19-CF-1026 & 23-CO-619

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

ANDRE BECTON,
Appellant,

v.

UNITED STATES,
Appellee.

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

OPENING BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

The parties have been represented by the following counsel:

	ANDRE BECTON	UNITED STATES (USAO DC)
SUPERIOR COURT: PRETRIAL & TRIAL	PDS: Lee Goebes (preliminary hearing) Jeffrey Stein (trial) Bernadette Armand (trial)	Lindsey Merikas Monica Trigoso Laura Bach
SUPERIOR COURT: SECTION 23-110 PROCEEDINGS	Gregory M. Lipper	Tracy Suhr
COURT OF APPEALS	PDS: Samia Fam Jaclyn S. Frankfurt William Collins Gregory M. Lipper	Chrisellen Kolb

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STATEMENT OF ISSUES PRESENTED

These consolidated cases comprise Andre Becton's (1) direct appeal of his conviction for second-degree murder while armed, and (2) appeal from the denial of a § 23-110 motion asserting ineffective assistance of trial counsel. At trial, Becton admitted that he had shot and killed the decedent, but argued that he acted in self-defense. His appeal presents the following questions:

1. When evaluating prejudice from counsel's failure to file a meritorious motion to suppress evidence under the Fourth Amendment, does the prejudice inquiry (a) consider only theoretical consistency—whether the improperly admitted evidence could theoretically be reconciled with the theory of defense, or (b) also examine whether, in practice, the inculpatory evidence could have made the jury less likely to actually accept the defense?

2. When evaluating, as part of a prejudice inquiry, the strength of the government's case at trial, does overwhelming evidence on an undisputed issue (such as the shooter's identity) compensate for weak evidence on the disputed issue (such as whether the shooter acted in self-defense)?

3. When the government invokes a decedent's purportedly peaceful or jovial personality to argue that he did not act violently—even when he was the aggressor in the incident leading to his death—does a trial court err in barring the defense

from rebutting the government's personality-based evidence by introducing evidence that the decedent had previously committed multiple assaults?

4. Even if the individual errors would not entitle the defendant to a new trial, does the cumulative effect (of trial counsel's deficient performance and the trial court's improper exclusion of the decedent's past acts of violence) entitle the defendant to a new trial?

STATEMENT OF THE CASE & JURISDICTION

On July 12, 2017, Appellant Andre Becton was indicted for (1) first-degree murder while armed, (2) possession of a firearm during a crime of violence, (3) and unlawful possession of a firearm. R19 at 1–3. On April 4, 2019, the jury found Becton not guilty of first-degree murder while armed, but guilty of second-degree murder while armed and the other charges. R89. On October 4, 2019, Becton was sentenced to twenty-five years in prison. R95.

Becton filed a timely notice of appeal on November 1, 2019. R96. On direct appeal, he initially was represented by the Public Defender Service for the District of Columbia. On July 8, 2021, PDS moved to withdraw, to enable Becton to pursue a claim of ineffective assistance of counsel "based upon trial counsel's failure to file a motion to suppress evidence at trial." 7/8/21 Mot. 2.

With new appellate counsel, Becton moved for relief under D.C. Code § 23-110. PCR8. (Citations to the § 23-110 record are abbreviated PCR.) An evidentiary hearing was held on June 9, 2023; the trial court orally denied the motion on the same day and issued a written judgment on June 27, 2023. PCR22. On July 27, 2023, Becton filed a timely notice of appeal. PCR24.

The Court has consolidated Becton's direct appeal (19-CO-1026) and his appeal from the denial of relief under § 23-110 (23-CO-619).

STATEMENT OF FACTS

A. Darnell Peoples is shot and killed after starting a verbal and physical fight with Andre Becton.

On the night of September 15, 2016, [redacted] arrived at the 600 block of Mellon Street and met up with Darnell Peoples, her friend and drug dealer. 3/28/19 Tr. 28:21–29:14, 88:22–25. [redacted] was trying to find someone willing to sell her crack cocaine. *See, e.g.*, *id.* at 43:4–16. Peoples greeted her by saying, "They gonna to kill me. I know they out to kill me. They gonna get me. I know they are." *Id.* at 29:15–19, 95:2–4. In fact, "nobody was trying to kill him" (*id.* at 95:7–9); Peoples was experiencing "intoxication of PCP" (4/2/19 Tr. 64:1–14).

On the same night, Andre Becton visited the 600 block of Mellon Street with three friends. Becton, whom some people called Dre, grew up in the Trenton Park neighborhood. *See* 3/26/19 Tr. 125:8–25. Becton and his friends arrived in a

burgundy Mercedes with tag number EY5434, and parked behind a convenience store on the corner. *See id.* at 128:9–13, 131:24–132:9, 133:2–7, 136:5–17.

Becton and two of his friends had shared part of a small bottle of wine that day and were "a little tipsy." *Id.* at 142:9–14; *see also id.* at 176:1–10, 177:5–9. Becton, however was not slurring his speech (*id.* at 174:17–23), was in a good mood (*id.* at 175:5–6; 3/27/19 Tr. 32:24–25), and was talkative and acting normally (*see id.* at 143:13–18). He joined an impromptu game of craps, played with two dice, down the street from Mellon Market. *See id.* at 144:23–145:8.

Peoples saw the craps game while crossing the street with [redacted], and he "started shouting at that group." 3/28/19 Tr. 97:1–3. Craps players are "either bent over" or "kneeled down." *Id.* at 42:2–5. When Peoples saw them, he asked, "why did they have their asses in the air" and "why y'all showing your behinds? What y'all trying to do, screw?" *Id.* at 46:7–18. Then he used an antigay epithet: "You all faggots or something." *Id.* at 98:1–7. He continued: "What, you all want to get fucked or something? What's really going on?" *Id.* at 98:8–14.

