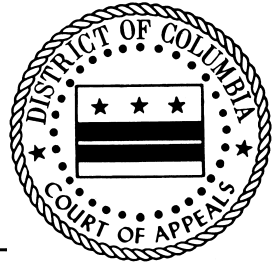


Appeal Nos. 16-CO-1061 & 24-CO-0314
Consolidated with No. 24-CO-0254



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**DISTRICT OF COLUMBIA
COURT OF APPEALS**

RODNEY A. BROWN

Appellant,

v.

UNITED STATES

Appellee.

On Appeal from the Superior Court
of the District of Columbia, Criminal Division
Case Nos. 1994 FEL 012246 & 1994 FEL 012247
(The Honorable Jason Park, Judge)

OPENING BRIEF FOR RODNEY A. BROWN

* MARGARET ABERNETHY (#1655549)
MID-ATLANTIC INNOCENCE PROJECT
1413 K Street, NW, Suite 1100
Washington, DC 20005
(202) 969-0979 ext. 701

THOMAS HESLEP (#351726)
419 7th Street, NW #405
Washington, DC 20004
(703) 801-1857

THOMAS CARTER (#1044815)
BAKER BOTTS L.L.P.
700 K Street, NW
Washington, DC 20001
(202) 639-7702

Counsel for Appellant Rodney A. Brown

DISCLOSURE STATEMENT

The parties have been represented by the following counsel:

	Rodney Brown	Leonard Bishop	USAO-DC
Trial	Thomas Heslep Todd Baldwin	PDS: Tamar Meekins Anthony Matthews	Ann Rosenfield
§ 23-110	N/A	Cynthia Katkish George Lane	Joan Draper
Direct & § 23-110 Appeal	Thomas Heslep	Jenifer Wicks	Suzanne G. Curt John R. Fisher Roy W. McLeese III Joan Draper Geoffrey Barrow
IPA	Thomas Heslep MAIP: Margaret Abernethy James Moody Charles McLaurin Shawn Armbrust Baker Botts: Thomas Carter Benjamin Rosen Jarad S. Daniels	Carrie Weletz Jenifer Wicks	Timothy W. Lucas
IPA Appeal	Margaret Abernethy Thomas Carter Thomas Heslep Williams & Connolly: F. Lane Heard	Peter H. Meyers	Chrisellen R. Kolb

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STATEMENT OF THE CASE & JURISDICTION

On November 25, 1994, Andre Newton was shot and killed. Following a jury trial in 1996, Appellants Rodney Brown and Leonard Bishop were convicted of first-degree murder and sentenced to aggregate sentences of 101 years and 8 months to life in prison. In 2020, Rodney and Leonard filed a joint motion under the Innocence Protection Act (IPA), D.C. Code § 22-4131 *et seq.*, and, in 2022, the court (Park, J.) conducted an evidentiary hearing during which Rodney and Leonard presented evidence that Eugene Nixon committed the November 25 shooting. On March 7, 2024, Judge Park denied the joint IPA motion in a written order. This appeal follows.

STATEMENT OF ISSUES PRESENTED¹

1. The trial court erred in its assessment of the multiple witnesses who testified that a fellow gang member, Eugene Nixon, was the perpetrator.
2. The trial court erred in its assessment of Tyrone Jones, an eyewitness who testified that Rodney and Leonard were not the shooters.
3. The trial court erred when it failed to give proper weight to the weaknesses in the evidence used to convict Rodney and Leonard at trial in 1996.
4. Relief should be granted under the IPA.

¹ Pursuant to D.C. App. R. 28(j), Rodney Brown incorporates and adopts by reference the facts, issues, and arguments set forth in Co-Appellant Leonard Bishop's opening brief.

STATEMENT OF FACTS

BACKGROUND

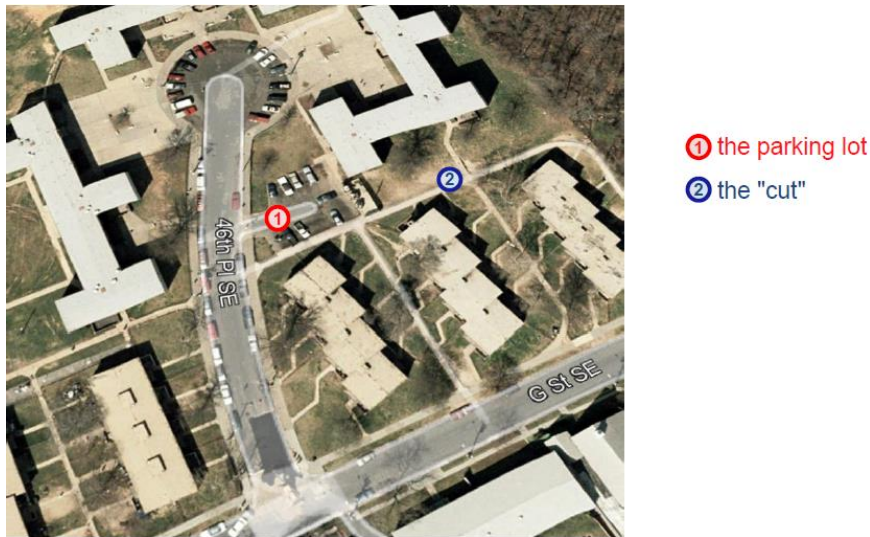
The Incident. In the mid-90s, the collection of streets around the Benning Terrace housing complex, known as “Simple City,” bore witness to recurring gang violence. A749-56; 9/22/22 Tr. at 43:23-44:18, 104:6-11; 10/25/22 Tr. at 25:13-26:9. As described by then-United States Attorney Eric Holder, the violence was rooted in “settling beefs, settling scores.” A751. Each act and each subsequent retribution would “feed on itself.” *Id.* Relevant to this case are two gangs:

The Alabama Avenue Gang	The Tolbert Gang
Eugene Nixon (Gene) Rob Gaulden Keith Fogle Michael Wonson Rodney Gordon Michael Raymond Ricky Skipper Todd Hopkins	Roy Tolbert Andre Newton Marcus Johnson

Shortly before sundown on November 25, 1994, Roy Tolbert drove Andre Newton and Carrington Harley to G Street to sell drugs on 46th Place (a cul-de-sac area known as “the Circle”). A1 at 16:24-17:6, 22:19-23:20. Newton was a regular in Tolbert’s gang; Harley was not. *Id.* at 21:14-22:6; A53 at 15:24-16:6; A533 at 31:18-24. Tolbert drove away and Newton and Harley walked to the parking lot below the cul-de-sac and began selling drugs. A1 at 17:24-19:20. As it was getting

dark,² a warning came that police were in the area. *Id.* at 23:23-24:2. What happened next occurred suddenly and ended just as quickly.³

As Newton and Harley were leaving the parking lot, walking toward 46th Place, they were shot from behind by bullets coming from the area between two buildings near the back of the parking lot (the “cut”). *Id.* at 26:1-27:13, 36:17-24.



[A747: aerial view of the Circle]

Both men fell to the ground. Newton was mortally wounded; Harley survived. Two bystanders—Keith Williams and Joey Payne—were also shot from behind while exiting the parking lot. A116 at 119:3-4, 126:19-22. A third, Michael Toland, who was walking with Williams and Payne, avoided injury.

The Investigation. When the police questioned those at the scene, no one could identify the shooters. Drucilla Williams, who ran to Newton’s assistance

² A116 at 117:3-5 (“[I]t was turning dusk like when it’s almost dark”).

³ A116 at 119:1 (“[I]t just happened so quick.”); A222 at 244:19-20 (“[E]verything happened so fast”).

following the shooting, could not. A692. Nor could Keith Williams or Joey Payne, A721 (Williams); A658 (Payne), nor Michael Toland, who was running with his back to the shooters, 9/23/22 Tr. at 9:18-10:17, nor Carrington Harley who could only make out “two silhouettes.” A657; A1 at 27:17.

A week later, police arrested Roy Tolbert and his cousin, Marcus Johnson, for attacking and stabbing three members of the Alabama Avenue gang (Todd Hopkins, Ricky Skipper, and Michael Raymond) outside the Eastside Club in Southwest DC. Upon his arrest, Tolbert told an MPD detective “that the stabbing was in retaliation for the shooting of ANDRE NEWTON that occurred on 11-25-94.” A710. In reliance on that information, police obtained a warrant to search the residence of Alabama Avenue gang member Todd Hopkins. A696 (“While investigating the above stabbing [at the Eastside Club], members of the [MPD] received information that Mr. Hopkins was involved in the murder of Mr. Newton and that his stabbing was in retaliation for that shooting.”). Two years later, when the Eastside Club stabbing case came to trial, the government argued to the jury that, prior to the stabbing, Tolbert confronted Hopkins and “accuse[d] him of the murder of Andre Newton” saying “I know you had something to do with that.” A660 at 32:24-33:17.

Oddly, another police report from the Eastside Club stabbing attributed to Tolbert the statement that “his uncle, MARTIN COLBERT [sic] ... told him that someone telephoned him and told him that ‘JUNE’ and ‘DINKINS’ killed ANDRE NEWTON.” A706. Marcus Johnson, also under arrest for the stabbing, gave a similar story, stating that he was near the Circle at the time of the November 25

shooting, heard gunshots, and then seconds later saw “June” running from the area. A672. Johnson identified Rodney Brown as “June,” A673, and the police later decided that “Dinkins” referred to Leonard Bishop, whose nickname was “Dink.” After giving police this information, Tolbert and Johnson were released on personal recognizance despite their pending AWIK charges. A736; A738.⁴

Because Rodney and Leonard were not members of the Alabama Avenue gang, Tolbert’s and Johnson’s implication of “June” and “Dinkins” in the Newton shooting left an important question unanswered: If Tolbert and Johnson suspected “June” and/or “Dinkins,” then why stab members of the Alabama Avenue gang and then tell police afterwards that the stabbing was in retaliation for the Alabama Avenue gang’s involvement in Newton’s death?

