you. So I can say out loud in my view the waiver here goes to his intentions and thought process as to why he wrote everything down on this page.

You're saying it was to talk to his lawyer about trial strategy. I want to know how it is that that's the case. If he wrote down Jug down there, maybe he wants Jug to bring him clean socks and soap the next time he comes to see him, then that wouldn't matter to me.

MR. DRISCOLL: Your Honor, the defense counsel's central concern here --

THE COURT: All I'm saying is are you objecting to his answering those questions? If it's on the basis of the waiver I'm overruling your objection. If you want me not to know that, the record will be he wrote a name down and has not given an explanation for why.

MR. DRISCOLL: We're objecting to disclosing any further reasons or trial strategy, why Mr. Johnson wrote specific individuals other than just the general question of what the purpose and intent behind drafting the note itself was.

THE COURT: I disagree with your definition of the scope of the waiver and I'm overruling your objection.

MR. DRISCOLL: Understood, Your Honor.

THE COURT: I guess what I can say is if you're saying he's not willing to answer those questions, I'm going to have to draw the inference that I draw from it.

MR. DRISCOLL: No, Your Honor, we will not say that.

THE COURT: So you're saying that Jug is somebody. Who is Jug? Tell me who Jug is.

THE WITNESS: I don't know his real name.

THE COURT: Why did you write his name down here?

THE WITNESS: I wanted him investigated.

THE COURT: About what?

THE WITNESS: They say right there the beef.

THE COURT: Put that mic facing your mouth. Tell me when you wrote Jug's name down on here who did you know him to be, from what neighborhood?

THE WITNESS: From my neighborhood.

THE COURT: Was he an associate of yours or somebody you had not been associated with in the past?

THE WITNESS: I know him.

THE COURT: Have you ever been to his house?

THE WITNESS: No.

THE COURT: Was he somebody who -- so you told me something about how you wanted him investigated because the

Government was saying you were having a beef?

THE WITNESS: Yes.

THE COURT: Was the Government in your mind saying you were having a beef with Jug or Jug's people?

THE WITNESS: Yes.

THE COURT: And so Jug was one of the people or in the group that the Government was saying you were having a beef with?

THE WITNESS: Yes.

THE COURT: You were saying you wanted your lawyer to investigate with Jug whether there was a beef going on?

THE WITNESS: Yes.

THE COURT: And so did you know how to get in contact with Jug at that point?

THE WITNESS: No.

THE COURT: Did you ever at any point explain to Ms. Brown who Jug was and what you thought Jug could do for your case?

THE WITNESS: Only partly because I don't know his name.

THE COURT: Did you ask her to try to find him?

THE WITNESS: Yes.

THE COURT: Did you know where he stayed even though you didn't know his name? I assume you knew where he stayed.

THE WITNESS: No.

THE COURT: You said you knew who his people were. Did you tell Ms. Brown who his people were?

THE WITNESS: Yes.

THE COURT: Who did you tell Liyah Brown his people were?

THE WITNESS: Chris Cuz.

THE COURT: So Chris Cuz is down here on this list also with Jug. And are you saying Chris Cuz and Jug were associates with each other?

THE WITNESS: Yes.

THE COURT: So the two of them are in the group you were suppose to be having a beef with according to the Government?

THE WITNESS: Yes.

THE COURT: What did you think Chris Cuz was going to be able to do for your case?

THE WITNESS: I mean we didn't have no beef.

THE COURT: And so did you ever tell Liyah Brown why it is you wanted her to talk to Chris Cuz?

THE WITNESS: I don't think so because they took the note. So I didn't discuss it with her.

THE COURT: But you just said you had seen the note again in discovery, so even if you had total amnesia by the time you had discovery you had the note back.

Did you talk to her at that time about wanting Chris

Cuz to be investigated for your trial?

THE WITNESS: I might have. I don't remember.

THE COURT: You don't remember. So is that because you decided that that was no longer a strategy you had for your trial to try and prove that there was no beef with these guys? What was the reason you wouldn't have sort of kept on that later on with her?

THE WITNESS: Yeah.

THE COURT: Yeah what?

THE WITNESS: That's why.

THE COURT: You no longer felt that was a trial strategy you had?

THE WITNESS: Yes.

THE COURT: And then J Rock, is J Rock the same as Walla or they're two different people?

THE WITNESS: Two different people.

THE COURT: Who is J Rock?

THE WITNESS: Juwan Johnson.

THE COURT: Who is Juwan Johnson?

THE WITNESS: Someone around the neighborhood.

THE COURT: Is he someone you were friends with or associates with?

THE WITNESS: Yeah.

THE COURT: And did you know where he stayed and how to locate him if you wanted to in the future?