The craps players asked Peoples "to leave them alone." *Id.* at 98:20–22. Several people, including Becton, stood up and told Peoples to leave. *Id.* at 46:19–23, 47:15–19. Peoples, however, "really wanted to talk to" Becton. *Id.* at 46:23–25. Becton told Peoples, "Go on about your business. Go on about your business." *Id.*

at 99:4–7. Rather than leaving, Peoples "stepped up to" Becton and "got in [Becton's] face." *Id.* at 100:4–11. Peoples told Becton, "Man, you don't talk to me like that. You don't talk to me." *Id.* at 100:12–18.

Peoples then put his hands on Becton. While Becton pushed Peoples' hand out of the way, Peoples "grabbed him anyway." *Id.* at 48:3–4, 49:9-10. After Peoples grabbed Becton, "the tussling started." *Id.* at 105:2–4. Although Becton was eleven years younger than Peoples, Peoples was 1.5 inches taller and 34 pounds heavier. *See* R4 at 1 (Becton was 24 years old); 3/26/19 Tr. 59:22–25 (Peoples was 35 years old); 4/1/19 Tr. 128:11–14 (Becton was 5′ 6″ and 170 pounds); 4/2/19 Tr. 32:15–19 (Peoples was 5′ 7″ and 204 pounds).

During the struggle, Becton shot Peoples twice. 4/2/19 Tr. 36:2–6. The first shot entered his left thigh and exited the back of his right thigh. *Id.* at 40:22–41:8. The second shot entered the left side of his neck exited his back further to the left. *Id.* at 44:24–45:2, 51:11–18. Becton returned to the car and sat in the right rear seat, and the car drove away. *See id.* at 149:3–150:12. [redacted] told detectives that the car was red with tags ending in 5434. *See* 3/28/19 Tr. 60:8–20, 62:21–23.

Shortly before midnight, police arrived and found Peoples lying on the ground bleeding. Peoples told a detective that "Dre" "from Trenton Park" had shot him. 3/26/19 Tr. 22:9–16. When asked why Dre had shot him, Peoples said

"because I was old" and that Dre "was shooting up everybody"; nobody reported anyone else getting shot. *Id.* at 22:19–24, 52:17–25. Peoples soon lost consciousness and died. *See id.* at 205:9–11.

Police recovered two shell casings from a 9-millimeter Lugar and a bullet fired by a Smith & Wesson firearm. *See* 4/1/19 Tr. 48:25–49:12, 50:4–9, 65:10–19. While searching the home of Becton's friend Demetrius Foreman, police found a Smith & Wesson 9-millimeter firearm, which Becton was carrying on the night of September 15, 2016. 3/27/19 Tr. 147:6–10; 153:22–154:3; 4/2/19 Tr. 68:11–21.

About a week after the shooting, a police officer saw a maroon Mercedes, with tag number EY5434, in a nearby residential neighborhood. 3/26/19 Tr. 201:3–24. Becton approached the officer, identified himself as the car's owner, consented to her request to search the car, and gave her the key. *Id.* at 202:1–18, 203:9–16.

On October 3, Becton sat for an interview with Detective Joshua Branson. Becton answered questions without legal counsel. Detective Branson discussed the September 15 shooting and asked Becton whether he had shot Peoples in self-defense; Becton responded that "it was not self defense. It wasn't him." 4/1/19 Tr. 122:1–3. As Branson conceded, "there is a misconception" that "there's no such thing as a self defense law in Washington, D.C." *Id.* at 150:8–19, 151:2–6.

Detective Branson testified that he did his "best to make sure that Mr. Becton didn't have a mistaken understanding of whether or not self defense law existed in D.C." *Id.* at 152:14–18. But in a second interview, later in October, Becton stated that he did not believe that "there is a self defense law in D.C." *Id.* at 153:15–18. One of Becton's friends, who was with him on September 15, likewise believed that "if you shoot and kill someone, even if you're acting in self defense, you would be guilty of murder in the District of Columbia." 3/27/19 Tr. 48:14–23.

B. The government extracts and searches the contents of Becton's iPhone.

1. Detective Branson applies for a warrant to search Becton's iPhone.

On October 21, Becton was charged with murdering Peoples. R1 at 4. More than two months after the shooting, Detective Branson applied for a warrant "to search a white and silver apple iPhone . . . belonging to Andre Becton." PCR8, Ex. A at 1 (capitalization omitted) (A1). Detective Branson's six-page affidavit described the investigation of the shooting, Becton's arrest, and the difficulty of retrieving phone contents. *See id.* at 1–6 (A1–A6). But Branson did not describe what evidence he expected to find on the iPhone, or even why he believed it might hold evidence of crime. *Id.*

The affidavit's first four pages described the shooting, the police investigation, and how Becton became a suspect. *See id.* at 1–4 ("UNDERLYING

INVESTIGATION") (A1–A4). Although this section summarized witness statements, police interviews with Becton, his clothing, and his car, Becton's iPhone was mentioned only once: "When Andre Becton was arrested, he was in possession of the aforementioned cellular phone to be searched." *Id.* at 4 (A4). This phone was "aforementioned" only in the affidavit's title. *See id.* at 1 (A1).