In investigating Newton’s killing, however, the police ignored the gang rivalry and what Tolbert said about the attack. Relying instead on what Tolbert and Johnson said about “June” and “Dinkins,” which deflected attention from the gang warfare, the police tried to secure an identification of Rodney and Leonard from the persons who had been at the scene of the shooting. Interrogated again by the police, Keith Williams changed his story. Contrary to what he had said on three prior occasions, he now claimed that he did not immediately fall to the ground when the shooting started, but looked back over his shoulder at the shooters. A758. Unlike Carrington Harley, who was closer to the shooters and could only see

⁴ This public document was not an exhibit in the innocence proceedings, but was noted for the trial court in post-hearing briefing. Brown ROA at 1891 n.7. The Court may take judicial notice of docket entries. *Francis v. United States*, 256 A.3d 220, 229 (D.C. 2021).

silhouettes in the falling darkness, Williams identified Rodney and Leonard as the two shooters. *Id.*

Seven months later, Carol Jefferies, who lived in a nearby apartment, came forward. She claimed that Rodney and Leonard ran into her apartment at 610 46th Place after the shooting (on the left side of the cul-de-sac and across the street from the parking lot where the shooting occurred), put a gun under her couch, then left. A303 at 335:7-336:1, 337:8-341:23. Two days later, as she headed to the liquor store and walked past a group on the sidewalk, she claimed to overhear Rodney say, “man, we punished them n****s coming on our turf.”⁵ *Id.* at 306:22-309:14.

Five months later still, James Jones, another resident of the apartment complex, came forward and told police he witnessed the shooting and that Rodney was one of the shooters. A429 at 461:15-462:4; 433:13-438:6.

The Trial. At trial, the government relied on the testimony of Williams, Jefferies, and Jones. Its theory of the case was that Rodney and Leonard saw Newton and Harley selling in their area, had Michael Toland tell their friends to leave the Circle, and then shot Newton and Harley. A116 at 106:14-109:25; A612 at 10:10-11:9. The defense strategy had two elements: showing (1) the testimony of Williams, Jefferies, and Jones was not credible; and (2) the Alabama Avenue

⁵ Jefferies testified that Leonard was not present. To avoid prejudice to him, the court permitted testimony about the purported statement only if it was altered to suggest that Rodney acted alone—i.e., “*I* punished them n****s for coming on *my* turf.” This Court acknowledged the altered statement “more clearly inculcates [Rodney] Brown” than the exact statement allegedly overheard by Jefferies. *Brown v. United States*, 934 A.2d 930, 941-42 (D.C. 2007).

gang was feuding with Tolbert, and thus had a motive to kill him and his associates. To satisfy the second element, the defense sought to call Michael Raymond, a member of the Alabama Avenue gang, to testify about an incident preceding Newton's murder when Tolbert shot at Raymond and other Alabama Avenue members. A500 at 733:16-734:22. However, when the government revealed the existence of an ongoing RICO investigation into the Alabama Avenue gang, A533 at 16:10-15, Raymond invoked his Fifth Amendment right and refused to testify, *id.* at 46:21-67:24, thwarting the defense's ability to present this theory to the jury, 76:6-79:25.

The jury began deliberations on March 19, 1996. For more than a week, it was unable to reach a verdict. Twice it informed the court that it was deadlocked. Not until the court delivered an anti-deadlock instruction did the jury return a verdict and, even then, not for two more days. A622 at 4:11-5:18; A629 at 60:2-4. It is no wonder the jury struggled:

Keith Williams told police on *three separate occasions* that he fell to the ground when the shooting began and did not see the shooters. A116 at 150:20-24. Only with his probation at risk (A723; A728) and after a more than hour-long interrogation with a detective who scared him (A116 at 150:5-8, 153:19-154:21) did he implicate Rodney and Leonard. Williams also testified pursuant to a plea deal that reduced his possible sentence from a mandatory minimum of 15 years to probation. *Id.* at 163:7-165:23; A686.

Carol Jefferies, a habitual drug and alcohol abuser (A303 at 376:8-378:5, 409:17-412:14), only came forward when faced with eviction from her apartment.

Id. at 372:4-20. In exchange for her testimony, the government paid for her to live in a hotel for two months and gave her \$1,400 in cash. *Id.* at 373:1-19, 375:11-19. Kicked out of the witness protection program for drug use, the government still provided her with a one-bedroom apartment rent-free. *Id.* at 373:22-376:1; A694. By the time of trial, Jefferies had received more than \$6,000 in housing and benefits from the government. A303 at 376:2-7.

Her trial testimony was also inconsistent with that of the two other government witnesses, both of whom said the shooters did not flee the area in the direction of her apartment. A222 at 218:16-219:13 (Keith Williams); A429 at 452:3-24 (James Jones). She never produced or accounted for the gun allegedly left under her couch by the shooters. And the government did not offer corroborating testimony from Jefferies' sister, who was also in the apartment. A303 at 382:17-20.

Like Jefferies, **James Jones** had been trying to move out of Simple City. A429 at 458:25-459:6. He had no explanation for his one-year delay in coming forward to accuse Rodney, saying only that he “chose not to report it.” *Id.* at 485:3-25. His wife was with him when he supposedly witnessed the shooting, but the government did not produce her to corroborate his story. *Id.* at 433:13. Cross-examination established that after he identified Rodney, Jones moved away from Simple City and into an apartment owned by Willie Toland, one of the detectives on the case. *Id.* at 454:16-455:9, 459:5-6. Jones claimed this was coincidence—that he had wanted to move for eight years and used a realtor to find the apartment. *Id.* at 431:10-432:16, 459:5-20. But he did not explain why, after all those years, he decided that Detective Toland's apartment was the one.

THE EVIDENCE OF INNOCENCE

In 2020, Rodney and Leonard filed a joint motion under the IPA asserting their innocence. Over the course of a five-day hearing on the motion, they presented (i) testimony from Alabama Avenue gang members that one of their gang, Eugene Nixon, was the shooter; and (ii) eyewitness evidence that neither Rodney nor Leonard was involved.

A. The Alabama Avenue Gang Witnesses

Four members of the Alabama Avenue gang—Keith Fogle, Rob Gaulden, Rodney Gordon, and Michael Wonson—swore that their fellow gang member, Eugene Nixon, confessed to killing Newton.

The day after the shooting, Nixon told **Keith Fogle** that he “tried to get Roy [Tolbert] but he got away,” so he “got his mans and them.” 9/22/22 Tr. at 54:19-20. From this, Fogle understood that Nixon had killed someone associated with Tolbert. *Id.* at 54:14-55:19, 62:11-17. Nixon also told Fogle how he did it: “he said he parked down on the back of ... G Street Hill, and came up through the back, through the cut, like, by the woods, by the market. And he said he ran up through the cut.” *Id.* at 56:5-9.



[A748: markings made by Fogle showing the path Nixon took]

Fogle assumed that Nixon was trying to kill Tolbert because the two had been “shooting at each other before that,” including an instance where Tolbert shot Michael Raymond, Nixon’s friend and another member of the Alabama Avenue gang, *id.* at 51:3-52:13, 55:23-56:1—the precise event Raymond was prepared to testify about at Rodney and Leonard’s trial until he invoked the Fifth, *supra* at 7.

Rob Gaulden refused to testify at the innocence hearing without immunity, stating that, without it, he would have “to bend the truth to save [him]self.” 9/30/22 Tr. at 23:13-18. Granted immunity (10/25/22 Tr. at 11:10-12), Gaulden testified that once Tolbert shot Michael Raymond, “[Gaulden], Gene, ... Rodney Gordon, and Chris”—all members of the Alabama Avenue gang—agreed to “kill Roy” and “anybody that be with him.” *Id.* at 30:13-31:13, 34:5-35:4, 68:8-16. After Newton’s death, Nixon told Gaulden that “he saw Roy in the circle last night,” “doubled back,” thought he killed him, but found out later he killed someone who “be with Roy.” *Id.* at 35:17-24, 38:1-5.

Before he died in 2019, **Rodney Gordon** executed a statement⁶ in which he swore that Nixon told him on the day of the shooting that he had “rolled past the Circle and saw Roy,” and that he was “about to go up there and shoot him.” A678-80. Minutes later, Gordon heard gunshots. A680-81. Gordon knew that Tolbert had previously fired shots at Nixon and also that the two “had got into it ... over a crap game.” A677-78.

Michael Wonson was incarcerated at Oak Hill Youth Detention Center at the time of the shooting. 9/22/22 Tr. at 157:17-158:1. Nixon called him afterward and told Wonson he had taken “care of Slim ... in The Circle.” *Id.* at 157:17-24. Wonson assumed Nixon was referring to Andre Newton, knowing that Nixon had wanted to kill Newton because of “an altercation over Nixon’s girlfriend,” which they had discussed previously. *Id.* at 158:24-159:14.

Marcus Johnson was a member of Tolbert’s gang, Newton’s best friend, and the first person to point police in the direction of Rodney and Leonard. 9/22/22 Tr. at 105:21-24, 136:1-5. He testified that he lied to police about seeing Rodney near the Circle in the moments after the shooting—and did so to curry favor after he had been arrested for stabbing members of the Alabama Avenue gang outside the Eastside Club and was facing charges for AWIK. *Id.* at 107:5-111:22, 137:15-138:5-10. He only named Rodney because Rodney had been mentioned in the

⁶ Sherrie Forester, a CJA investigator who formerly worked for the MPD, testified about obtaining Gordon’s statement. 9/30/22 Tr. at 107:11-110:20.

“rumor mill going around,” so he figured it was his best “shot” at avoiding jail.⁷ *Id.* at 138:5-10, 145:21-148:4. On cross-examination by the government, and without knowing that other witnesses in the innocence proceedings had incriminated Eugene Nixon (*id.* at 134:10-16), Johnson testified that he went to the Eastside Club with the intent to attack members of the Alabama Avenue gang (“Winston, Gene, Ricky, Rob, those guys”) because he believed they, not Rodney or Leonard, were responsible for Newton’s death. *Id.* at 120:21-122:13. Newton’s death—and Johnson’s retaliatory attack on members of the Alabama Avenue gang outside the Eastside Club—were episodes in an ongoing feud between the Tolbert gang and the Alabama Avenue gang. *Id.* at 120:21-129:6, 135:19-136:8 (“Their crew didn’t like our crew”). Two previous episodes in the feud, he explained, also involved shootings between the gangs. *Id.* at 123:23-129:6.