THE WITNESS: Yes.

THE COURT: Did you ever in the future after this note got taken talk to Ms. Brown about talking to J Rock?

THE WITNESS: Yes.

THE COURT: What was it that you thought J Rock could do for you in your case?

THE WITNESS: Well, they had something about DNA.

THE COURT: Can you explain that to me?

THE WITNESS: You see the 4th of July was we was all out there gambling on the 4th of July and drinking and stuff.

THE COURT: What would J Rock have said about that?

THE WITNESS: That we was all out there on the 4th of July.

THE COURT: And you're saying that that would have explained the DNA in some way?

THE WITNESS: Yes.

THE COURT: How would it have explained it?

THE WITNESS: Because we was all out there drinking and hanging out.

THE COURT: So he would have been able to say he was out there with you and everybody was drinking and that's how your DNA got on something?

THE WITNESS: Yes.

THE COURT: And that's the 4th of July and that's not the date of the --

THE WITNESS: Yes, the 4th of July.

THE COURT: The 4th of July was the date of our offense?

MR. DRISCOLL: No, July 9th.

THE COURT: Got it. Walla, who is Walla?

THE WITNESS: Darrell Whiler.

THE COURT: Walla, W-A-L-L-A.

THE WITNESS: Yes.

THE COURT: Who was he to you at the time you wrote the note?

THE WITNESS: Somebody from the neighborhood.

THE COURT: Meaning a friend or associate of yours or like you and J Rock and Walla?

THE WITNESS: I mean he cool.

THE COURT: But not as close as J Rock?

THE WITNESS: Yeah.

THE COURT: What did you believe at the time you wrote the note that he would be able to do for your case?

THE WITNESS: Everybody in that box is the 4th of July. That's what it was for.

THE COURT: You're saying that Walla and J Rock and Scubba and Woo, were all four of them with you on July 4th and that was all about to explain how your DNA got on something?

THE WITNESS: Yeah.

THE COURT: Are Scubba and Woo friends of yours or associates of yours?

THE WITNESS: Yes.

THE COURT: So you're cool with them?

THE WITNESS: Yes.

THE COURT: And then Burke and D-Tay and his girl and Kai, who are all of them?

THE WITNESS: Eric Morris.

THE COURT: So Burke, is that a B you wrote down there?

THE WITNESS: Yeah.

THE COURT: And he's Eric Morris. And at the time that you wrote that what did you -- what was Eric Morris to you?

THE WITNESS: He's from the neighborhood.

THE COURT: And somebody who was either a friend or associate of yours or cool with you, no problems with him?

THE WITNESS: No.

THE COURT: So that's a yes, he was a friend or associate of yours?

THE WITNESS: Yes.

THE COURT: Was he real close to you or just someone you knew?

THE WITNESS: Somebody I knew.

THE COURT: Did you ever talk later -- what did you

think Burke would be able to do for your case?

THE WITNESS: It's a known gambling spot. Everybody gambled there.

THE COURT: So the block where the shooting happened was a known gambling spot?

THE WITNESS: Yes.

THE COURT: And then what about -- and is Kai a person, a separate person.

THE WITNESS: Yes.

THE COURT: Who is Kai?

THE WITNESS: Kayvon Glover.

THE COURT: For some reason I recognize that name but who was Kayvon Glover to you at the time?

THE WITNESS: My cousin.

THE COURT: What would Kayvon Glover have been able to do for your case?

THE WITNESS: Same thing, everybody in this box.

THE COURT: What about D-Tay?

THE WITNESS: Same thing, Deante Bethea.

THE COURT: And then finally whose girl are we talking about, who is his girl?

THE WITNESS: Bethea.

THE COURT: Do you remember her name?

THE WITNESS: No, that's why I just say that.

THE COURT: What would she have been able to say?

THE WITNESS: She used to be out there when we were gambling.

THE COURT: So for all these four people were you able to talk to Liyah Brown later about Burke, Kayvon Glover, and D-Tay and D-Tay's girl about how she should look into having them, you know?

THE WITNESS: We couldn't find Burke but I believe we found D-Tay and Kai.

THE COURT: So she actually followed up on those four people and looked for them?

THE WITNESS: Yes.

THE COURT: So Burke couldn't find, but did find D-Tay and Kai, is that what you're saying?

THE WITNESS: Yes.

THE COURT: And so remind me, did any of these people in these boxes testify at trial?

THE WITNESS: I think Chris Cuz.

THE COURT: Obviously I can remember myself by looking at the file. So now where it says that beef was squashed, you've explained that. And so right next to Jug and Chris Cuz where you wrote that beef was squashed, did you mean that was why you needed them?

THE WITNESS: Yes.

THE COURT: What was the point of where was the SC located and how many something did I or with someone else.