In a section entitled Affiant's Training, Detective Branson explained that "cellular telephones now offer a broad range of capabilities." *Id.* at 5 (A5). Those paragraphs did not mention Becton or the investigation. In the remaining three paragraphs, Branson averred that "[a]nalyzing electronic handheld devices for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment." *Id.* The concluding paragraph was one sentence: "Based on the facts set forth in this affidavit, your affiant believes probable cause exists and respectfully requests that a Judge of the District of Columbia Superior Court issue a search warrant for the white and silver Apple IPhone bearing [the IMEI number], to recover the cell phone number, call log, phone book, any video recordings, any audio recordings, any photographs, text messages and voice messages." *Id.*

Detective Branson opined that he might need to "open[] every file and scan[] its contents briefly to determine whether it falls within the scope of the warrant." PCR8, Ex. A at 6 (A6). The application and resulting warrant also "did

not include any attachment" that would have "limit[ed] the warrant in any way by a date restriction." 6/9/23 Tr. 30:15–23. Instead, Detective Branson sought and received permission to review information from any time period, no matter how long before the shooting. *See* PCR, Ex. A at 7 (A7).

After receiving the warrant, the government conducted a "forensic cellphone extraction" and retrieved "[a]nything stored on the cellphone." 3/28/19 Tr. 183:14–16, 184:21–185:1. The extraction also retrieved some deleted items, because "when you delete stuff, it doesn't automatically go away." 3/28/19 Tr. 185:9–17. Detective Travis Barton searched the resulting 1500-page PDF for terms related to "self-defense." *Id.* at 187:14–17, 194:6–14.

Although the warrant "did not authorize a search for internet search history" (PCR13 at 33 n.17), the government extracted and reviewed Becton's Internet search history. Becton had searched various websites to see whether there were any warrants for his arrest. *See* 4/1/19 Tr. 132:7–17. The government also retrieved text messages in which Becton "is stating that he is getting an attorney because they took his car." 3/28/19 Tr. 17:2–8. Those messages were not shielded from prosecutors. *See id.* at 17:19–25, 196:20–197:4.

2. Trial counsel does not move to suppress the fruits of the iPhone search.

The application, warrant, and iPhone extraction were produced to Becton's trial counsel. 6/9/23 Tr. 9:4–17. Becton was represented by two lawyers from the Public Defender Service. His lead counsel was assigned to the case in March 2018. *Id.* at 7:24–8:9; R37. At the time, he was defending another murder case: The "so-called mansion murders," a "quadruple homicide that involved north of 50,000 different items of discovery." 6/9/23 Tr. 13:6–11, 13:21–14:4, 29:4–20. As trial counsel testified, "I just remember finishing that case [in late October 2018] and then having the tsunami of the rest of my caseload waiting for me." *Id.* at 14:5–11.

Trial counsel did not move to suppress the fruits of the cellphone search, but "it was not a strategic decision not to file that motion." *Id.* at 9:18–20, 11:9–10. If given the choice, trial counsel "would have preferred that [Becton's iPhone extraction] not be in evidence." *Id.* at 11:10–12.

C. At trial, Becton argues that he acted in self-defense.

1. Although the government emphasizes the shooter's identity, Becton's claims self-defense, not misidentification.

In its opening statement, the government previewed several pieces of evidence establishing that Becton was the person who shot Peoples. *See, e.g.*, 3/25/19 Tr. 274:7–275:3, 278:9–15 (color, model, and license plate of car, and video footage of car driving away); *id.* at 280:15–17 (testimony of Becton's friends); *id.* at

276:17–277:12 (type of gun used); *id.* at 279:1–10 (Peoples identified his shooter as "Dre, from Trenton Park," where Becton grew up). And "at the end of this case," predicted the government, "you'll know who the shooter was: Dre, from Trenton Park, the defendant, Andre Becton." *Id.* at 281:4–7.

Becton's opening statement claimed self-defense, not misidentification. As the defense explained, "This case isn't about whether Mr. Becton shot Darnell Peoples. This case is about why he had to." *Id.* at 281:17–19. In particular, "Mr. Becton could not allow this PCP-addled man who was agitated and aggressive and [had] become violent get control of that gun, so he struggled for that gun" and "struggled to keep control of it." *Id.* at 283:17–20. And when Peoples "lunged at Mr. Becton and the gun again," he "fired." *Id.* at 283:22–24.

2. Although Peoples started the fight with Becton, the government argues that Peoples is jovial and nonviolent.

Notwithstanding the testimony about Peoples' behavior on Mellon Street before the shooting, the government argued, "that doesn't make [Peoples] violent or aggressive." 4/3/19 Tr. 61:18–62:2. Over defense objection, moreover, the trial court allowed [redacted] to testify that she had never seen Peoples "be violent" or "be aggressive" when "he's high." 3/28/19 Tr. 34:6–16.

According to the defense pharmacology expert, Dr. Ian Blair, Peoples was intoxicated to the same degree found in subjects suffering from PCP-related

behavioral effects—which include becoming "very aggressive and violent." 4/2/19 Tr. 107:23–108:2, 109:20–110:8. Dr. Blair added that PCP originated as "a great anesthetic"; one effect is that "you don't feel pain." *Id.* at 109:2–19. When cross-examined, Dr. Blair found it conceivable that the symptoms of PCP intoxication could be affected by the "user's personality traits." *Id.* at 119:6–14.

To identify Darnell Peoples' personality traits, the defense subpoenaed Cherie Peoples (his wife) and Ivory Gaskins (the mother of his child). 3/19/19 Tr. 6:1–12, 3/26/19 Tr. 71:3–10. Between 2013 and 2016, Cherie had accused Peoples of assault once and Gaskins had accused him of assault twice; the second assault took place less than seven months before the shooting. *See* R66 at 2–3 (A9–A10).

Date + Victim	**Assault Details**
Feb. 3, 2013 assault of Cherie Peoples	Peoples visited Cherie to watch the Super Bowl. R66 at 3 (A10). After she took Peoples home, Gaskins punched Cherie; Peoples then pushed Cherie "into a brick wall"—"striking her several times against the wall"—and fled into his apartment. *Id.* Peoples was arrested; the case was eventually dismissed for want of prosecution. R79 at 4–5.