B. Tyrone Jones

Tyrone Jones was about 13 years old on November 25, 1994. A818. He was in the front seat of his cousin’s car, parked along 46th Place, when he saw two masked men emerge and start shooting. 10/11/22 Tr. at 27:9-25. Using the photograph below, Jones testified that the car he was sitting in was by the “tin can” (circled below) or “a little bit back,” and that Newton fell on the curb/sidewalk just south of the entrance to the parking lot (marked by an “X”). 10/11/22 Tr. at 66:8-68:4; A757.

⁷ Prior to the Eastside Club stabbing, an anonymous caller told police he heard the shooters were “June” and “Dinkins,” A702, demonstrating the “rumor mill” described by Johnson.



The shooter closest to Newton fired multiple shots at him and others. *Id.* at 27:15-22. At one point, that shooter raised his mask, and Jones saw his face. *Id.* at 27:19-25, 102:13-22. Jones was much younger than Rodney and Leonard, and so not a “friend,” but he knew them through his cousins. *Id.* at 33:12-34:12. Had either been the shooter, Jones would have recognized him. *Id.* at 34:18-21. When Rodney and Leonard were arrested, Jones told his cousins (Antwan Pulliam, Juan Pulliam, and Juan Green) that they were not the shooters. *Id.* at 36:10-37:12. Juan Green confirmed to an investigator for MAIP that Jones told him they were not the shooters shortly after their arrest. 10/25/22 at 98:4-9.⁸

Jones also testified about a photo identification made at the request of Rodney’s counsel shortly before the innocence hearing. Shown photographs of

⁸ Antwan and Juan Pulliam had died by the time the investigator interviewed Green. 10/11/22 Tr. at 35:11-36:9.

three individuals, none of whom were identified by counsel, Jones testified that “[he] instantly pointed to [the photo of Eugene Nixon] and said that look like the shooter.” 10/11/22 at 32:9-33:4, 87:16-19, 106:13-107:6. Jones did not know who Nixon was or that other witnesses had incriminated him, and had never seen a photo of him before. *Id.* at 106:25-107:3.

C. Trial Court’s Order

More than a year after the completion of post-hearing briefing, the trial court issued an order denying the IPA petition. This timely appeal follows.

SUMMARY OF THE ARGUMENT

The evidence of guilt was weak from the start. The jury could not reach a verdict for more than a week, twice telling the judge it was deadlocked. This was understandable: one eyewitness changed his story in exchange for a plea deal; a second, who received \$6,000 in financial assistance from the government, told a story at odds with that of every other government witness; and a third, who only came forward a year after the incident, ended up living in an apartment owned by one of the detectives, purportedly by sheer coincidence.

Set against this shaky evidence of guilt is compelling and consistent evidence of innocence. Four members of the Alabama Avenue gang swore that Eugene Nixon confessed to the shooting. His target had been Roy Tolbert, the person who dropped Newton at the Circle that day and whose gang had been feuding with Alabama Avenue for some time; a feud that involved exchanges of gunfire prior to November 25 and continued afterward when Tolbert’s gang stabbed members of the Alabama Avenue gang outside the Eastside Club as

retaliation for Newton's death. Police were aware of this gang feud and its connection to the November 25 shooting but instead pursued a lead that Marcus Johnson gave them, which he has acknowledged was false. The Alabama Avenue gang witnesses had every reason not to incriminate Nixon, who was their fellow gang member, and were content letting two people they didn't care about take the fall. Years later, with Nixon dead, and a MAIP investigator asking them for the first time what really happened, the truth finally emerged.

And there is Tyrone Jones. From only twenty feet away, he watched as Newton was shot. He would have recognized Rodney or Leonard had either been the shooter. They were not, as Jones told his cousin at the time, and has maintained ever since. When shown a photograph of Nixon for the first time in 2022, he pointed to it and said Nixon looked like the shooter, despite not knowing his relevance to this case.

The trial court erred in rejecting the evidence provided by the Alabama Avenue witnesses and Tyrone Jones as unreliable. As for the Alabama Avenue witnesses, the trial court erred by ignoring evidence that supported their credibility, including the consistency of their testimony, both with each other and with the historical and documentary record; giving undue weight to broad categorical factors without regard to the case-specific evidence; and overstating the significance of other factors. The trial court carried the same mistakes over to Tyrone Jones, relying on generic factors (e.g. his age and the passage of time), as well as insignificant ones (e.g., the distance he was from the shooter), while overlooking what rendered him credible.

The trial court also failed to give proper weight to the weaknesses in the evidence used to convict Rodney and Leonard at trial. Rather than engage in the appropriate analysis, the trial court afforded little weight to the evidence used to impeach the government's witnesses at trial and ignored other weaknesses brought out during the innocence proceedings.

THE LEGAL STANDARD

The IPA permits a person to petition the court for relief based on the discovery of new evidence that shows he is actually innocent of the crime(s) he was convicted of. D.C. Code § 22-4135(a). If the new evidence demonstrates innocence by clear and convincing evidence, the IPA requires the court to vacate the person's conviction(s) with prejudice. *Id.* § 22-4135(g)(3). If it only satisfies the preponderance of the evidence standard, the IPA requires the court to vacate the relevant conviction(s) and grant a new trial. *Id.* § 22-4135(g)(2).

In assessing whether IPA relief should be granted, the trial court must consider “[h]ow the new evidence demonstrates actual innocence.” D.C. Code § 22-4135(g)(1)(B). That evaluation “cannot ... occur in a vacuum,” *Stringer v. United States*, 301 A.3d 1218, 1233 (D.C. 2023), or in a manner that treats each “piece of evidence in isolation,” *Caston v. United States*, 146 A.3d 1082, 1094 (D.C. 2016). It must be cumulative, *id.*, taking into consideration all the evidence, including “the potential weaknesses in the government's case,” *id.* at 1099; see also *House v. Bell*, 547 U.S. 518, 538 (2006) (“[T]he habeas court must consider all the evidence, old and new”).

The denial of an IPA petition is reviewed for abuse of discretion, *Stringer*, 301 A.3d at 1226, which occurs when the trial court’s findings are based on “a clearly erroneous evaluation of the evidence,” *Kleiman v. Kleiman*, 633 A.2d 1378, 1383 (D.C. 1993), or a “manifest misunderstanding of the record,” *Ashrafi v. Fernandez*, 193 A.3d 129, 133 (D.C. 2018). While credibility findings based on the court’s assessment of demeanor are afforded “substantial deference,” such deference does not extend to credibility findings based on the factual record, such as inconsistencies amongst the witnesses or between testimony and documentary evidence or other “objective facts.” *Stringer*, 301 A.3d at 1228 (citing *Caston*, 146 A.3d at 1096); *see also Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985); *Cooper v. Dep’t of Navy*, 594 F.2d 484, 486 (5th Cir. 1979). When the findings are based on the record, not demeanor, this Court has more leeway “to find clear error” based on its own assessment of the record. *Stringer*, 301 A.3d at 1228.

ARGUMENT

I. THE ALABAMA AVENUE WITNESSES PROVIDED RELIABLE EVIDENCE OF INNOCENCE

Four Alabama Avenue gang members swore that their fellow gang member, Eugene Nixon, was responsible for Newton’s death. The trial court recognized this evidence was “new” under the IPA (A807, A810-11, A815, A817), but concluded the Alabama Avenue witnesses were not reliable.⁹ How it reached that conclusion

⁹ The IPA also requires the court to consider “[w]hy the new evidence is or is not cumulative or impeaching.” D.C. Code § 22-4135(g)(1)(C). Because the trial court reached the question of whether the IPA evidence established actual innocence by a preponderance of the evidence, it implicitly acknowledged the innocence evidence was neither cumulative nor impeaching. *Id.* § 22-4135(g)(2)

was erroneous. Its credibility determinations depended on the categorical application of factors (e.g., the passage of time since the incident) that call for more nuanced consideration and rested on purported inconsistencies that either were not actually inconsistencies or were minor deviations. It also ignored evidence that supported the credibility of the witnesses' testimony.

A. The Trial Court's Reasons for Finding the Witnesses Unreliable Were Erroneous

Keith Fogle. Fogle testified that on the day after the shooting, Nixon confessed to him that he tried to kill Tolbert but got "his mans" instead. Nixon further told Fogle the path he took to get to the Circle and how he tried to surprise Tolbert. In refusing to credit this testimony, the trial court placed undue weight on three categorical factors as well as insignificant inconsistencies in the recollections of the Alabama Avenue gang witnesses.

The passage of time. The trial court erred, first of all, in discounting Fogle's testimony because he was recalling a conversation "that occurred nearly three decades ago." A808-09. But does one ever forget that a friend confessed to a murder? And does one forget that confession when it meant two innocent men went to prison for it? 9/22/22 Tr. at 93:21-24 ("two guys went to prison for something they didn't do"). The court ignored the notable subject of the

(a court only reaches the preponderance analysis if the factors listed in (g)(1) are satisfied). For good reason. The innocence evidence is not cumulative because it is entirely different from anything that was presented at trial in 1996. Nor is it merely impeaching, as the evidence is directly exculpatory. *Prophet v. United States*, 707 A.2d 775, 778 (D.C. 1998).

conversation—not one about last Sunday’s football game, but about a confession to a murder that sent two innocent men to prison.