Can you tell me what that says and what that was supposed to mean?

THE WITNESS: It was shell casings.

THE COURT: Where were the shell casings located and how many, what's that word right there, how many?

THE WITNESS: Thracks.

THE COURT: What does that mean?

THE WITNESS: How many shell casings was out there?

THE COURT: The word thracks means what?

THE WITNESS: That's what I just put right there right, shell casings.

THE COURT: Thracks is a word for shell casings?

THE WITNESS: Yeah.

THE COURT: Never heard that one, okay. So you're saying where were the shell casings located and how many shell casings did I or was someone else. So what was the thing you were going to be discussing with your lawyer that was -- what was that note written for to say?

THE WITNESS: Basically like was it somebody else out there or was it me.

THE COURT: And then you wrote 4th of July also known and that's what you've already explained to me; is that correct?

THE WITNESS: Yes.

THE COURT: You wrote gambling spot in the hood from

Spring Road to the building to something is 3500. What does that say, to what?

THE WITNESS: I think Raymond.

THE COURT: And that's to explain what you told me, which is everybody is out there gambling?

THE WITNESS: Yes.

THE COURT: Now moving to, if I was supposed to have on a hat and glasses how could you recognize me. Who is the you you're talking about?

THE WITNESS: The thing was, my whole thing was if you have a picture of somebody and they supposed have a hat and glasses, you don't know them because it was obvious the guy didn't know me and he didn't know the suspect.

THE COURT: So what was the point of writing that down?

THE WITNESS: Because I know it wasn't me. So I'm trying to figure out -- I felt as though somehow he was coerced to say it was me for some reason.

THE COURT: What was the point of putting that on the paper?

THE WITNESS: It was someone I wanted to bring up with my attorney.

THE COURT: And then all my pictures from 2002 to 2008 I weighed 150 pounds. Why did you write that?

THE WITNESS: In here it say 5-11, 180 pounds. Most

of my pictures I was small and 200 pounds at the time. So that was the purpose.

THE COURT: So you were making the point that what?

THE WITNESS: Whoever the guy was it wasn't me.

THE COURT: So okay, you wrote this stuff down in your jail cell?

THE WITNESS: Yes.

THE COURT: Did you -- you testified that this was after the preliminary hearing and after you had first met with Liyah Brown after the preliminary hearing?

THE WITNESS: Yes.

THE COURT: Did you discuss the things on this note with her when you met with her after the preliminary hearing?

THE WITNESS: We discussed some things but that was the purpose of me jotting the note down.

THE COURT: So when you wrote this down at that time did you know in your mind when Liyah Brown was going to be meeting with you again after that?

THE WITNESS: I never knew.

THE COURT: You never knew?

THE WITNESS: No.

THE COURT: After writing these things down make any arrangements to meet with her, like through your case manager or anything like that?

THE WITNESS: No, I had to wait. I had to sign up

and talk to the case manager to get a phone call.

THE COURT: I'm asking did you do that after you wrote these notes down to schedule an appointment with Liyah Brown?

THE WITNESS: Yes.

THE COURT: So your case manager would be able to -- so I guess you're saying that after writing these notes you got your case manager to contact Ms. Brown?

THE WITNESS: No.

THE COURT: When after that did you make an effort to see Ms. Brown or did you actually communicate with her?

THE WITNESS: I'm not sure. I know I communicated with her.

THE COURT: So between writing this note and seeing her in January did you ask your case manager to contact her for you?

THE WITNESS: No, I asked her could I get a legal call.

THE COURT: That's what I'm asking. You've testified that you wrote these notes. They did the raid on your cell sometime after that, and then after the raid you called her to let her know it happened and said it was urgent?

THE WITNESS: Yes.

THE COURT: And so how long after the raid do you

Hearing Exhibit 12B

A622

Jug Chriscuz	[redacted] That beef was 59
June 20 J-Noc wa Ra Scubba woo	where was the sc locketed and How many times did I. Or was someone else
Berk K D-Tay His girl	→ 9th July also Raam Gambling spot in the Hood From spring rd to the building to [illegible] is 3500

If I [redacted] suppose to have on a hat and glasses,
How can you recongnize me.
All of my pictures From 2002 - 2009 I weighed
150 pounds
[illegible]

Hearing Exhibit 9

A634

(3)

IRVING JOHNSON
NOTES

[redacted]

Seized from Ascell
- pics w/ sz dec daughter
- phone #s:
  James Lawrence daughter
  Scooby - Steven
  Kay - cousin
  Woofie - William Galloway
  Leeleek - friend
  DNE

July 4th

Diyante
Kay - cousin
Scooby
Woofie
Juwan Johnson

[redacted]