Date + Victim	Assault Details
Feb. 17, 2015 assault of Ivory Gaskins	An argument with Gaskins "resulted in [Peoples] pinning [her] to the living room floor and striking her in the face"—with his child watching. R66 at 3 (A10). Gaskins suffered "a bruise to the forehead and left eye, a gash on her right arm, and ripped out eyelashes." *Id.* Peoples fled; Gaskins was hospitalized. *Id.* Gaskins sought a Civil Protection Order, which Peoples did not contest, but withdrew her request two months later. 3/25/19 Tr. 243:23–244:5 (A16–A17).
Feb. 17, 2016 assault of Ivory Gaskins	At 3 a.m., Peoples and Gaskins began arguing over child support. R66 at 2 (A9). Gaskins asked Peoples to leave; he refused and "began to choke" her. *Id.* Gaskins suffered "abrasions to [her] right arm, neck, left hand, [and] right hand." *Id.* at 2–3 (A9–A10).

The trial court excluded this evidence, believing that "there is certainly no probative value to those prior incidents." *Id.* at 242:23–243:3, 246:5–7 (A15–A16, A19).

On the first day of trial, Cherie testified that she had known Peoples for sixteen years, and he "was silly. He was funny. He liked to make people laugh. He liked to make people smile." 3/26/19 Tr. 58:25–59:14. According to Cherie, when she talked to Peoples on September 15, he was "[l]aughing, giggling, joking"—"like he normally do." *Id.* at 61:25–62:15. The defense argued that this testimony opened the door to evidence of Peoples' previous assaults, but the trial court again denied the defense request. *Id.* at 64:22–65:19 (A22–A23).

3. The government introduces Becton's T-Mobile phone records and documents extracted from his iPhone.

The government also presented evidence extracted from Becton's iPhone and phone records subpoenaed from his phone company. Detective Barton testified that he extracted the contents of Becton's iPhone and that it is "possible that some things are deleted and are not able to be extracted." 3/28/19 Tr. 183:14–16, 185:5–17. Yet deleting data from a smartphone does not affect "what would appear in, for example, call detail records obtained from a cellular provider." *Id.* at 185:22–25.

From Becton's cellular provider, T-Mobile, the government introduced records of Becton's "[i]ncoming and outgoing phone calls and text messages" from September 15 until September 17. *See* 3/27/19 Tr. 125:25–126:6, 128:13–17, 129:8–11. The jury was given "four communications, whether they be phone calls or text messages[,] that it appeared that Mr. Becton had deleted from his phone following the shooting." 6/9/23 Tr. 33:15–20. Also sent back with the jury were "several internet searches in which Mr. Becton had entered search terms or visited sites that would contain information about whether there was an outstanding warrant for his arrest." *Id.* at 33:20–24.

D. [redacted], the sole eyewitness.

The government's main witness was [redacted], the only eyewitness to the shooting. [redacted]'s doctors considered her to be an unreliable source of

information about her own history, and she conceded that sometimes she has "trouble remembering things reliably." 3/28/19 Tr. 135:11–136:9.

1. [redacted] *is impeached about her untreated hallucinations and psychosis in September 2016 and her use of crack cocaine on September 15, 2016.*

a. [redacted] is impeached after denying her history of hallucinating.

Before September 2016, [redacted] had been diagnosed with schizophrenia and major depressive disorder with psychotic features. *Id.* at 124:10–17. These conditions made her paranoid and caused her to hallucinate; she would see ghosts and hear voices, including "commands to do bad things." *Id.* at 124:21–125:15, 125:19–126:3, 131:2–15. In 2013, [redacted] told her doctor, "I see crazy people killing one another because they are sad or mad." *Id.* at 130:2–7.

At trial, however, she denied having hallucinated before September 2016 and denied having ever hallucinated people killing each other. *Id.* at 126:4–126:13. After reviewing her medical records, [redacted] admitted to hallucinating several times before 2016. *See id.* at 132:14–133:3. [redacted] continued to hallucinate after 2016. According to her medical records, in 2017 she reported seeing ghosts at her home and otherwise seeing and hearing things. *Id.* at 133:10–134:10. At trial, however, [redacted] denied having hallucinated since September 2016. *Id.* at 133:4–9.

b. [redacted] is impeached after denying that she was failing to take her antipsychotic medicine.

Before September 2016, [redacted] had been prescribed antipsychotic medicine to prevent hallucination. *Id.* at 140:15–141:4. Three months after the shooting, however, [redacted] was hospitalized and told her psychiatrist, "I was taking a whole bunch of stuff and I dropped all of it last year." *Id.* at 144:15–146:10; *see also* 143:16–144:13. [redacted] did not remember having dropped her psychiatric medicine in 2016, but admitted, "If that's what I told them, that's what I did." *Id.* at 144:8–13.

She did recall that in September 2016, she would take her medicine only "sometimes" and that "you have to take it regularly." *Id.* at 141:5–14. By January 2017, she had medicine stockpiled, because she "[wasn't] taking it regularly in September 2016. *Id.* at 143:11–15. Still, [redacted] claimed to have been complying with her medication regimen because she "had it at [her] home." *Id.* at 143:5–15.

c. [redacted] is impeached after denying that she was not seeing a psychiatrist in September 2016.

In December 2016, [redacted] told her doctor that she "hadn't seen a psychiatrist in, like, a year." *Id.* at 147:15–148:10. At trial, [redacted] claimed that her December 2016 statement was "phoney"—even while agreeing, "That's what I told them." *Id.* at 147:24–148:12. [redacted] claimed to have seen her treatment team in September 2016; her medical records, however, reflected that she "relapsed in

July of 2016 and remained unengaged with treatment until November." *Id.* at 150:12–151:7. Ultimately, [redacted] conceded that she did not attend mental-health appointments between July and November 2016. *Id.* at 151:17–19.

d. [redacted] is impeached after denying that she drank alcohol and smoked crack on the night of the shooting.

