A-_______

In The
SUPREME COURT OF THE UNITED STATES
October Term 2023

Irvin Harris Johnson,
Appellant/Petitioner,

v.

United States,
Appellee/Respondent.

Application for an Extension of Time in Which to File a Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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APPLICATION TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE, AS CIRCUIT JUSTICE

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November 3, 2023

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APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court's Rule 13.5, Applicant Irvin Harris Johnson requests a 30-day extension of time within which to file a petition for a writ of certiorari, up to and including December 15, 2023.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Irvin Harris Johnson* v. *United States*, No. 13-CF-0493 (D.C. App. Apr. 7, 2023) (attached as Exhibit A). The District of Columbia Court of Appeals denied Applicant's motion for rehearing or rehearing en banc on August 17, 2023 (attached as Exhibit B).

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case under 28 U.S.C. § 1254(1). Under this Court's Rules 13.1, 13.3, and 30.1, a petition is currently due by November 15, 2023. In accordance with Rule 13.5, Mr. Johnson has filed this application more than 10 days in advance of that due date.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the District of Columbia Court of Appeals in this case, up to and including December 15, 2023.

1. An extension is warranted because of the importance of the issues presented and the seriousness of the errors made by the District of Columbia Court of Appeals. The Court of Appeals held that neither attorney-client privilege nor work-product doctrine applied to—meaning the Sixth Amendment did not protect—handwritten notes that Mr. Johnson wrote to himself, while he was in jail, in

preparation for his next meeting with his trial attorney. That erroneous holding threatens the right to counsel and conflicts with precedent from other courts.

Like many people who are jailed while awaiting trial, Mr. Johnson did not know when he would next get to speak with his lawyer. Thus, as reactions and strategy points occurred to him, he jotted them down so he could refer to them when meeting with counsel. He thus produced "a recitation of [his] impressions and his reactions to the information he learned at his preliminary hearing and from the affidavit supporting his arrest warrant," Ex. A at 12, which he discussed "with counsel both before and after he wrote [it]," C.A. App'x 893. Yet the government seized this note from his jail cell and used it at trial as a purported "confession." The note was so powerful—especially compared to the other, purely circumstantial evidence against Mr. Johnson—that the jury asked to see it during deliberations.

Even so, the court below held that no privilege attached to this note because it did "not, *on its face*, mention counsel or otherwise indicate that it was intended for their eyes." Ex. A at 13 (emphasis added). And the court said that, even if the note was protected by the work-product doctrine, no prejudice resulted from its use at trial—even though the government portrayed it as a confession and the jury asked to see it. *Id.* at 14. On these grounds, the court found no Sixth Amendment violation. *See id.* at 13. The court then denied Mr. Johnson's petition for rehearing en banc.

Thus, under the decision below, the prosecution is free to seize a client's notes, blow them up as evidence for the jury, and repeatedly tell the jury that the defendant's written thoughts about legal strategy—prepared for discussions with his

lawyer—are akin to a confession. As Judge Howard observed at oral argument, such a rule produces profound and unfair consequences. And it threatens the basic purpose of the privilege and work-product doctrines, and thus the Sixth Amendment right to counsel.

This Court has long recognized "the centrality of open client and attorney communication to the proper functioning of our adversary system of justice." *United States* v. *Zolin*, 491 U.S. 554, 562 (1989). "By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108 (2009). If jailed clients cannot take the initiative to prepare notes for attorney meetings without losing the privilege, their counsel cannot effectively advise them, and they cannot properly defend themselves. "Certainly, an outline of what a client wishes to discuss with counsel—and which is subsequently discussed with one's counsel—would seem to fit squarely within our understanding of the scope of the privilege." *See United States v. Defonte*, 441 F.3d 92, 96 (2d Cir. 2006) (per curiam).