Delay. The trial court also erred when it determined that Fogle’s “two decades of silence casts doubt on the reliability of his statements.” A809. Delay cannot inherently count against credibility in an IPA case. Doing so would read a de facto statute of limitations into the IPA, which is contrary not only to the plain language of the statute, but to one of the very reasons for the creation of the IPA—to eliminate the time limits associated with D.C. Crim. Proc. R. 33 in recognition that it often takes years to uncover evidence of a person’s innocence. D.C. Council, Comm. on the Judiciary, Addendum to Bill 14-153 at 5 (Jan. 29, 2002). Delay can only be cause to question the reliability of a witness if there is independent reason to view the delay suspiciously—e.g., the witness is a friend, whom one would expect to come forward at the first opportunity, *McCray v. Vasbinder*, 499 F.3d 568, 573-74 (6th Cir. 2007), or if the new evidence is being produced at “the 11th hour” “when a prisoner’s life is a stake,” *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O’Connor, J., concurring).

Fogle’s delay here was not suspicious. He is not Rodney’s or Leonard’s friend, 9/22/22 Tr. at 64:22-65:8, and there was no eleventh-hour reason to come to their aid. Indeed, these facts *support* Fogle’s credibility. *House*, 547 U.S. at 551-52 (witnesses considered credible despite 10-year delay because they implicated a friend of theirs and “the record indicate[d] no reason why [the witnesses]” would have wanted to help the petitioner).

In any event, Fogle explained his delay in naming Nixon as the shooter. As noted by the trial court, Fogle did not come forward contemporaneously because “his ‘friend [Nixon] would have gone to prison’” and “he might not have ‘be[en] here today or [his] family wouldn’t be here today’” if he had told the truth. A807; 9/22/22 Tr. at 96:3-7 (“I would be dead right now. There would be no doubt about that.”). The court rightly did not question that explanation. But because Nixon died three months after Rodney and Leonard’s trial, the court did question why Fogle did not come forward then, calling his explanation “unclear.” A808-09.

As the court acknowledged, Fogle told investigators what he knew *when he was asked*: “Mr. Fogle came forward ... only after being contacted by investigators working for Mr. Brown and Bishop in connection with their IPA motion.” A808. With the insertion of “only” in that sentence—i.e., “only after being contacted by investigators”—the court cast suspicion on Fogle’s statement, but there is nothing suspicious in his saying nothing until he was asked. The world of Simple City is not a high school civics class. Fogle was a gang member, and gang members do not seek out the police. He was not Rodney’s or Leonard’s friend, he owed them nothing, and he had his own problems. As he explained, the “penitentiary is a dangerous place,” and he didn’t know how Rodney and Leonard would react if they learned he had kept quiet all those years while they wrongfully served time behind bars. 9/22/22 Tr. at 97:7-19. Unless someone asked him, “it wasn’t nothing [he] was planning on ... ever revisiting.” *Id.* at 67:16-17. He was content leaving “a closed door closed.” *Id.* at 97:18-19.

Fogle was not alone in this sentiment. Rob Gaulden similarly testified that the Alabama Avenue gang “didn’t care” “what happened to [Rodney and Leonard]” because they were “from the [C]ircle.” 10/25/22 Tr. at 39:4-40:10 (“[I]f you don’t deal with somebody and you got a problem with them, why would you care what happened to them.”). Like Fogle, Gaulden only came forward because someone finally “asked him what happened” and because the government gave him immunity. *Id.* at 43:7-13. Rodney Gordon said the same thing: he did not come forward earlier because he “was from Alabama Avenue” and Rodney and Leonard “were from the Circle” so he “didn’t see eye to eye with [them].” A676-77.

Nixon’s death. The trial court erred, too, in discounting Fogle’s testimony on the ground that, “because Mr. Nixon is deceased, there is no way for him to defend himself against these accusations.” A808. Precisely because Nixon is dead, however, he is in no need of a defense. That fact should have played no part in the trial court’s consideration of Fogle’s testimony. If the court meant instead that, because Nixon is dead, he cannot deny that he confessed, that denial can be taken for granted; as one would expect anyone accused of murder to deny the deed.

The trial court relied on *Diamen v. United States*, 725 A.2d 501, 513 (D.C. 1999), in support of its argument that “[p]utting the blame on people who are dead ... is particularly suspect.” That reliance is misplaced for two reasons. *First*, *Diamen* cited *Herrera*, 506 U.S. at 417, as supporting authority, but *Herrera* says nothing about blaming a deceased person as “suspect.” *Herrera* concerned hearsay in affidavits where no explanation was provided for “why the affiants waited until the 11th hour” to come forward. *Id.* at 417-18. *Second*, *Diamen* applied the higher

Schlup standard, not the IPA’s preponderance standard. 725 A.2d at 512 (citing *Schlup v. Delo*, 513 U.S. 298 (1995)). In any event, the petitioners in *Diamen* were subsequently exonerated based on evidence that deceased individuals committed the crime. *Eastridge v. United States*, 372 F. Supp. 2d 26 (D.D.C. 2005); *Eastridge v. United States*, 602 F. Supp. 2d 66 (D.D.C. 2009).

As *Herrera* shows, the real question is always what the indicia of credibility are. Here they are numerous. *First*, Fogle had nothing to gain by identifying Nixon as the murderer. Rodney and Leonard were not, and are not, his friends or associates, 9/22/22 Tr. at 64:18-65:8, and he has never spoken to them about the incident, *id.* at 69:11-13. *Second*, in relating what Nixon told him, Fogle accurately described the path of the shooter (e.g., parking his car on G Street and running “through the cut” into the parking lot of the Circle), despite having no opportunity to prepare for his interview with an investigator from MAIP. *Id.* at 68:9-23, 80:24-81:21. *Third*, Fogle understood the shooting to be the product of an ongoing feud between Tolbert and Alabama Avenue; a feud corroborated by multiple witnesses:

- Proffer by defense counsel that Michael Raymond would testify about an instance when Roy Tolbert shot him (A500 at 733:16-734:3);¹⁰
- Todd Hopkins’ statement to police that “he and ROY were beefing because ROY had shot his friend MIKE earlier this summer” (A711);

¹⁰ Raymond died before the innocence hearing, 10/25/22 Tr. at 27:12-25. A proffer by an officer of the court is “presumptively trustworthy.” *Simmons v. United States*, 945 A.2d 1183, 1192 (D.C. 2008).

- Tolbert told police about incidents where “GENE” and “ROB” carjacked Tolbert’s aunt and uncle at gunpoint, as well as an incident where “GENE” broke into Tolbert’s uncle’s house (A706);
- Marcus Johnson testified that the Alabama Avenue and Tolbert gangs were feuding before Newton’s death, that he believed Newton’s death was a product of that feud, and that the subsequent Eastside Club stabbing was retaliation for Newton’s murder (9/22/22 Tr. at 120:21-129:3);

The government itself attested to the feud:

- The police represented in an application for a search warrant that “[w]hile investigating the ... stabbing [at the Eastside Club], members of the [MPD] received information that Mr. Hopkins was involved in the murder of Mr. Newton and that his stabbing was in retaliation for that shooting (A696);”
- The government represented to the jury in *U.S. v. Tolbert & Johnson* that the Eastside Club stabbing was retaliation for Newton’s murder, stating that two days after Newton was killed, Tolbert “goes up to Todd Hopkins and accuses him of the murder of Andre Newton and said I know you had something to do with that.” (A660 at 33:6-17).

Fourth, Fogle’s testimony that Nixon confessed to the murder was consistent with that of three other Alabama Avenue gang members:

- Gaulden similarly recalled that Nixon said “he saw Roy in the circle,” “doubled back,” thought he killed him, but found out later he killed someone who “be with Roy.” 10/25/22 Tr. at 35:17-24, 38:1-5.
- Gordon stated that on the day of the shooting, Nixon told him he “rolled past the Circle and saw Roy,” and that he was “about to go up there and shoot him.” “About 3 or 4 minutes later,” Gordon heard gunshots. A678-81.
- Wonson, who was incarcerated at the time and had a coded telephone call with Nixon just after the shooting, recalled Nixon saying that he had taken “care of Slim ... in The Circle.” 9/22/22 Tr. at 157:17-24.

Fifth, none of these witnesses collaborated with each other.¹¹ Gordon came forward on his own initiative. A682-84. Fogle and Gaulden were surprised by a visit from a MAIP investigator. Only Wonson knew in advance that the investigator was coming to talk with him, but none of the four discussed what they knew with the others before they talked to the investigator. 9/22/22 Tr. at 68:21-69:13, 80:24-81:21 (Fogle), 164:8-165:15 (Wonson); 10/25/22 Tr. at 43:21-45:15 (Gaulden). To this day, Fogle still isn't aware that others have come forward about Nixon's guilt. 9/22/22 Tr. at 69:8-10.

While the passage of time, delay in coming forward, and accusing someone who is dead may in some circumstances weigh against credibility, they do not categorically do so. For those factors to matter, the trial court must explain *why* they matter. *United States v. Facon*, 288 A.3d 317, 338 (D.C. 2023). Here, however, the trial court appeared to treat these factors as ones that inherently counted against Fogle's credibility, ignoring contrary evidence.

Nixon's motive. Lastly, the trial court erred in finding Fogle's testimony unreliable based upon what it perceived to be "starkly inconsistent accounts

¹¹ The trial court appears to suggest Gaulden and Wonson had an opportunity to collaborate when they were supposedly "cellmates" "in a federal facility in Allenwood, Pennsylvania." A810. The evidence was to the contrary. Gaulden testified not they had been cellmates in Allenwood, but they were currently cellmates in Warsaw, VA, where they both had been transferred for purposes of the innocence hearing. 10/25/22 Tr. at 44:9-17, 47:8-19; Brown ROA at 372-73. Gaulden and Wonson told a MAIP investigator what they knew before they came to Warsaw.

regarding Mr. Nixon’s purported motiv[e]” for the November 25 shooting. A808.

This finding was erroneous for three reasons:

First, the trial court missed the big picture. The witnesses were consistent on the unforgettable point—that Nixon admitted to each of them that he committed the shooting on November 25, 1994, in the Circle.

Second, the trial court failed to appreciate that neither Fogle, Gaulden, nor Gordon claimed that Nixon told them *why* he had committed the murder. Each may have thought he knew why Nixon did it based on surrounding events, but they were speculating about his motive. It should be no surprise, then, that their speculations did not perfectly align. *Caston*, 146 A.3d at 1096 (“[T]he circumstances in which inconsistent statements were made ... must be taken into account.”). If they had aligned, that fact would cut against the witnesses’ reliability, as evidence of collusion.

Third, the discrepancies in their speculation about motive are insignificant:

- Fogle stated that Nixon and Tolbert “were shooting at each other” before November 25 and that Tolbert had shot at Nixon’s good friend, Michael Raymond. 9/22/22 Tr. at 51:3-52:13, 55:24-56:1;
- Gaulden stated that the Raymond shooting led to an agreement among Nixon, Gordon, “Chris,” and himself to kill Tolbert and “anybody that be with him.” 10/25/22 Tr. at 28:5-31:13, 34:5-24, 68:2-16;
- Gordon stated that Nixon and Tolbert had “got into it ... over a crap game” and that a day or two later, Tolbert shot at Nixon. A677-78.

While Gordon identified a different precipitating event than did Fogle and Gaulden, all three situated the shooting in an ongoing feud between the two gangs.

That Gordon remembered one earlier point of dispute in that feud, and Fogle and Gaulden another, is neither surprising nor significant.

Only Michael Wonson offered a truly different motive: that Nixon wanted to kill *Newton* because of “an altercation over Nixon’s girlfriend.” But a person can act for more than one reason. There is no conflict between Nixon’s wanting to kill Tolbert because of an ongoing feud (one that Wonson himself acknowledged existed), going to the Circle to kill him, shooting at a number of persons in the area, and killing Newton in the melee—someone whom Nixon wanted to kill in any event because of a separate dispute. Nor is it surprising that Wonson was not aware of Nixon’s attempt to kill Tolbert that day. Wonson was incarcerated at the time, speaking to Nixon via coded phone calls, and there is no evidence that he knew about the conspiracy among the members of the Alabama Avenue gang to kill Tolbert as a result of the attack on Michael Raymond. 10/25/22 Tr. at 34:3-12.

Stringer v. United States illustrates the trial court’s error here. In *Stringer*, the trial court found an IPA witness not credible based on certain inconsistencies between the witness’s testimony and the factual record. This Court, after conducting its own assessment of the factual record, disagreed about the significance of these inconsistencies, noting “plausible” explanations that rendered the inconsistencies insignificant, if they existed at all. 301 A.3d at 1229-30 (concluding the claimed inconsistency was “not an inconsistency of much significance”); *id.* at 1231 (“[T]he trial court’s characterization overstates the extent of the discrepancy.”). The same is true here. The trial court noted what it considered inconsistencies between the witnesses regarding Nixon’s motive to

commit the shooting, but ignored (i) the critical evidence that all the witnesses heard Nixon confess that he murdered someone at the Circle and (ii) the commonsense fact that gang warfare can present more than one motive for retaliation. As was true in *Stringer*, the inconsistency perceived by the trial court is “not an inconsistency of much significance.”

Once the irrelevant categorical factors are eliminated from the analysis and the insignificance of the dual motive for Nixon to kill Newton is recognized, Fogle’s reliability is clear.

Rob Gaulden. The trial court invoked the same three reasons for finding Gaulden unreliable—that he came forward long after the murder, placed the blame on Nixon, who had died, and attributed a different motive to Nixon than did other witnesses. A813. That three-part rationale is misconceived for the reasons stated above. The court’s additional bases for discounting or disbelieving Gaulden’s testimony likewise suffer from an overreliance on categorical factors that are not relevant here, as well as minor or explainable inconsistencies.

Prior convictions. The trial court categorically discounted Gaulden’s testimony because of his criminal record and his testimony in an ineffective-assistance-of-counsel challenge that another judge found self-serving. *Id. First*, testimony from people with criminal records can, of course, “still have substantial exculpatory potential.” *Caston*, 146 A.3d at 1099; *People v. Tankleff*, 49 A.D.3d 160, 181 (N.Y. App. Div. 2007) (“A witness’s unsavory background does not render his or her testimony incredible as a matter of law.”). Indeed, “the [government] use[s] such witnesses all the time,” *Tankleff*, 49 A.D.3d at 181,

including witnesses with perjury convictions, *see, e.g., Walker v. United States*, 317 A.3d 388, 394 (D.C. 2024) (government witness was convicted of perjury).

Second, it is one thing for a person to lie when he is a defendant and his liberty is at stake; it is altogether different to lie for someone else, particularly someone who is not a friend and when there is nothing to be gained. *People v. Johnson*, 502 Mich. 541, 570 (2018) (“Although Skinner had a prior conviction for perjury, that conviction was obtained under circumstances very different from the case at hand.”); *Colbert v. United States*, 310 A.3d 608, 615 (D.C. 2024); (“If the ‘past is prologue,’ that prologue cannot be selectively excerpted in a way that ignores factors mitigating past offenses.”). Gaulden was not testifying on his own behalf, or on behalf of people he knew or had any reason to care about, but *against* his self-interest, which is why he insisted on immunity. *Stringer*, 301 A.3d at 1232 n.2 (noting the IPA witness had “quite a bit to lose by confessing to be the sole killer”); *People v. Wong*, 11 A.D.3d 724, 726 (N.Y. App. Div. 2004) (“Despite his apparent belief that he could be prosecuted for perjury, Dellfava recanted.”). The trial court ignored all this.

In noting Gaulden’s prior criminal convictions, the court tacked on the statement that, “having observed Mr. Gaulden’s demeanor and manner of testifying, I did not find Mr. Gaulden to be a reliable witness.” A813. While demeanor findings are typically afforded deference on appeal, “the trial judge may [not] insulate his findings from review by denominating them credibility determinations.” *Anderson*, 470 U.S. at 575. Deference is due only if the court explains *how* or *why* a witness’s demeanor affected their credibility. Here, the trial

court did not do that; it based its conclusory finding on Gaulden’s criminal history and another judge’s findings at an unrelated proceeding. Deference is therefore not appropriate. *Stringer*, 301 A.3d at 1228-29. To conclude otherwise would invite trial courts to invoke “demeanor” as a talisman, precluding meaningful review. *Henny v. United States*, __ A.3d __, 2024 D.C. App. LEXIS 334, *14-15 (D.C. 2024) (“[W]e must be able to discern what the trial court’s basis for ruling was.”).

Conspiracy. For three flawed reasons, the trial court deemed unreliable Gaulden’s testimony that he and other members of the Alabama Avenue gang conspired to kill Roy Tolbert after Michael Raymond was shot.

First, the court credited Raymond’s self-serving testimony in the Eastside Club stabbing trial that he had no idea why Tolbert attacked him at the Club. A810 (“I have no idea, sir.”). Frankly, crediting this testimony was naive. It was in Raymond’s interest (and the government’s) to portray him as the innocent victim of the stabbing attack.¹² To acknowledge a feud between the two gangs—specifically, to acknowledge that the stabbing was in retaliation for the killing of Newton, which, in turn, was in retaliation for the shooting of Raymond himself—could have implicated the entire Alabama Avenue gang in Newton’s death. The very testimony quoted by the trial court is also inconsistent and incredible on its face. The court notes that “Mr. Raymond acknowledged that he and his friends [i.e., the Alabama Avenue gang] were feuding with Mr. Tolbert and Mr. Johnson

¹² The defense’s theory was that Raymond and his friends were the aggressors while Tolbert and Johnson acted in self-defense. A731 at 209:10-210:6 (questioning Raymond about whether his friends started the fight); A674 (Johnson told police Raymond, et al., threatened them and started the fight).

in December 1994 [but] he denied that he ‘hated them.’” *Id.* Having acknowledged the feud, Raymond’s statement that he had “no idea, sir” why Tolbert attacked him was unbelievable, as was his profession that he didn’t hate Tolbert and his gang.

Second, apart from its naivete in evaluating Raymond’s self-serving testimony, the court concluded that Raymond’s testimony was not consistent with the testimony of Fogle and Gaulden that “it was widely known that Mr. Tolbert was the person who shot Mr. Raymond.” *Id.* That conclusory sentence ignored abundant record evidence that Tolbert did shoot Raymond, including the testimony Raymond himself was expected to give at Rodney and Leonard’s trial.¹³

Third, the trial court doubted the existence of a conspiracy because Gaulden did not go after Tolbert “while the two were housed in the same unit of the same federal penitentiary.” A812-13. In short, the court appeared to suggest that, if only Gaulden had tried to murder Tolbert in prison, the court would have found him credible—but not otherwise. Then, too, the court ignored Gaulden’s testimony that after the Raymond shooting and until he went to prison himself, the Alabama Avenue gang “did everything physically possible to hurt [Tolbert],” including shooting Tolbert’s “truck up.” 10/25/22 Tr. at 72:14-73:7.

¹³ A500 at 733:16-734:22 (defense proffer that Michael Raymond would testify about being shot by Tolbert); A711 (Todd Hopkins confirmed to police that “he and ROY were beefing because ROY had shot his friend MIKE earlier this summer”); 9/22/22 Tr. at 51:17-22 (“Roy chased [Michael Raymond] in the car one day and was shooting at the car.”); 10/25/22 Tr. at 28:5-16 (Roy “pulled up on the side of the car and shot the car up,” hitting Michael Raymond three times).

Mistake. The trial court’s final reason for deeming Gaulden unreliable concerned his testimony that Nixon seemingly believed he had shot Tolbert, not Newton. A811 (“[I]t is unclear how [Nixon] would have ... misidentified Mr. Newton as Mr. Tolbert when chasing him down and then executing him at point-blank range”). The court reached this conclusion only by ignoring the circumstances of the shooting. It was not a calculated sniper attack with a lone target. It was an impromptu and opportunistic gang attack, not unlike other shootings between the two gangs. 9/22/22 Tr. at 127:9-14 (describing how the two gangs would shoot at one another blindly: “if you live in Simple City, we have what you call cuts. I’m not going to run through the cut to see who is shooting at me. People were shooting, we shot back and we went our separate ways. ...I just know it was [the Alabama Avenue gang], because that’s the way it was.”).