During that same interval, [redacted] resumed smoking crack cocaine. *Id.* at 151:22–24. By September 2016, she was smoking crack—which "put [her] in another zone"—almost every night after work. *Id.* at 26:25–27:4, 27:18–25. Before trial, [redacted] had admitted, in a signed statement to a defense investigator, that when she went to Mellon Street on September 15, she had already "smoked crack" and "drank about a half [pint] of Amsterdam." *Id.* at 76:12–14, 77:22–25. She signed this statement because it "was true." *Id.* at 81:18–82:4.

At trial, however, [redacted] claimed that she did not drink alcohol or smoke crack on September 15. She testified that she had worked from 10 a.m. until 9 p.m., went home, and then went to Mellon Street "to see who I see to get some drugs." *Id.* at 25:14–26:10, 261:21–24. She continued to deny these events even after reviewing her actual statement describing what she did after work:

> I smoked crack. I drank about a half pint of Amsterdam. I changed my shirt but not my pants or shoes from work. I did the crack and drank by myself. I left my apartment at about 10:30 p.m. or 10:45 p.m.

Id. at 82:8–18. Eventually, [redacted] conceded she had "told [the investigator] that." *Id.* at 82:20–25. Still, she insisted, "I didn't drink or smoke that night." *Id.*

e. [redacted] is impeached after denying that she smoked crack before speaking to detectives about the shooting.

After the shooting, [redacted] smoked crack and "didn't sleep very much at all." *Id.* at 86:16–22. A few days later, she spoke to a detective, who later testified that she did not appear to be intoxicated during the interview. *See id.* at 86:10–12; 4/1/19 Tr. 113:6–10. But in her signed statement, [redacted] said that between the two events she was "drinking and drugging the whole time." 3/28/19 Tr. 88:3–5. At trial she claimed, "That's what I told him but I wasn't." *Id.* at 88:6.

2. [redacted]*'s testimony about the struggle between Becton and Peoples.*

During the struggle between Becton and Peoples, [redacted] was near an alley "approximately 30 feet" away. *Id.* at 75:15–22. She had "started to back away" when Peoples "went up to" Becton, and she kept "backing up the whole time." *Id.* at 48:16–20, 107:19–22. Because the events took place late at night, it was dark outside; when forensic technicians looked around afterward, they "were using flashlights" and their cameras' flashes and night settings. 3/27/19 Tr. 108:11–23.

a. [redacted] claims that Peoples was addressing Becton "in a nice way."

According to [redacted], after Becton had objected to Peoples' calling the craps players "faggots," Peoples said, "you don't talk to me like that. You don't talk to me." 3/28/19 Tr. 100:12–18. She claimed Peoples said this "in a nice way." *Id.*

b. [redacted] is impeached about whether Peoples tried to "grab" Becton or merely "hug" him.

Before the grand jury, [redacted] testified that Peoples initiated physical contact when he tried to "grab" Becton. *Id.* at 105:11–23. At trial, [redacted] reiterated that Peoples "went to grab" Becton, but she backtracked and claimed that Peoples actually went "to hug" him: "So [Peoples] went to grab—I mean, went to hug him." *Id.* at 48:2–3. When asked about this discrepancy, [redacted] claimed that Peoples "was trying to hug him at first until [Becton] broke his arms loose and then he [Peoples] tried to grab him [Becton]." *Id.* at 103:25–104:9.

In any event, [redacted] later confirmed that she saw Peoples "trying to grab him": "Q. And what that means is that you saw [Peoples] grab him, right? A. Right." *Id.* at 103:12–20. Although Becton pushed Peoples' hand out of the way, Peoples "grabbed him anyway." *Id.* at 48:3–4, 49:9-10. The "tussling started" once Peoples "grabbed him." *Id.* at 105:2–4.

c. [redacted] is impeached about who was grabbing whom during the struggle.

In her written pretrial statement, [redacted] stated that "it looked like [Becton] had to work hard to get out of [Peoples'] grip." *Id.* at 110:16–111:1. Indeed, "the whole time they were struggling [Becton] was telling [Peoples] to get off him." *Id.* at 111:2–22. Yet at trial, [redacted] claimed that Peoples and Becton were "grabbing one another." *Id.* at 109:14–16.

Attempting to address this inconsistency, the government alluded to one of [redacted]'s statements shortly after the shooting, and asked [redacted] "was your memory about what happened better in February of this year or when the incident happened?" *Id.* at 157:24–158:1. "This year," she said. *Id.*

d. [redacted] is impeached about whether Peoples was trying to grab at Becton's gun.

[redacted] testified that Becton's gun was stored in his waistband. *See id.* at 50:15–17. When describing how Peoples was "grabbing" at Becton, [redacted] made "a gesture at [her] waistband sort of with [her] hand pulling out." *Id.* at 52:11–14. And Peoples grabbed at Becton "before a gun comes out." *Id.* at 106:7–11.

In response to a follow-up question, [redacted] claimed that Peoples was actually grabbing "the guy himself, period." *Id.* at 52:24–53:1. She later clarified that she "can't know exactly what [Peoples] is grabbing at." *Id.* at 106:17–19.

e. Whether [redacted] saw the gunshots.

At trial, [redacted] claimed that as the two men were struggling, Becton pulled a gun out from his waist and "shot down once, pow." *Id.* at 48:15–17, 50:25–51:1. When prompted by the government, [redacted] added that Becton had counted down from five before shooting. *See id.* at 69:19–20 ("Q. And at any point, did you hear a countdown? A. Yes. He said, I give you till five.").