In turn, the decision below violates the Sixth Amendment and conflicts with other appellate courts' rulings. "The essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel." *E.g.*, *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 174 (4th Cir. 2019) (collecting cases) (citing *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981)). By failing to apply the privilege to client materials intended for use in

confidential attorney-client communications, the decision below eviscerates this principle and conflicts with other appellate decisions. *E.g.*, *Defonte*, 441 F.3d at 96 (district court erred by rejecting privilege claims over jailed person's diary, including notes for discussions with counsel); *Bishop* v. *Rose*, 701 F.2d 1150, 1151, 1155 (6th Cir. 1983) (finding Sixth Amendment violated where defendant's handwritten statement was discovered by prison guards, sent to the prosecutor, and used to impeach him at trial). "Similarly, the work-product doctrine fulfills an essential and important role in ensuring the Sixth Amendment right to effective assistance of counsel." *In re Search Warrant*, 942 F.3d at 174. By finding no prejudice from the work-product violation even though the note was *used at trial as a "confession,"* the decision below conflicts with other courts' recognition that "a prosecutor's intentional intrusion into the attorney-client relationship" almost always "constitute[s] a *per se* violation of the Sixth Amendment." *United States v. Orduno-Ramirez*, 61 F.4th 1263, 1269 (10th Cir. 2023).

2. Undersigned counsel respectfully submits that an extension of time is warranted because counsel of record and additional counsel in this case, who are representing Mr. Johnson on a *pro bono* basis, have multiple obligations that would make it difficult to complete a petition for a writ of certiorari by the current deadline.

Mr. Green is preparing to present oral argument to this Court in *Brown* v. *United States*, No. 22-6389, on November 27.

Mr. Fougere is in hearings and preparing briefing due in November in proceedings before the U.S. District Court for the District of New Jersey in *Amgen*

Inc. v. Sandoz Inc., No. 23-cv-2406-CPO-EAP and the U.S. District Court for the Southern District of New York in *PRCM Advisers LLC v. Two Harbors Investment Corp.*, No.: 1:20-cv-05649-LAK-BCM.

Mr. Loss-Eaton is assisting Mr. Green with his oral-argument preparations in *Brown*; is responsible for preparing multiple petitions for writs of certiorari currently due in December; is responsible for briefing issues remanded by this Court to the Pennsylvania state courts in *Mallory* v. *Norfolk Southern Railway*, 600 U.S. 122, 127 n.3 (2023); and will be preparing to present oral argument before the Sixth Circuit in *Norfolk Southern Railway* v. *Dille Road Recycling*, LLC, No. 22-4037, in early December.

Ms. Lindsay is preparing opening and reply comments due in November and December for multiple clients in a rulemaking proceeding before the U.S. Surface Transportation Board in *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2).

Ms. Branch has obligations in matters pending before the U.S. District Court for the Northern District of California in two different cases, *Lyons v. Gilead Sciences, Inc.*, 19-cv-02538, and *Calkin v. Gilead Sciences, Inc.* 20-cv-01884.

In addition, students from the Northwestern Supreme Court Practicum will assist with the preparation of this petition, and an extension is warranted to allow their assistance without interfering with their academic schedule.

CONCLUSION

For these reasons, Applicant respectfully requests an extension of 30 days, to and including December 15, 2023, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

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November 3, 2023

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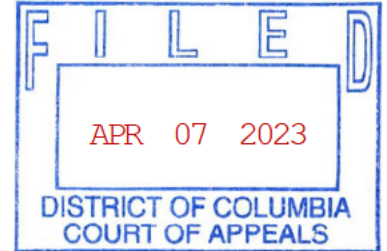
Exhibit A

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.

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[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

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[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*

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[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

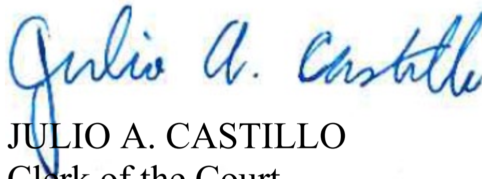
"the key witness for the prosecution may have been under the influence of a mind-altering drug." *Kigozi*, 55 A.3d at 651 (alteration omitted). Here, however, the cell tower evidence was not crucial to the government's case but merely corroborative. Eyewitnesses placed appellant at both shootings with 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
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

Exhibit B

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

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Morgan Branch, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney