No. 23-CF-0205

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

RONNIKA M. JENNINGS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Superior Court of the District of Columbia,
No. 2018 CF1 006028 (Demeo, J.)

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

In a much-publicized indictment, the government charged Ronnika Jennings, a MPD customer service representative, with 45 counts related to various gang-related shootings and murders by Derek Turner. Jennings was acquitted of 40 of those 45 charges. And now, seven years after Jennings was indicted, the government concedes that one of those convictions must be vacated as it ***is not even a crime***. But it defends four charges that Jennings was an accessory after-the-fact ("AAF") to Turner's three assaults with intent to kill ("AWIKs") on February 17 and his March 2017 murder of Andrew McPhatter. These charges lack evidentiary support.

First, an AAF charge requires proof that the accessory both "knew" (meaning, had "personal" and "actual knowledge") that the principal had committed the felony and, with that knowledge, "assisted" the principal in avoiding apprehension or prosecution. *Butler v. United States*, 481 A.2d 431, 443 & n.21, 444 (D.C. 1984). There is no evidence Jennings knew of Turner's criminal acts. She did not observe them, no police report she reviewed identified him as the perpetrator, and there is no evidence of anyone telling her that he had committed the crimes. Nor is there evidence that she provided anything of assistance to Turner in escaping arrest or trial. Thus, her AAF convictions must be overturned.

Specifically with regard to the charge of AAF to Turner's murder of McPhatter (the only charge on which Jennings is currently incarcerated), the government primarily relies on Jennings's conduct on March 1-2 to prove that she assisted Turner. But under D.C. law, the assistance must occur after the victim's death and before the principal's arrest. *Hawkins v. United States*, 119 A.3d 687, 697

(D.C. 2015) ("[A] defendant cannot be convicted of accessory after the fact to murder on the basis of actions taken while the decedent is still alive"); *Butler*, 481 A.2d at 444 (an accessory "cannot assist a criminal to evade apprehension or punishment ... at a time the felon was dead or had already been arrested"). Here, McPhatter was shot on March 1 but died on March 5, and Turner was arrested on March 11 and detained thereafter. There is no evidence that from March 5-11, Jennings either knew that Turner had murdered McPhatter or did anything to help him avoid apprehension. While the government claims that Jennings provided information from police records to Turner, there is no evidence that she ever viewed any police record regarding the McPhatter murder from March 3 through September 6, the day that Turner (already in custody) was charged with the murder. And the sole police report Jennings viewed on March 2 made no mention of Turner as a suspect, identified no witnesses, and revealed nothing confidential about the investigation. Thus, even if Jennings wanted to assist Turner in evading apprehension or prosecution, she had no information with which to do so. Hence, her conviction as an AAF to murder must, like her other four convictions, be reversed for lack of evidence.

Second, Jennings's interrogation was introduced at trial in violation of *Garrity v. New Jersey*, 385 U.S. 493 (1967). *Contra* the prosecution's claims, Jennings preserved the argument for *de novo* review, unrebutted testimony establishes that her interrogation statements were compelled given her knowledge that she would be fired if she did not cooperate, and the government used the statements to secure a search warrant and later impugn her with jurors. Both uses were impermissible.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE ACCESSORY AFTER THE FACT CHARGES

D.C. law narrowly defines the elements of the AAF offense, retaining its traditional, common law meaning when the AAF statute was enacted in 1901. *Little v. United States*, 709 A.2d 708, 712 (D.C. 1998). The elements of the offense are:

(1) A felony must have been completed by another prior to the accessoryship;
(2) The accessory must not be a principal in the felony;
(3) The accessory must have knowledge of the felony; and
(4) The accessory must act personally to aid or assist the felon to avoid detection or apprehension for the crime or crimes.

Outlaw v. United States, 632 A.2d 408, 411 (D.C. 1993). The government failed to prove either of the last two elements: knowledge and assistance.

D.C. hews to the traditional rule that an accessory must know the underlying felony had been completed, *Little*, 709 A.2d at 712, and have "personal" and "actual knowledge" that the principal committed it, *Butler*, 481 A.2d at 443 & n.21; *accord Butler v. State*, 643 A.2d 389, 400 (Md. 1994) ("defendant must have had actual knowledge that the person assisted was the one who committed the felony"). And as the government admits (Opp. 87), the accessory must have this knowledge "before" she assists. *Jones v. United States*, 716 A.2d 160, 164 (D.C. 1998).

D.C. law also limits AAF's assistance element to conduct taking place after the felony was completed and before apprehension of the principal. *Little*, 709 A.2d at 712; *Butler*, 481 A.2d at 444. This Court, moreover, has "decline[d] to construe the AAF statute expansively as reaching conduct which falls so far short of the

illustrations of accessoryship provided by Blackstone" and successor commentators. *Outlaw*, 632 A.2d at 413. Those "illustrations" included helping the principal escape or harboring him, destroying evidence, inducing a witness to absent himself or give false testimony, or giving the police false information. *Id.* at 411-412.

Applying these established principles of knowledge and assistance here, it is clear as a matter of law that the government did not prove either element.

A. The Government Failed To Prove That Jennings Was An AAF To The February 17 AWIKs

In Counts 15, 18, and 21, Jennings was charged with taking action on February 21-23 as an AAF to Turner's February 17 AWIKs. Thus, the government had to prove that, as of February 21-23, Jennings knew Turner had committed the AWIKs. But the ***only*** evidence at trial concerning the relevant time period was that Jennings:

(1) received a phone call from Turner on February 20;
(2) accessed Cobalt reports regarding the February 17 AWIKs twice on February 21;
(3) received a phone call from Turner on February 22;
(4) accessed Cobalt reports regarding the February 17 AWIKs twice on February 23; and
(5) exchanged three brief calls (sixteen, six, and twenty-six seconds) with Turner on February 23.

Br. 5-7; Opp. 88-89.[1] From this, the government contends that a jury could infer beyond a reasonable doubt that Jennings both knew Turner was the shooter and assisted him in avoiding apprehension. The argument is frivolous.

[1] As used throughout this reply brief, "Br." refers to Jennings's opening brief and "Opp." refers to the government's opposition brief.

1. The Government Failed To Prove That Jennings Knew Turner Had Committed The February 17 AWIKs

When Jennings accessed the Cobalt reports on February 21 and 23, they made no mention of Turner as even a suspect in the February 17 shootings. App. 777-778. And no witness testified as to the content of the calls between Jennings and Turner. *See* App. 381-382, 487. Thus, the government's knowledge argument is that the mere timing of both the calls and Jennings's review of the reports allowed the jury to infer that Jennings knew Turner had committed the February 17 shootings. *See* Opp. 91-92. The government cites no caselaw for that proposition—and this Court has rejected the notion that evidence that communications took place around the time of a crime, without proof of their content, suffices to prove the requisite knowledge. *See Hawkins*, 119 A.3d at 699 ("log of telephone calls between Mr. Hawkins and Ms. Campbell after she dropped him off that night" was too speculative to support obstruction conviction because there was "no evidence about what Mr. Hawkins and Ms. Campbell said to each other"); *Butler*, 481 A.2d at 443-444 (principal's "visit to appellant Butler at the D.C. Jail does not support any inference as to the content of their conversation. Any such assumption would be pure speculation.").

Moreover, the government is conflating an inference that Turner and Jennings may have ***generally discussed*** the February 17 shootings with an inference that Turner ***told*** Jennings that he committed those shootings. The AAF actual knowledge element cannot be satisfied by the former. *See Commonwealth v. Devlin*, 314 N.E.2d 897, 899-900 (Mass. 1974) (discussing traditional commentaries and authorities to hold that the knowledge element requires proof that the accessory knew, either "by

his observations *or by information transmitted to him*, of the substantial facts of the felon[y]," including "knowledge of the identity of the … felon" (emphasis added)). Even assuming the timing of the calls and Cobalt searches allows an inference that Jennings and Turner discussed the February 17 shootings, it does not follow that their discussion included an admission by Turner that ***he*** had committed them. The critical question for purposes of the knowledge element is ***what***, if anything, Turner said regarding the shootings during the calls with her. More precisely, did Turner say (or even suggest) on the calls that ***he*** had committed the shootings? There is no evidence that he did. App. 381-382, 487. Even now, the government does not assert that Turner told Jennings during the calls that he had committed the shootings. While the government claims that "the content of the calls can readily be inferred from the surrounding circumstances" (Opp. 94), it never specifies ***what that content was***—because the government (and the jury) did not know.

Ultimately, the government seems to suggest that Jennings should have suspected that Turner's interest in the relevant police records (if that was even a topic of the calls) showed his involvement. But suspicion is not the "personal" and "actual knowledge" an AAF offense requires. *Butler*, 481 A.2d at 443; *see also Coleman v. United States*, 202 A.3d 1127, 1143 (D.C. 2019) (distinguishing "actual knowledge" from "should have known"). To prove an AAF charge, "[i]t is essential that the commission of the felony should be ***known to, not merely suspected by***, the person aiding the principal." Hochheimer,[2] *The Law of Crimes and Criminal Procedure*

[2] Maryland courts regularly cite Hochheimer's treatise for the common law of crimes. *See*, *e.g.*, *Hopewell v. State*, 712 A.2d 88, 92-93 (Md. Ct. Spec. App. 1998).

§ 26 (2d ed. 1904) (emphasis added); *see also* 2 LaFave, *Substantive Criminal Law* § 13.6(a) (3d ed. 2024) ("[T]he person giving aid must have known of the perpetration of the felony by the one he aids. Mere suspicion is not enough."). Evidence that Jennings knew Turner, who the government contends was involved in a gang feud (Opp. 4), was interested in the February 17 AWIKs does not establish beyond a reasonable doubt that Jennings had "personal" and "actual knowledge" that Turner had committed those AWIKs. For example, Turner could well have been just as interested had it been another gang member who did so.

Clark v. United States, 418 A.2d 1059 (D.C. 1980), confirms the proof failure here. There, the alleged accessory drove the principal to the robbery's location, dropped him off, drove around the block during the robbery, and picked him back up. *Id.* at 1061. This Court concluded that even the accessory's presence in the car with the principal ***immediately before and after*** the robbery was "insufficient to support an inference that ... the [accessory] knew the [principal] had committed the robbery." *Id.* The government never explains how, given that holding, simply exchanging phone calls around the time of AWIKs proves knowledge. *See* Opp. 92.

2. The Government Failed To Prove That Jennings Assisted Turner In Relation To The February 17 AWIKs

Similarly insufficient is the evidence that Jennings acted with "specific intent to act so as to assist a principal"—meaning, "assistance or aid designed to hinder apprehension, trial[,] or punishment." *Butler*, 481 A.2d at 444. As explained, the government offered no evidence as to what was said during the calls between Jennings and Turner. Br. 6. And the particulars of what was said matter; as this

Court observed, a supposed accessory's "morally repugnant" conduct does not necessarily rise to the level of culpable assistance. *See Outlaw*, 632 A.2d at 412.

The government's theory of assistance is that Jennings kept "Turner informed about the police investigation" and thereby "enabled Turner to remain in public without fear of detection." Opp. 94. But whether that is true depends on what was said, which the government never proved. Moreover, the government has the assistance element backwards. It argues that Turner would have "had to go to great lengths to avoid apprehension" had Jennings ***not*** assisted in the way it claims she did. *Id.* The government's theory, that is, was that Jennings provided information that caused Turner ***not*** to avoid apprehension. *Id.* This is the ***opposite*** of what had to be proved to establish "assistance or aid designed to hinder apprehension, trial, or punishment." *Butler*, 481 A.2d at 444. Its burden was to prove that Jennings assisted Turner in evading apprehension, not that she made his evasion unnecessary. Thus, even if Jennings ***knew*** of Turner's AWIKs, ***intended*** to help him avoid apprehension, and told Turner he was ***not*** a suspect, the government has no theory as to how even "the possibility existed that the aid might have facilitated the offender's escape." *Id.*

B. The Government Failed To Prove That Jennings Was An AAF To The March 1 Murder

In Count 36, the government charged Jennings as an AAF to Turner's murder of Andrew McPhatter. App. 103. The government's evidence was that:

(1) Turner and Jennings exchanged five phone calls after the McPhatter shooting on March 1;
(2) Jennings accessed Cobalt reports regarding the incident twice (at

7:19am and 7:21am) on March 2;
(3) Turner and Jennings exchanged three phone calls on March 2;
(4) McPhatter died of the gunshot wounds on March 5;
(5) Jennings called Turner on March 6;
(6) Turner called Jennings on March 8;
(7) Turner texted Jennings on March 10 stating, "Nik I need u to call me ASAP Please.";
(8) Turner and Jennings exchanged three calls on March 10;
(9) Turner was arrested on March 11; and
(10) Jennings viewed a police report in Cobalt concerning the McPhatter murder on September 6, the day Turner was charged with such.

Br. 7-8; Opp. 89-90. For starters, the evidence from before March 5 or after March 11 is categorically irrelevant. An AAF to murder cannot be based on assistance provided before the victim's death, *Hawkins*, 119 A.3d at 697, which here occurred on March 5 (App. 103). And an accessory "cannot assist a criminal to evade apprehension or punishment ... at a time the felon was dead or had already been arrested," *Butler*, 481 A.2d at 444, which here occurred on March 11 (App. 375).

The only evidence of Jennings's conduct between March 5 and March 11 is a log listing five calls between Jennings and Turner and a single text message from Turner to Jennings that read, "Nik I need u to call me ASAP Please." App. 698, 700, 702, 717. That is plainly insufficient to establish either the knowledge or assistance elements of the AAF to murder charge.

1. The Government Failed To Prove That Jennings Knew Turner Committed The March 1 Murder

As noted, AAF knowledge requires proof that the supposed accessory "knew before [s]he acted that the [felony] had actually been perpetrated." *Jones*, 716 A.2d at 164. In addition, the accessory "must have had actual knowledge that the person

assisted was the one who committed the felony." *Butler*, 643 A.2d at 400 (emphasis omitted); *see also Butler*, 481 A.2d at 443 & n.21 (holding an accessory must have "personal" and "actual knowledge" that the principal committed the felony).

The time when an AAF accessory must possess knowledge—when assistance is given—is critical here. The government first argues about Jennings's knowledge by discussing her communications with Turner in January and February 2017. Opp. 88-89. But Jennings could not have known that Turner murdered McPhatter over a month before it happened. Similarly misguided is the government's reliance on the March 2 Cobalt searches and the March 1-2 calls between Jennings and Turner. Opp. 89-90. Again, Jennings could not have known that Turner *murdered* McPhatter until McPhatter died on March 5. *See Little*, 709 A.2d at 710-711.

In any event, far from showing that Jennings knew Turner had murdered McPhatter, the March 2 Cobalt reports stated that McPhatter was alive (in "critical condition"), App. 845, and never mentioned Turner, App. 841. Indeed, they did not describe the sex, race, height, weight, hair color, or clothing of *any* suspect. *See id.*

Even if pre-death evidence could be used to prove Jennings's knowledge that Turner murdered McPhatter, the mere proximity of the March 2 Cobalt searches and March 1-2 calls between Jennings and Turner do not establish Jennings's "personal" and "actual knowledge" that Turner was even the shooter. *See Butler*, 481 A.2d at 443 & n.21; *Butler*, 643 A.2d at 400. Whatever other inference one might reasonably draw about the general topic of the communications, it is "pure speculation" to conclude that Turner disclosed himself as the shooter during the calls. *See supra* at 5 (citing *Butler*, 481 A.2d at 443, and *Hawkins*, 119 A.3d at 699).

The evidence of Jennings's knowledge is even weaker after McPhatter died on March 5. While Turner and Jennings exchanged calls on March 6, 8, and 10, no evidence suggests even the topic of the calls. And even if Cobalt searches around that time could support an inference as to the content of the calls, Jennings ran no searches in proximity to those calls; indeed, she ran ***no*** searches about the shooting from March 3 until September 6, when Turner was charged with the murder. Br. 19. Nor did any witness testify as to the calls' contents. Br. 8. And the one March 10 text message between them does not suggest what was discussed. App. 717.

The government points to communications in April and May between Turner, Jennings, and Marshay Hazelwood. Opp. 90. But none of the communications refer to the McPhatter murder (much less include an admission by Turner to such), Turner was not then detained for the murder, and Jennings did not access any Cobalt reports about it in the month before or four months after. *See* Br. 9-10. There is literally ***no*** evidence that at any relevant time Jennings knew Turner had murdered McPhatter.

2. The Government Failed To Prove That Jennings Assisted Turner In Relation To The March 1 Murder

As noted, "a defendant cannot be convicted of accessory after the fact to murder on the basis of actions taken while the defendant is still alive." *Hawkins*, 119 A.3d at 697. And an accessory "cannot assist a criminal to evade apprehension or punishment ... at a time the felon was dead or had already been arrested." *Butler*, 481 A.2d at 444. Rather, "the aid rendered must be of such a character as to 'enable elusion of *present* arrest and prosecution.'" *Id.* As McPhatter died on March 5 (App. 103) and Turner was arrested early on March 11 (App. 375), the government had to

prove that Jennings culpably assisted Turner during the fewer-than six days between.

Almost all the acts on which the government relies to prove assistance occurred on March 1-2 when Jennings accessed the Cobalt database and had calls with Turner. Opp. 89. But McPhatter died days later, *see* App. 103; 11/2/22 Tr. 185-186, so Jennings cannot be convicted of AAF based on these acts. *See Hawkins*, 119 A.3d at 697. In any event, the government offered no evidence of what Jennings said about the Cobalt report (even assuming she discussed it) that could have assisted Turner. Br. 7-8. As of March 2, the report did not mention Turner, describe any suspect or any investigative steps, or identify any witnesses. *See* App. 841-869.[3]

The government also fails to identify evidence of acts by Jennings between March 5 and 11 that helped Turner avoid apprehension or prosecution. *See* Opp. 89. While the two had calls on March 6 (App. 702) and 8 (App. 700), and exchanged a text message and three calls on March 10 (App. 698, 717), the government offered no evidence of the content of those calls. Br. 8. And Jennings did not access Cobalt reports in connection with those communications. *See id.* Thus, the government's argument that Jennings "ke[pt] Turner informed about the police investigation" (Opp. 94) has no evidentiary basis, especially after McPhatter's death on March 5.

What is more, the government's appellate theory has the assistance element precisely backwards. The government contends that whatever information Jennings purportedly provided "enabled Turner to remain in public without fear of detection,"

[3] Citing generic testimony about what Cobalt reports typically include, the government asserts that the report Jennings viewed disclosed "evidence recovered, and the 'investigative process.'" Opp. 89. But the March 2 report, which is in evidence, contains none of that information. *See* App. 429-430; 841-869.

and that "[w]ithout this knowledge, Turner ***would have had to*** go to great lengths to avoid apprehension." Opp. 94 (emphasis added).[4] In other words, the government's theory was that Jennings provided information that caused Turner ***not*** to take steps to avoid apprehension. *See id.* As discussed (*supra* at 8), this is the ***opposite*** of what the government had to prove to demonstrate "assistance or aid designed to hinder apprehension, trial, or punishment." *Butler*, 481 A.2d at 444.[5]

The government further asserts that, during her interrogation, "Jennings falsely claimed that she ran only one warrant check on Turner and denied searching for police reports of the charged crimes." Opp. 90.[6] But the indictment nowhere charges that Jennings assisted Turner by providing false information to investigating officers. *See* App. 103-124. Sustaining the conviction on that basis would constitute an impermissible constructive amendment. *See Scutchings v. United States*, 509 A.2d 634, 637 (D.C. 1986) (requiring reversal when "facts introduced at trial go to an essential element of the offense charged, and the facts are different from the facts that would support the offense charged in the indictment"). Those (supposedly) false denials also occurred in 2018 (App. 176), well outside the 2017 timeframe during

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[4] The government contends that it made this argument at trial regarding the AAF to murder charge. *See* Opp. 94 (citing 11/16/22 Tr. 60-61). It did not. The transcript pages it cites relate not to the March 2017 murder but to calls and Cobalt searches in January 2017. The jury acquitted Jennings of the charge arising from those January searches. *See* App. 93, 153.

[5] Emphasizing the illogic of the government's position is the fact that Turner, fresh off of supposedly assistive calls with Jennings on March 1, 2, and 6, felt no hesitation in visiting his probation officer on March 8. Br. 8; 9/21/22 Tr. 152-157. Doing so ultimately led to the discovery of his illegal firearm and arrest on March 11. *Id.*

[6] Jennings was acquitted of the charge related to the warrant checks between January 8 and February 16, 2017. 11/16/22 Tr. 59-60; App. 93, 153.

which the indictment charged that the AAF offense occurred. *See* App. 103. Thus, any such false statements cannot constitute assistance to sustain the AAF to murder charge. *See Williams v. United States*, 756 A.2d 380, 389 (D.C. 2000) (evidence must establish offense on date "reasonably close" to date charged).[7]

Finally, in a footnote, the government suggests Jennings's communications with Turner after his March 11 arrest could "reasonably be perceived as assisting him 'in order to hinder [his] ... trial[] or punishment.'" Opp. 95 n.12 (quoting *Clark*, 418 A.2d at 1061). The theory is that, by assuring Turner on May 31 that the police were not "fishing" and had "no evidence," "Jennings allowed Turner to follow through on his plan to have Hazelwood falsely claim possession of the gun" charged in the federal indictment. *Id.* The government never argued this theory at trial, *see* 11/16/22 Tr. 66-68; App. 657—no doubt because it cannot withstand scrutiny.

First, as noted, Jennings never ran a Cobalt search on the McPhatter murder from March 3 until Turner was charged on September 6. *See supra* at 11. Thus, even if Jennings had ***wanted*** to help Turner by passing information through Hazelwood in May 2017, she ***had no information*** then to share about the murder. And there is no evidence that she communicated with Turner at all after May 31.

Second, the government contends, citing no evidence, that sharing

[7] In fact, there was no evidence that Jennings made any false interrogation statements regarding her Cobalt searches of the February 17 AWIKs or March 1 murder. The government cites testimony that Jennings did not "admit" to those searches in the interrogation. *See* Opp. 90 (citing 11/14/22 Tr. 70-72). But Detectives avoided asking her about specific Cobalt or WALES searches, telling her "the house never shows its full hand." *See* RJ-1 at 1:15:45-1:16:15. And the one time Jennings was asked about a specific search, she said she did not "recall" it. *Id.* at 1:29:30-1:30:10.

information with Turner would have "allowed" him to follow through on his plan for Hazelwood to falsely claim ownership of his gun. Opp. 95 n.12. But the government never explains how unspecified information would have "allowed" him to do so. *Id.* In any event, the AAF assistance element requires the accessory's "specific intent" to assist in the manner described, not just the possibility that the act would assist the principal. *Butler*, 481 A.2d at 444; *see also Outlaw*, 632 A.2d at 413 (accessory must have "*intended* to aid or assist the felon to avoid detection or apprehension"). The government does not argue, much less cite evidence proving, that Jennings had a specific intent to assist with regard to the Hazelwood incident.[8]

II. THE TRIAL COURT IMPROPERLY ADMITTED JENNINGS' INVOLUNTARY INTERROGATION STATEMENTS

Reversal of Jennings's convictions is also required, both because her interrogation statements were involuntary under *Garrity* and because the trial court erred in failing to hold a *Kastigar* hearing.

A. Jennings's *Garrity* Argument Is Subject To *De Novo* Review

The government argues that Jennings "waived" her *Garrity* voluntariness argument because she did not invoke that case by name below. Opp. 63. This is meritless. Jennings moved *in limine* to suppress her interrogation statements as "involuntary" and "coerced," in violation of the Fifth Amendment. App. 126-129. And during the suppression hearing, Jennings's counsel elicited testimony about her knowledge of the employment consequences of her failure to cooperate. App. 214-

[8] To the contrary, the jury acquitted Jennings of any involvement with Turner's plan to have Hazelwood falsely claim possession of the gun. *See* App. 105-123, 162-167.

215. Nothing more was required to preserve her Fifth Amendment objection. As noted in Jennings's opening brief (at 46-47), preserving a suppression issue does ***not*** require citing specific case. *See Tindle v. United States*, 778 A.2d 1077, 1082 (D.C. 2001). The government has no response. *See* Opp. 63-64.[9]

B. Jennings Made The Two-Part Showing That Her Interrogation Statements Were Involuntary Under *Garrity*

The government agrees that a police department employee subject to interrogation can prove involuntariness by showing that she ***either*** was "directly threaten[ed]" with loss of employment if she failed to cooperate ***or*** "actually believed" she would be fired for failure to cooperate and was "objectively reasonable" in holding that belief. Opp. 66. Jennings made the latter showing.

The interrogating detective testified at the suppression hearing—without objection or contradiction—that during the interrogation Jennings "knows if she does not cooperate she is fired." App. 214-215. Thus, the unrebutted evidence below was that Jennings subjectively believed she would be fired for not cooperating with her interrogation. And that belief was objectively reasonable because, as the interrogating detective testified, that ***was*** the sanction she faced. App. 214-215; *see also* Ex. RJ-1 at 41:45-42:25 ("You're making detrimental decisions regarding … your employment."); Br. 11-12 (collecting interrogating detective's statements). Indeed, he further testified that he "wasn't concerned," as Internal Affairs was, about "ma[king] sure that none of her rights were going to be violated." App. 574.

[9] In any event, the *Garrity* decision was expressly referenced in discussions with the court during Det. Fultz's trial testimony. App. 573-574.

The government objects that Jennings did not introduce the "rule or policy mandating termination … [or] employment consequence should an employee invoke the right against self-incrimination." Opp. 67. But it cites no case holding that such evidence is required when the interrogating detective (from the same department) testifies that the department's policy called for termination of employment for failure to cooperate. Such a requirement would be especially inappropriate given that, even now, the government has not argued the detective was incorrect.

C. The Government Cannot Demonstrate That Its *Garrity* Error Was Harmless Beyond A Reasonable Doubt

The government argues that Jennings "fails to establish that any [*Garrity*] error" was harmful. Opp. 69. But on *de novo* review, the burden is not on the defendant to show prejudice; rather, the government must prove that its error was harmless beyond a reasonable doubt. Br. 47. Here, the government introduced Jennings's involuntary interrogation at trial and concedes that it argued to the jury that Jennings's denials of guilt during her interrogation "demonstrated a lack of credibility." Opp. 69. Having made these trial uses of the interrogation, the government cannot carry its burden of showing harmlessness beyond a reasonable doubt, particularly when, as discussed above, the government's evidence of Jennings's guilt was speculative at best. *See*, *e.g.*, *United States v. Giddins*, 858 F.3d 870, 878, 883 (4th Cir. 2017) (reversing where the "video [including statements] was played for the jury, and the government referred to the video and the statements … during both opening[s] … and closing[s]").

The government contends, however, that the interrogation video was

"exculpatory and offered no leads," and thus its admission was harmless. Opp. 75-76. That is incorrect. Prosecutors repeatedly referenced the video throughout closing arguments, referring to Jennings's statements as well as her demeanor. App. 659-662. Furthermore, *contra* the government's assertion that the search warrant for her phone was acquired through "independent means," Opp. 76, n.10, the government's warrant affidavit relied heavily on her interview statements, App. 52-53. The video was thus both used as inculpatory evidence and to produce leads.

D. *Garrity* Suppression Extends To Jennings's Expressive Act Of Producing Her Cellphone

The government does not dispute that suppression for *Garrity* violations extends to expressive acts. *See* Opp. 72 n.8. Instead, the government argues, in a footnote, that suppression was not required because it was a "foregone conclusion" that the cellphone belonged to Jennings since it was in her pocket. *Id.* But absent probable cause to search Jennings—which the government does not contend it had—the government's ability to establish "the existence" and Jennings's "possession" of a cellphone in her pocket was anything but a "foregone conclusion." *In re Clark*, 311 A.3d 882, 890 (D.C. 2024) (per curiam). Without Jennings's act of production, which was coerced under *Garrity*, the government had no ability to prove such possession.

E. The *Garrity* Error Necessitated A *Kastigar* Hearing

Once a defendant establishes that an interrogation statement was involuntary, the burden shifts to the government to prove, in a *Kastigar* hearing, that no derivative use of it was made in the prosecution. *See* Br. 48-50. Here, the trial court, having

erroneously failed to find a *Garrity* error, did not hold a *Kastigar* hearing.

The government responds that Jennings did not request a *Kastigar* hearing below and thus this Court's review is limited to plain error. Opp. 74. This is incorrect. A *Kastigar* hearing is required only if a defendant shows involuntariness. Once the trial court rejected the involuntariness claim, Jennings had no basis to request a *Kastigar* hearing. And as explained in Jennings's opening brief (at 49), this Court has held that a defendant need not raise such "pointless" arguments to preserve them for appeal. *Graves v. United States*, 245 A.3d 963, 970 (D.C. 2021). The government offers no argument in response to *Graves*. *See* Opp. 74.

The government also contends that not holding a *Kastigar* hearing was harmless because Jennings's statements were exculpatory. *See* Opp. 75 (citing *United States v. Anderson*, 450 A.2d 446, 451 (D.C. 1982)). But the *Anderson* court found harmlessness after an evidentiary hearing about the government's use of the coerced statements. 450 A.2d at 450. That does nothing to establish that the failure to hold a *Kastigar* hearing was at all harmless.

III. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE OBSTRUCTING AN OFFICIAL PROCEEDING CHARGE

The government rightly concedes that Jennings's conviction for obstruction of justice (Count 47) must be vacated because the government charged her with an offense that is not even a crime under the D.C. Code. *See* Opp. 101, 105.

The government suggests, however, that it could have charged Jennings with obstructing a police investigation "where the investigation has developed beyond 'a preliminary street investigation by police.'" Opp. 105 (quoting *Wynn v. United*

States, 48 A.3d 181, 189 (D.C. 2012)). This Court has held nothing of the sort. To the contrary, it has held that obstruction must be of a court proceeding, not a police investigation. *See Wynn*, 48 A.3d at 191. To be sure, this Court also held that, once a covered court proceeding is pending, that proceeding can be obstructed by false statements given to police officers involved in the prosecution. *See Brown v. United States*, 89 A.3d 98, 103 (D.C. 2014). But this Court has never held that a Section 22-722(a)(6) obstruction charge can be premised on obstruction of a MPD investigation rather than obstruction of a prosecution then-pending in court.

Having argued for an erroneous interpretation of Section 22-722(a)(6), the government then argues that it could have proven that Jennings obstructed the MPD investigation by accessing Cobalt databases to provide information to Turner. Opp. 105-106. That argument is confused, as the only charge of obstruction against Jennings related to the replacement of her cellphone, not the sharing of information with Turner. *See* App. 112, 122. In any event, the government's discussion of Jennings's obstruction conviction is immaterial, as the government concedes the conviction is defective and must be vacated. Opp. 105. But the Court should not, in vacating, endorse the government's distorted portrayal of the relevant caselaw.

CONCLUSION

This Court should reverse Jennings's five convictions and order a judgment of acquittal based on insufficient evidence. In the alternative, the Court should vacate the convictions and remand for a *Kastigar* hearing and, if permissible, re-trial with proper jury instructions on the four remaining charges.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-page limitations of D.C. Ct. App. R. 32(a)(5), (6).

1. Exclusive of the exempted portions of the brief, as provided in D.C. Ct. App. R. 32(a)(5), the brief contains 20 pages.

2. The brief, including footnotes, has been prepared in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2025, a copy of the foregoing Reply has been served electronically through the Appellate E-Filing system upon the counsel below:

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