[redacted] also testified that she "didn't see the gun until it went off." *Id.* at 53:7–8. Although she had told the grand jury that the gun was silver, at trial she testified that she was not "able to tell what color the gun was." *Id.* at 54:3–4, 56:20–57:24. And while she claimed that the first shot seemed to have been aimed at the ground, she did not "see where the gun was pointed or directed when the gun went off." *Id.* at 58:13–25. Nor did [redacted] see the second shot. *Id.* at 117:15–18. After the first shot, she ran; while running, she "heard the second shot" followed by Peoples yelling, "he hit me, he hit me, he hit me." *Id.* at 59:10–16.

f. [redacted] is impeached about the location of the shooting and the number of people who entered Becton's car.

[redacted] was "certain"—and remembered "very clearly"—that Becton fired the first shot from the sidewalk "by the crate." *Id.* at 116:3–23. But the two shell casings were found in the street, not on the sidewalk or by the crate; "a shell casing can give you a general idea of where a gun was fired." *Id.* at 100:20–101:14, 106:9–

107:10. [redacted] also thought it "very clear" that after the shooting, four people had entered the red car. *Id.* at 120:1–19. Surveillance video, however, showed only one person entering the car. *See* Gov. Ex. 305A.

E. Closing arguments address self-defense and mitigation.

Over the government's objection, the trial court concluded that "there obviously here is sufficient evidence to support the jury being instructed on self-defense." 4/2/19 Tr. 81:9–24. There was no basis, moreover, "to find that Mr. Becton was the first aggressor." *Id.* at 85:6–14. The trial court instructed the jury on both self-defense and mitigation, noting that the government was required to prove beyond a reasonable doubt that (1) Becton "did not act in self-defense," and (2) "there were no mitigating circumstances." 4/3/19 Tr. 41:20–42:3, 43:7–9.

In its closing, the government argued that Peoples was "grabbing for his life" and "trying to stop [Becton] from pulling that gun out and so he grabbed him hard and held on, but he lost his grip"; and that while Peoples was trying "to get away," Becton shot him "downward." 4/3/19 Tr. 52:6–11. The government further claimed, given a "smudge" on a nearby car, that after Peoples was shot once "he lost his balance and he fell on that car." *Id.* at 52:24–53:4. Based on this premise, the government argued that Peoples was falling down and not a threat when Becton fired the second shot. *Id.* at 53:7–16.

The defense interpreted the evidence differently. For one, the autopsy report, reflecting that Peoples was shot in the front, was "perfectly consistent with struggling over a gun" and Peoples lunging at Becton after the first shot. *Id.* at 127:22–128:3. The government's car-smudge theory was "elaborate and completely unsubstantiated"; the government introduced no testimony that Peoples had fallen onto the car and no evidence that either blood or Peoples' DNA were on the car. *See id.* at 108:5–24, 127:3–7.

With respect to [redacted], the sole eyewitness, the defense described not only the psychiatric and drug problems that prevented her from testifying accurately about the shooting, but also how objective evidence contradicts [redacted] even when "she says she [is] certain about something." *Id.* at 113:11–114:4. So "what we learned with Ms. [redacted] is that certainly doesn't equal accuracy." *Id.* at 113:21–23. And if "you can't trust her about that sort of things, how can you trust her beyond a reasonable doubt about details that matter and for which we don't have video to corroborate it?" *Id.* at 115:18–21. What is more, the defense noted that "for the most important things in this case, there isn't any meaningful corroboration" and "[we] don't have video footage of exactly what happened." *Id.* at 113:15–18.

The government argued, conversely, that the jury could trust its witnesses due to "the objective evidence"—including the "phone extractions." *Id.* at 90:22–

91:11. "[W]hen you see that their testimony is aligning with the objective evidence," the government said, "that's how you know that they're telling the truth." *Id.* at 90:22–25. Immediately after describing how "the phone extractions" corroborate the government's witnesses (*id.* at 91:12–14), the government argued that "objective evidence" is evidence that "doesn't get drunk," "doesn't forget," and "doesn't have favor, bias" (*id.* at 91:17–19).

As for those phone extractions, the government reminded the jury that "users can delete information" from their phones (*id.* at 71:13–18), and compared the T-Mobile phone records from Becton's phone with the records extracted from Becton's "actual phone." *Id.* at 71:1–9. "Highlighted in red on the top at 11:43 pm"—three minutes after the shooting—"there's an outgoing call from the defendant's phone which is missing from the forensic extraction." *Id.* at 71:10–13. And there are additional deleted communications between that phone number." *Id.* at 71:19–21. Communications deleted the next morning at 7:20 a.m., plus "additional deleted messages . . . at 8:15 and 8:39." *Id.* at 72:4.

After identifying calls or messages that Becton allegedly deleted, the government itemized his Internet searches. *Id.* at 73:10–17. While describing the searches, the prosecutor showed several of them to the jury. *See* 6/9/23 Tr. 39:5–7.

The government also urged the jurors to "look through [those records] once they are sent back with you." 4/3/19 Tr. 76:2–4. By looking at the records, "you'll be able to see the different searches, the different content that was extracted from the defendant's phone." *Id.* at 76:5–7. Plus "the content that, frankly, wasn't able to be pulled off the phone." *Id.* at 76:7–8. "Those searches, those deletions." *Id.* at 91:14–15. Those searches and deletions, the government stressed, go to Becton's "state of mind as consciousness of guilt." *Id.* at 91:12–14.