The evidence was that Nixon saw Tolbert near the Circle, left, returned, ran up through “the cut” in an attempt at a sneak attack, and began shooting at those in the Circle. He shot three persons in addition to Newton, and others were caught in the line of fire. 10/25/22 Tr. at 55:20-24 (Nixon: “like, I shot nine people”). Nixon could have mistaken any one of these nine persons for Tolbert, including Carrington Harley who fell face down in the street after being shot from behind. *Id.* at 122:19-22. In other words, Nixon may not have mistaken Newton for Tolbert, but instead—given twilight and how quickly things happened—mistaken Harley or one of the other fleeing individuals, including Keith Williams and Joey Payne (both shot in the back), as Tolbert.

The trial court's errors in its assessment of the conspiracy and the mistaken-identity theory are again, emblematic of the error seen in *Stringer*. Once all of the appropriate evidence is taken into consideration, the trial court's claimed inconsistencies are rendered non-existent or insignificant. As with Fogle, removing the irrelevant categorical factors from the analysis and viewing the "inconsistencies" for the little they are worth, Gaulden provided credible evidence of innocence.

Rodney Gordon. Like Fogle and Gaulden, Gordon came forward years after the murder and recounted a conversation with Nixon that strongly suggested he was the murderer. A817 ("Mr. Nixon told Mr. Gordon that he 'rolled past the Circle and saw Roy [Tolbert]' and that 'he was about to go up there and shoot him.'"). The trial court did not find Gordon's sworn statement unreliable because of delay or because it blamed a dead person; instead, the court found that, because *Gordon* was dead, it could not assess *his* credibility. That rationale effectively rules out an entire category of proof (affidavit evidence from an unavailable witness) as evidence of innocence in an IPA case. Affidavit evidence may warrant special scrutiny, but it is error to categorically exclude it, particularly where other live testimony corroborates the affidavit. *Cf. Caston*, 147 A.3d at 1098 ("[W]here the proffered support for a claim of actual innocence consists *solely* of affidavits that give inconsistent accounts about the crime, a court may conclude that the movant has not met his burden.") (emphasis added).

Insofar as it considered Gordon's statement at all, the court gave no weight to what was consistent with the testimony of other witnesses—that (i) Nixon saw

Tolbert near the Circle; (ii) told Gordon he was going to return to shoot him, (iii) appeared to have a gun with him; (iv) drove off with another person in the car; and (v) heard multiple gunshots minutes later—and focused entirely on purported inconsistencies that are either not inconsistencies at all, or insignificant ones. What Gordon said about a possible motive—that Nixon acted because of a dispute over a craps game and a subsequent shooting—is not an inconsistency. Like the other witnesses, Gordon speculated about Nixon’s motivation; he did not claim to be quoting him. And that Gordon recalled Nixon being surprised to learn “four to five days after the shooting that Mr. Tolbert had not been killed” instead of two days after (as Gaulden testified) is the kind of minor discrepancy in memories that one would expect years after the event. *Caston*, 146 A.3d at 1096-97 n.38 (collecting cases discussing the irrelevance of minor inconsistencies). Again, what would have warranted skepticism is perfect alignment in their accounts.

Michael Wonson. The trial court made similar errors in assessing Wonson’s credibility. It erred in faulting Wonson for waiting too long to come forward, claiming to recall a conversation from long ago and inculcating a dead person. A815. Faulting Wonson for delay was especially erroroneous because the evidence—not addressed by the court—was that he did not find out until 2010 that Rodney and Leonard had been charged and convicted, and, at that time, *his attorney advised him not to get involved*. 9/22/22 Tr. at 161:19-162:17. The court’s other findings are similarly flawed for failure to address all the relevant evidence.

It found Wonson unreliable because he was “good friends” with Rodney and Leonard in 1994, A815, but ignored Wonson’s explanation of what he meant: “We

would occasionally speak and, you know, have a conversation.” 9/22/22 Tr. at 163:10-11. His use of “good friends” showed his “language [wa]s far from precise,” *Caston*, 146 A.3d at 1096 n.35, yet the trial court took the term literally, without reference to Wonson’s description of their “friendship.” *Faltz v. United States*, 318 A.3d 338, 350 (D.C. 2024) (faulting trial court for interpreting statements “without discussing the context in which the statements were made” or the witness’s “subsequent testimony”).

The court also questioned Wonson’s reliability because he was unsure what caliber weapon Nixon used to commit the shooting, even suggesting Wonson changed his description of the weapon at the innocence hearing to match the ballistics evidence from the crime scene. A815-16. But his testimony reflected only that he could not remember the caliber of one of the many weapons at his disposal almost three decades ago. There is nothing in the record to suggest Wonson even knew what the ballistics evidence at trial was. *Stringer*, 301 A.3d at 1232 (error for trial court to speculate without record evidence).

Finally, the trial court questioned Wonson’s reliability because he attributed a different motive to Nixon than did other witnesses. A816. Again, the court failed to consider all the relevant evidence. Nixon did not tell Wonson that he went to the Circle to shoot Newton; rather, after the fact, he told Wonson that he had killed Newton because of a dispute over a woman (a dispute the two of them had discussed previously). This abbreviated account not only squares with what Fogle, Gaulden, and Gordon observed and/or heard from Nixon, but explains why so many persons were shot and, specifically, why Newton was shot. Taken together,

the testimony of Fogle, Gaulden, Gordon, and Wonson describe this sequence of events: (i) Nixon saw Tolbert near the Circle, (ii) returned to kill him or “anybody that be with him,” (iii) ran through the cut to surprise him and opened fire, (iv) causing those in the parking lot (including Williams, Payne, Toland, Harley, and Newton) to flee (v) while Nixon kept firing; (vi) Harley, shot in the back, fell face down, (vii) Williams and Payne, also shot in the back, continued to run, escaping the parking lot along with Toland, and (viii) as Nixon reached Newton, who had fallen after being hit, he shot him again at close range.

In short, Nixon ran up the cut, expecting to find Tolbert and intending to kill him in retaliation for shooting Michael Raymond. He continued to fire at those who fled after the first shot was heard, shooting “like, ... nine people,” and mistakenly believed he got Tolbert. He came upon Newton, who had fallen from an earlier shot, and, recognizing the man with whom he had a separate grudge, fired again at point-blank range. Nixon confessed to Fogle, Gaulden, and Gordon—fellow members of the gang who knew Nixon wanted to kill Tolbert—his attempt to kill Tolbert. Nixon confessed to Wonson—the incarcerated gang member with whom he had previously discussed his girlfriend-related grudge—that he had killed Newton. As was the case in *Stringer*, the trial court’s claimed inconsistency is “overstate[d].”

Removing the trial court’s errors from its analysis, Wonson provided reliable evidence of Rodney and Leonard’s innocence.

Marcus Johnson. The final witness relevant to the credibility of the Alabama Avenue witnesses was Marcus Johnson. The trial court found that

Johnson's testimony was not new evidence. That was error.¹⁴ So, too, was its determination that his testimony, even if new, "would not support a finding of actual innocence" because he did not witness the shooting. A824. Johnson did not claim to be an eyewitness, and Rodney and Leonard did not offer his testimony to establish either that Nixon was the shooter or that, definitively, they were not. They offered Johnson's testimony to explain how they became suspects in the first place, and to corroborate the fact that Newton's death was a byproduct of feuding between the Tolbert and Alabama Avenue gangs—a feud that began before Newton's killing and continued after with the attack on members of the Alabama Avenue gang at the Eastside Club.

To be relevant, not every "piece of evidence ... alone [need] prove the defendant's actual innocence." *Caston*, 146 A.3d at 1094. Imagine a case where the government alleges that X committed a murder because he wanted to collect life insurance on Y. It would be relevant evidence that a life insurance policy existed for Y and that X was a beneficiary of that policy. Likewise, here, it is relevant that there was a feud between the two gangs. Johnson's testimony confirmed the existence of that feud and, thus, corroborated the testimony of the Alabama Avenue witnesses that Newton was a casualty of that war. The trial court sought to have it both ways, discrediting Wonson's testimony because the defense did not present corroborating evidence that he and Nixon spoke by phone (A815),

¹⁴ Rodney Brown incorporates by reference Section I(B) of Co-Appellant Leonard Bishop's opening brief, which explains why the trial court erred in concluding that Johnson's testimony was not new, and even if it is not new, why the court was still required to consider it.

but discarding the corroborative evidence presented about the feuding and violence between the Tolbert and Alabama Avenue gangs.

B. The Trial Court Overlooked Critical Evidence of Innocence

A trial court errs when it fails to consider evidence relevant to its factual findings. *Ashrafi*, 193 A.3d at 133 (trial court’s decision was “compromised by its failure to account” for critical evidence); *Colbert*, 310 A.3d at 613 (trial court “failed to account for—and did not so much as mention—a significant” factor). Such was the case recently in *Faltz v. United States*, when the court failed to “fully grapple” or “contend” with the “totality of the evidence [the petitioner] presented in his IPA claim.” 318 A.3d at 350. And such is the case here.

Four witnesses each swore that a fellow gang member confessed to the shooting. The three who were not incarcerated and could speak more freely (Fogle, Gaulden, and Gordon) heard Nixon give a consistent account of what happened—that he saw Tolbert near the Circle, left the vicinity, returned to kill him, but got his man instead. And each of these three witnesses offered the same motive for the shooting: the Tolbert and Alabama Avenue gangs had been engaged in a violent tit-for-tat for months—warfare that was corroborated not only by the police records (*supra* at 22-23), but by Marcus Johnson, Andre Newton’s best friend. And there is the eyewitness testimony of Tyrone Jones, who told family members contemporaneously that Rodney and Leonard were not responsible and later identified Nixon as someone who resembled one of the shooters.

The court failed to give appropriate weight to the consistency of the witness testimony and the documentary record. *Al-Adahi v. Obama*, 613 F.3d 1102, 1105

(D.C. Cir. 2010) (“[A]lthough some events are independent ... other events are dependent: the occurrence of one makes the occurrence of the other more or less likely.”); *People v. Deacon*, 96 A.D.3d 965, 969 (N.Y. App. Div. 2012) (“The recantation further acquires an ‘aura of believability’ because of the testimony of the other witnesses at the hearing and its consistency within the context of other matters contained in this record.”); *Tankleff*, 49 A.D.3d at 180-81 (credibility of witnesses was bolstered by their independence and consistency).