Turning to Peoples, the government argued that although he thought people were trying to kill him, "that doesn't make him violent or aggressive." *Id.* at 61:18–62:2. Although Peoples argued with his wife earlier that night, his wife "said he was jovial. He was a jokester." *Id.* at 57:12–17. The "talkative" Becton, conversely, was "the type of person who might react, who might take comments too seriously" and "take matters too personally and too far." *Id.* at 60:3–20. For the government, the "heart of this case" was "the testimony of the people on Mellon Street"—"and the people who knew [Peoples] and how [he] behaved." *Id.* at 85:24–86:2.

In response, the defense renewed its request to tell the jury about Peoples' prior assaults; the trial court denied the defense request. *Id.* at 96:15–18, 98:1–4 (A29, A31). During its rebuttal, the government accused the defense of arguing that Peoples' use of PCP "inherently makes him aggressive" and claimed that the

defense toxicologist was "arguing stereotypes" even though there are "multiple symptoms of PCP, not just aggression and blind rage." *Id.* at 141:14–17, 142:1–5.

Finally, to establish the premeditation necessary for first-degree murder, the government highlighted [redacted]'s testimony that Becton counted down from five before shooting: "He tells him to go on. And then he begins that countdown." 4/3/19 Tr. 85:12–14. "That's deliberating. That's premeditated. That's, [a]t the end of five, I'm going to shoot." *Id.* at 85:14–15. The defense agreed that for premeditation, "all we have is Ms. [redacted]'s testimony." *Id.* at 117:24–118:1.

The jury acquitted Becton of first-degree, premeditated murder. 4/4/19 Tr. 10:6–9. Becton was convicted of second-degree murder, possession of a firearm during a crime of violence, and unlawful possession of a firearm. *Id.* at 10:10–21.

F. Becton files a § 23-110 motion challenging trial counsel's failure to file a suppression motion.

While his direct appeal was pending, Becton moved for relief under D.C. Code § 23-110, arguing that trial counsel was ineffective in failing to file a motion to suppress the information extracted from his iPhone. PCR8. Following an evidentiary hearing, the trial court credited trial counsel's testimony that his failure to file a suppression motion was not a strategic decision, and he would have preferred for the full iPhone extraction to have been excluded. *Id.* at 11:9–12; *id.* at 79:15–22 (A40).

The trial court further concluded that the search warrant affidavit is "utterly devoid of any facts that would support a finding or frankly even a reasonable inference that some reasonable basis existed to believe that Mr. Becton's cell phone contained evidence of the crime." *Id.* at 75:16–21 (A36). In addition, "the warrant was utterly without restriction to date and time" and "would have essentially allowed a search of the contents of Mr. Becton's phone going back to its initial use." *Id.* at 76:21–77:6 (A37–A38). Given these omissions, "the motion to suppress in all likelihood would have been granted had it been filed." *Id.* at 76:9–15 (A37).

But the trial court concluded that Becton was not prejudiced by trial counsel's deficient performance, opining that Becton's cell phone records were "insignificant" to the government's overall case and that "the government's evidence at trial . . . was incredibly strong." *Id.* at 80:20–21 (A41). The trial court cited several pieces of evidence, nearly all of which related to whether Becton was the shooter, not whether he acted in self-defense. *See, e.g.*, 80:21–81:4 (Peoples' dying declaration that the shooter was "Dre from Trenton Park") (A41–A42); *id.* at 81:12–14 (ballistics evidence linking Becton to the firearm) (A42); *id.* at 81:15–17 ("evidence concerning the appearance of Mr. Becton's car on the scene, including a partial license plate of the vehicle") (A42). The trial court also observed that the evidence extracted from Becton's iPhone "was not, in fact, inconsistent with the

defense theory at trial." *Id.* at 83:3–9 (A44). But the trial court did not address how the government had relied on Becton's deleted phone records—"those searches, those deletions"—to establish consciousness of guilt.

SUMMARY OF ARGUMENT

The government's sole eyewitness established that Darnell Peoples, who was experiencing paranoid delusions, accosted Andre Becton with an antigay epithet, then initiated physical contact, then continued to grab at Becton, then reached at Becton's waistband, where his gun was stored. Meanwhile, the eyewitness's inculpatory testimony was readily impeachable and repeatedly impeached, and she did not purport to see the second, fatal shot. Toxicology reports revealed that Peoples was intoxicated from PCP, and the defense toxicology expert testified that PCP kills pain and causes violence and aggression.

On the disputed questions of self-defense and mitigation, then, the government's case was tenuous. But Becton's defense was compromised by two serious errors: (1) Ineffective assistance of trial counsel, who failed to file a motion to suppress the fruits of a defective warrant to search Becton's iPhone, and (2) the trial court's decision to exclude evidence of Peoples' three previous assaults, even after the government put Peoples' personality directly at issue.

First, although correctly concluding that trial counsel had performed deficiently in failing to file a suppression motion, the trial court erred in ruling that counsel's errors did not prejudice Becton. The trial court focused on whether the iPhone records were inconsistent with his theory of defense, but overlooked how the evidence undermined his defense in practice. In particular, the trial court did not address how the government used the phone records to suggest that Becton was trying to cover up a crime by deleting evidence of calls and messages after the shooting. These records, and the accompanying suggestion that Becton had destroyed evidence, helped the government salvage its case despite the unreliable and oft-impeached testimony of sole eyewitness [redacted].

At the same time, the trial court overestimated the strength of the government's case disproving self-defense and mitigation. The evidence identified by trial court supported the undisputed allegation Becton was in fact the shooter, but the government's evidence on the main question in dispute—whether Becton acted in self-defense—was far weaker.

Second, the trial court erred in excluding evidence of Peoples' past acts of violence: three domestic assaults within the past three years, including one less than seven months before the shooting. Excluding this evidence directly impaired Becton's ability to present a complete defense: The government was allowed to

present evidence and argument that Peoples had a peaceful and jovial personality, but Becton was unable to respond with evidence that Peoples had a violent side.