Their consistent testimony was especially important because the record established that Fogle, Gaulden, Gordon, and Wonson did not coordinate their testimony. Fogle and Gaulden were surprised even to be receiving a visit from an investigator from the MAIP, let alone discussing what they knew about Nixon. 9/22/22 Tr. at 68:17-69:13, 80:24-81:21 (Fogle); 10/25/22 Tr. at 43:17-45:15 (Gaulden). Marcus Johnson and Tyrone Jones implicated Nixon without knowing his relevance to the innocence proceedings. 9/22/22 Tr. at 134:10-16 (Johnson); 10/11/22 Tr. at 106:25-107:3 (Jones). Concocted stories do not align this way.

Nor do witnesses concoct stories for the benefit of people to whom they have no allegiance. The witnesses here were not friends of Rodney and Leonard, but members of rival gangs. 10/25/22 Tr. at 39:7-21, 46:20-22 (Gaulden); 9/22/22 Tr. at 64:22-65:8 (Fogle); 118:22-119:24-25 (Johnson); *see House*, 547 U.S. at 552 (“The confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie.”); *Deacon*, 96 A.D.3d at 969 (“There appears to be no relationship between Campbell and the defendant of a nature that would motivate Campbell to inappropriately come to the

defendant's aid."); *Wong*, 11 A.D.3d at 726 (same); *Johnson*, 502 Mich. at 570 ("Skinner lacked any motive to lie in this case.").

Not only that, but several of the witnesses foresaw risk or suffered harm from testifying. Gaulden only agreed to testify pursuant to a grant of immunity because he admitted his involvement in the conspiracy to kill Tolbert that led to Newton's death. At the hearing he laughed at the idea that he was receiving any benefit for testifying. 10/25/22 Tr. at 46:25-47:15. Johnson traveled from North Carolina pursuant to a material witness subpoena. And because Wonson was pursuing IRAA relief at the time of the innocence hearing, his transfer to the Warsaw Regional Jail for several months so he could testify at the hearing adversely affected his IRAA petition. 9/22/22 Tr. at 200:19-201:11; 9/19/22 Tr. at 11:19-24, 16:11-13. People don't make their lives harder—let alone confess to their involvement in a murder—for people they don't like, unless it's the truth.

The trial court did not fully grapple with or balance these facts when assessing the reliability of the Alabama Avenue witnesses—the precise error this Court identified in *Faltz*. 318 A.3d at 350 (the trial court emphasized a piece of evidence, but "[did] not mention" other evidence that would support the IPA petitioner's claim); *Henny*, __ A.3d __, 2024 D.C. App. LEXIS 334, *15 ("[W]e cannot meaningfully review the trial court's ruling absent some explanation for why it seemingly rejected" certain evidence); *Johnson*, 502 Mich. at 570-71 ("While Skinner's testimony contained some questionable aspects, which the trial court appropriately noted, it also contained some reliable aspects, which the trial

court failed to acknowledge.”). Had it done so, it would have found the witnesses credible.

II. TYRONE JONES PROVIDED REIABLE EVIDENCE OF INNOCENCE

The trial court dismissed Jones’ testimony, even if new,¹⁵ as “of little value,” on the grounds that his account was “based on observations made nearly three decades ago when he was thirteen years old, of individuals he rarely saw from a distance away.” A822. This aspect of the Order is almost wholly conclusory and failed to fully and fairly consider the evidence.

First, the trial court deemed it significant that Jones initially testified that the car in which he was a passenger was parked “a few feet away” or “a car or so” away from Newton when he was shot—then, when pressed to be more specific, said he was “probably” the distance between the witness stand and one of the attorneys seated just beyond the courtroom podium, “around 20 feet,” according to the court. 10/11/22 Tr. at 24:9-10, 28:24-25, 102:23-103:15; A822. As the court recognized, this was a clarification, not a discrepancy or alteration in his testimony. A822 (“Mr. Jones *clarified* that he was approximately twenty feet away.”). It is the court that was inconsistent: it found Tyrone Jones’ identification of individuals he saw “from a distance away” as of little value, but fully credited the identifications

¹⁵ Rodney Brown incorporates by reference Section I(C) of Co-Appellant Leonard Bishop’s opening brief, which explains why the trial court erred in concluding that Jones’ testimony was not new, and even if it is not new, why it must be considered.

made by the government's witnesses, who were considerably more distant. A761 at 29:19-24 (Keith Williams: he was "like, 80 feet" away from the shooters); A429 at 433:13-434:14, 447:7-9 (James Jones: he was parked in front of apartment 620, putting him more distant than Williams who was exiting the parking lot).

In any event, twenty feet is not a "distance away," as the court claimed. In the below photo, Jones testified that he was near the circled "tin can," while Newton and the shooter were on the sidewalk near the entrance to the parking lot (marked by an "X"). 10/11/22 Tr. at 66:8-68:14; A757.



Indeed, Fogle, Wonson, Gaulden, and Jones himself had no trouble identifying Rodney and Leonard during the innocence hearing from the same approximate twenty-foot distance. 9/22/22 Tr. at 53:1-19 (Fogle), 155:5-25 (Wonson); 10/25/22 Tr. at 33:2-14 (Gaulden); 10/11/22 Tr. at 33:16-24 (Jones).

Second, from the fact that Jones had only seen Rodney "five, six times, seven times" in 1994, the trial court concluded that Jones "rarely saw [Rodney and Leonard]," implying that he was incapable of recognizing them. A822. That

conclusion disregarded Jones' testimony that he had "known them for a while" because "they grew up with [his] cousins." 10/11/22 Tr. at 34:4-5. When Jones testified he had seen Rodney "five, six times, seven times" in 1994 alone, he was not talking about street-corner sightings, but people he knew through his family. *See Caston*, 146 A.3d at 1095 (noting "at least one purported inconsistency reflects the court's own loose paraphrasing of [the witness's] testimony.>").

Third, the trial court also erred when it concluded that because Jones was thirteen years old at the time, the reliability of his memory must be "far from clear." A822. But this was the first murder Jones had witnessed "firsthand." 10/11/22 Tr. at 97:10-12. And it was very firsthand—from twenty feet away, or the distance in many courtrooms from the podium to the witness box. That Jones was thirteen at the time is all the more reason why his memory would be vivid, not indistinct. As he testified: "It's naturally it come, and you just – it sticks – it stays there."¹⁶ *See, e.g., Johnson*, 502 Mich. at 568-71 (new witness found credible

¹⁶ The court misunderstood Jones' testimony and, in consequence, misleadingly quoted it. A819 ("he stated that shootings were 'the everyday norm' and 'not ...stuff ... that's vividly in your mind']"). What Jones said in full was:

You know, when you grow up in this kind of environment, these types of events become the everyday norm. So it's not – it's stuff that you – that's vividly in your mind. It's naturally it come, and you just – it sticks – it stays there.

10/11/22 Tr. at 44:23-45:2. One thought begins, then ends mid-sentence with "not." He then re-starts and states, "it's stuff that you – that's vividly in your mind." It is apparent that he re-started, then stated that neighborhood murders are memorable, because he repeated the statement, "It's naturally it come, and you just – *it sticks – it stays there.*" *Id.* (emphasis added). Jones reiterated this point later, saying he "vividly" remembered the shooting. *Id.* at 106:11-12.

despite being 8 years old when the crime occurred and waiting 16 years to come forward).

Jones' testimony is also notable for its consistency. When Rodney and Leonard were arrested, Jones told his cousin, Juan Green, that the police had the wrong guys, 10/11/22 Tr. at 35:11-37:12—a conversation Green confirmed to a MAIP investigator. 10/25/22 Tr. at 98:4-9. A decade later, when Jones and Rodney were incarcerated at the same facility, Jones recounted the same facts, then later executed an affidavit to the same effect in 2011. 10/11/22 Tr. at 38:22-41:12; 42:6-43:3. At the IPA hearing, Jones again reaffirmed those facts, which align with the undisputed trial evidence:

- His testimony that there were two shooters and that one continued firing at Newton when Newton fell to the ground (*Id.* at 27:12-19) aligns with Carrington Harley's trial testimony (A1 at 27:11-22), as well as that of James Jones (A429 at 437:12-14).
- His testimony regarding where Newton was shot and fell (10/11/22 Tr. at 66; A757) aligns with Harley's (A1 at 29:21-23, 36:25-37:6; A53 TT at 123:21-25) and Jones's trial testimony (A429 at 435:8-17).
- His testimony that a woman came to Newton's aid (10/11/22 Tr. at 28:7-9) aligns with that of Harley (A1 at 30:22-24).

The trial court failed to consider, much less recognize, the significance of this consistent evidence, and thereby erred both in failing to weigh critical evidence and giving too much weight to inconsequential facts.

The trial court also erred in its determination that Jones' photo identification of Nixon was "entitled to little weight." A822. Contrary to the court's finding, the circumstances under which the identification occurred were in fact "fleshed out":

the record reflects that three photographs were placed in front of Jones, who “instantly pointed to [the photo of Nixon]” stating, “that look like the shooter.” 10/11/22 Tr. at 106:22-24. No one told him who was in the photos or whom to pick; he had never seen a photo of Nixon before; and did not know who Nixon was or his significance to this case. *Id.* at 87:12-19, 106:13-107:6. Nor is it significant that Jones could identify Nixon, but not Newton. It should not be expected that a witness will focus equally on everything he sees, or that Jones would focus more on the person shooting a gun.

III. THE TRIAL COURT FAILED TO WEIGH PROPERLY THE WEAKNESSES IN THE CONVICTING EVIDENCE

It is essential for a trial court, in evaluating an innocence claim, to consider the weaknesses in the convicting evidence. *Caston*, 146 A.3d at 1099; *Stringer*, 301 A.3d at 1233. The trial court paid lip service to that requirement, but its analysis was superficial and incomplete. *Stringer*, 301 A.3d at 1233 (instructing trial court to “consider the potential weaknesses in the government’s case” “to a greater extent than it did”). Because Judge Park did not preside over the 1996 trial, “his assessment of the weight of the trial evidence can be no better than [this Court’s].” *Caston*, 146 A.3d at 1099; *Stringer*, 301 A.3d at 1233 (“The [IPA] judge did not preside over [Appellant’s] trial and thus was not in an advantageous position to assess the weight of the trial evidence.”).

The jury struggled to reach a verdict in this case, deliberating for more than a week, deadlocking twice, and only rendering a verdict after receiving an anti-deadlock instruction. The jury’s struggle in reaching a verdict signals the weakness

of the government's evidence, yet the trial court made no mention of it. *See Ebron v. United States*, 838 A.2d 1140, 1150 (D.C. 2003) ("The jury deliberated five days, and the court found it necessary to provide an anti-deadlock instruction. Under these circumstances, we cannot say that the government's case was overwhelming."); *Simmons*, 945 A.2d at 1187 (noting there was reason to "think the jury found this a close case," because it "deliberated for four days and sent three notes, one after receiving an anti-deadlock instruction, stating that it was unable to reach a unanimous verdict"). That the jury found it difficult to reach a verdict is not surprising. There were clear reasons to question the credibility of each of the government witnesses:

Keith Williams told police on three separate occasions, including immediately after the incident, that he could not see the shooters well enough to identify them. A116 at 146:2-24. He implicated Rodney and Leonard only after his counselor terminated him from his drug treatment program, putting his probation at risk. A723; A728. And by the time of trial, he was testifying pursuant to a plea deal that allowed him to avoid significant prison time. A686; A116 at 159:6-165:23. The trial court did not consider the plea deal significant because the charges to which he pled were only brought after he had implicated Rodney and Leonard. A840. But the court ignored the evidence that Williams was at risk (revocation of probation) and had reason to bargain his way out of trouble *before* he implicated them. It also disregarded the reality that in order for Williams to reap the benefits of the plea deal, he had to stick with that accusation. A686; A116 at 145:5-22 (plea deal required him to testify), 166:20-167:24 (sentencing delayed until after

testimony). Williams even went into hiding multiple times to avoid testifying; the later charges and plea deal all but compelled his testimony. A116 at 156:14-23, 157:21-158:16.

Williams' ever-evolving story is not surprising given what is known about the tactics used by the police to investigate this case. Michael Toland testified at the innocence hearing that the police harassed his family, threatened to "lock [him] up for perjury," and were "trying to make [him] say he saw something" that was not true, including that Rodney and Leonard were involved in the shooting.¹⁷ 9/23/22 Tr. at 22:6-23:24. Joey Payne similarly described the government "trying to get [him] to say [Rodney and Leonard] were the shooters and threatening to "lock [him] up if [he] wasn't on their side."¹⁸ A658-59. Keith Williams himself testified at trial that he was scared of Detective Rice, the person who interrogated him. A116 at 153:19-24.

Carol Jefferies was a daily substance abuser who claimed her memory improved when she drank. A303 at 376:13-378:5, 410:13-411:10. She came

¹⁷ The trial court discounted Toland's testimony, but its reasons for doing so are rooted in logical fallacies. A834. That Toland did not succumb to police pressure does not mean others did not. And just because the police mentioned other possible names does not mean they were not trying to get Toland (and others) to implicate Rodney and Leonard. It was the government's theory that the shooting was the product of a conspiracy amongst Rodney and Leonard's friends, *supra* at 6, so the fact that police mentioned other people does not detract from its focus on Rodney and Leonard.

¹⁸ Joey Payne passed away on October 9, 1996, so he was unable to testify at the innocence hearing. 9/22/22 Tr. at 38:9-10. Tom Heslep testified about the process he followed to obtain Payne's statement. 10/11/22 Tr. at 110:7-114:9.

forward six months after the shooting only after she learned she was about to be evicted from her home. *Id.* at 369:13-372:20. In exchange for her testimony, the government solved her housing issues by providing her with a place to live and subsistence benefits that totaled over \$6,000. *Id.* at 376:2-7.

James Jones waited even longer to come forward (one year). He admitted he had occasional memory problems, A429 at 461:15-462:4, 466:9-10, and like Jefferies used the shooting as an opportunity to get out of Simple City—something he had been trying to do for eight years. *Id.* at 458:25-459:6. Two months before Rodney and Leonard’s trial, Jones moved into a new apartment owned by one of the lead detectives on the case. *Id.* at 454:16-455:9; 458:25-459:6.

Not only did the government’s witnesses have motive to lie, they contradicted one another and the physical evidence. Jefferies’ story contradicted both Keith Williams’ and James Jones’ testimonies that the shooters did not flee across 46th Place in the direction of her apartment. A222 at 218:16-219:13; A429 at 452:13-24. And the conversation she claimed to overhear while on her way to the liquor store was two days after the shooting, which would have been a Sunday, when liquor stores were closed. *See* D.C. Law 19-168 § 2042(a) (Sept. 20, 2012) (changing prior D.C. liquor laws to allow sales during certain hours on Sundays). James Jones, who claimed he watched the shooting from start to finish, was adamant that Newton was shot in the back while hunched in a “turtle position,” and that he never saw the shooter press a gun to Newton’s neck, A429 at 445:11-446:5, which is contradicted by the medical examiner’s testimony that Newton was shot point-blank from the front, A491at 523:9-527:16.

Keith Williams’ trial testimony was also impeached by Michael Toland, who testified that immediately after the shooting both Williams and Joey Payne said they did not see who the shooters were. 9/23/22 Tr. at 10:14-20. Toland also denied Williams’ testimony at trial that he told persons to leave the Circle just prior to the shooting—testimony the government used to support its “drug turf” motive (*supra* at 6). *Id.* at 17:8-22, 45:9-46:9. The trial court discards Toland’s evidence because it is not “new.” A834. But it was offered, not as new evidence of innocence, but to cast doubt on the government’s theory of the case and to challenge Williams’ credibility. *Faulkner v. State*, 227 A.3d 584, 614 n.24 (Md. 2020) (“[T]he circuit court was correct to consider the effect of newly discovered evidence on other evidence that was available” at the time of trial).

Lastly, the government’s evidence is weakened by the fact that the first real lead the police got in the case was a lie. Marcus Johnson’s false identification of Rodney was arguably the impetus for police focusing their investigation on Rodney and Leonard. From there, police had names and faces to use as suggestive devices when interviewing witnesses who—between immense police pressure and the allure of plea deals and housing benefits—might otherwise have never implicated Rodney and Leonard.

The trial court’s failure to contend fully and with all of the weaknesses in the government’s evidence renders its assessment superficial and incomplete.

IV. RELIEF SHOULD BE GRANTED UNDER THE IPA

Had the trial court not erred in its evaluation of the evidence, Rodney and Leonard would have received relief under the IPA—a legal conclusion this Court

is capable of determining now on its own. *Lewis v. Est. of Lewis*, 193 A.3d 139, 144 (D.C. 2018) (clear and convincing standard is a legal conclusion reviewed *de novo*); *Pridgen v. United States*, 134 A.3d 297, 302 (D.C. 2016) (preponderance standard is a legal conclusion reviewed *de novo*); D.C. Code § 22-4135(g)(2)-(3) (if either the preponderance or clear and convincing standard is met, the court “shall” grant relief under the IPA).

Four members of a rival gang swore that Eugene Nixon, not Rodney or Leonard, was responsible for the November 25 shooting. The shooting, and, in turn, Newton’s death, was the result of an ongoing war between Roy Tolbert’s gang (whom Newton associated with) and Nixon’s gang (Alabama Avenue). Nixon’s confession and the deadly feud that served as his motive were not only corroborated by fellow Alabama Avenue members who did not collaborate and have no reason to help Rodney and Leonard, but by the historical record and Marcus Johnson, Newton’s best friend. Absent Johnson’s false identification of Rodney to the police, this feud may not have been ignored and two innocent men may never have gone to prison. Were that not enough, an eyewitness came forward who confirmed Rodney and Leonard were not involved and identified a photo of Nixon as resembling one of the shooters, despite not knowing who he was.

The evidence—if reviewed properly and in totality—would leave any factfinder with a “firm belief” in Rodney and Leonard’s innocence. *District of Columbia v. Hudson*, 404 A.2d 175, 179 & n.7 (D.C. 1979) (en banc) (clear and convincing standard). At the very least, their innocence is “more plausible,” *In re B.L.*, 824 A.2d 954, 956 (D.C. 2003) (preponderance standard), than the

government's theory—one that involves biased witnesses, a flimsy motive that had Rodney and Leonard shooting at their own friends (Toland and Payne), a police investigation spurred by a false identification, and a jury that deadlocked twice and deliberated for more than a week.

CONCLUSION

The trial court failed to properly evaluate the IPA evidence. Had it done so, it would have found that Rodney and Leonard are, at the very least, more likely than not innocent. At minimum, a new trial should be granted.

Respectfully submitted,

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/s/ Margaret Abernethy

Margaret Abernethy (#1655549)
Mid-Atlantic Innocence Project
1413 K Street NW, Suite 1100
Washington, DC 20005
(202) 969-0979 ext. 701

Thomas Heslep (#351726)
419 7th Street, NW #405
Washington, DC 20004

Thomas Carter (#1044815)
Baker Botts L.L.P.
700 K Street, NW
Washington, DC 20001
(202) 639-7702

Counsel for Appellant Rodney A. Brown

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2024, a true and correct copy of the foregoing Opening Brief for Rodney A. Brown was served upon:

Chrisellen R. Kolb
Assistant United States Attorney
United States Attorney's Office
601 D St. N.W.
Washington, D.C. 20001
Counsel for Appellee

Peter H. Meyers
2000 G Street, N.W.
Washington, D.C. 20007
Counsel for Leonard Bishop (24-CO-0254)

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/s Margaret Abernethy
Margaret Abernethy