Finally, even if each error individually would not warrant relief, the errors' cumulative effect entitles Becton to a new trial. Especially given the problems with the government's sole eyewitness, the absence of his phone records and presence of Peoples' violent history not only would have strengthened Becton's defense, but also would have tethered the government's case to [redacted] alone.

ARGUMENT

I. The trial court erred in concluding that Becton was not prejudiced by trial counsel's deficient performance.

Becton was prejudiced by his trial counsel's deficient performance. Section 23–110 allows a prisoner in custody to invoke a constitutional error as a basis to "vacate, set aside, or correct the sentence." D.C. Code § 23–110(a). Under the Sixth Amendment, trial lawyers are ineffective if (1) their performance was deficient, and (2) that deficient performance prejudiced their client's defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both the performance and prejudice inquiries "present mixed questions of law and fact." *Porter v. United States*, 37 A.3d 251, 256 (D.C. 2012). The Court defers to the trial court's factual findings "unless they lack evidentiary support," and reviews "legal conclusions, including the court's conclusion as to prejudice, *de novo*." *Id.*

A. The trial court correctly concluded that trial counsel performed deficiently by failing to file a motion to suppress the records extracted from Becton's iPhone.

Becton's deficient-performance claim turns on undisputed facts and blackletter law. The trial court credited trial counsel's testimony that his failure to file a suppression motion was not a strategic decision. 6/9/23 Tr. 11:9–12; *id.* at 79:15–22 (A40). "The failure to file a meritorious suppression motion can constitute ineffective assistance of counsel if the failure constitutes performance below an objective standard of reasonableness under prevailing professional norms." *Hockman v. United States*, 517 A.2d 44, 51 (D.C. 1986). And a search-warrant application must establish "probable cause to believe that contraband or evidence is located in a particular place." *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (quotation marks omitted).

This Fourth Amendment rule applied to Becton's iPhone. Two years before the government searched Becton's iPhone, the Supreme Court held that the Fourth Amendment's warrant requirement applies to post-arrest searches of modern smartphones, which "place vast quantities of personal information literally in the hands of individuals." *Riley v. California*, 573 U.S. 373, 386 (2014). A "search warrant for data on a modern smart phone therefore must fully comply with the requirements of the Warrant Clause." *Burns v. United States*, 235 A.3d

758, 773 (D.C. 2020). In this case, the application did not even attempt meet these requirements, and a suppression motion inevitably "would have been granted had it been filed." 6/9/23 Tr. 76:9–15 (A37).

As the trial court explained, the warrant affidavit was "utterly devoid of any facts that would support a finding or frankly even a reasonable inference that some reasonable basis existed to believe that Mr. Becton's cell phone contained evidence of the crime." *Id.* at 75:16–21 (A36). Detective Branson's affidavit described (1) the investigation and arrest of Becton, (2) the general uses and types of information found on modern cellphones, and (3) the steps necessary to retrieve a smartphone's contents. *See* PCR8, Ex. A at 1–6 (A1–A6). Yet the affidavit contained no statement that "evidence of crime is likely to be found on Becton's phone because…." Given this omission, the warrant was "based on nothing—not even a bare bones assertion of probable cause." *Burns*, 235 A.3d at 774.

Detective Branson's affidavit also did not suggest, let alone support, that Becton's phone played any role in the shooting or its aftermath. *See In re J.F.S.*, 300 A.3d 748, 758 (D.C. 2023) ("detailed affidavit" in support of search warrant explained "why a broad swath of data on the phone might contain relevant evidence"); *Abney v. United States*, 273 A.3d 852, 863 (D.C. 2022) (affidavit "explained the affiant's basis for believing that the cell phone would contain

evidence of the robbery"). Nor did the charges against Becton suggest that his phone would contain evidence of crime. *See, e.g.*, *Abney*, 273 A.3d at 863 (affiant "explained that four persons participated in the robbery"); *id.* at 864 (affiant stated that "on the date of the robbery, [defendant] contacted the complaining witness 'via cellphone'"). Here, the government alleged that Becton shot a stranger on his own, after an impromptu one-on-one struggle.

Even the "obviously deficient warrants" issued in Burns were supported by more specific probable cause than the warrant to search Becton's iPhone. Although the *Burns* defendant was not a suspect at the time, the warrant application still identified three specific items of relevant information likely to be found on his phones. *See, e.g.*, *id.* at 774 (supporting affidavit "established probable cause to believe the phones contained text messages between [the defendant and the decedent on the day of the shooting] and a log showing the precise time of the telephone call [the defendant] reportedly made to his cousin (W-3) that night"). Even so, the Fourth Amendment violation—which occurred in the year 2015—was "so extreme and apparent" that the "good faith exception to the exclusionary rule therefore does not apply." 235 A.3d at 767. Unlike the affiant in *Burns*, Detective Branson identified zero items of relevant information likely to be found on Becton's iPhone, and he sought permission to "open[] every file" from any period of time.

PCR8, Ex. A at 6 (A6). In sum, the good-faith exception is even less appropriate here than it was in *Burns*.

Even if the good-faith exception otherwise applied, it would not extend to the government's review of Becton's Internet search history. As the government has conceded, the warrant "did not authorize a search for internet search history." PCR13 at 33 n.17. By definition, the police cannot reasonably rely on permission from a valid search warrant if the seized information was not "described in a valid search warrant." *Irving v. United States*, 673 A.2d 1284, 1287 (D.C. 1996).

B. The trial court erred in concluding that trial counsel's deficient performance did not cause Becton to suffer prejudice.

Although correctly concluding that trial counsel had performed deficiently, the trial court erred in ruling that Becton was not prejudiced. Prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bellinger v. United States*, 127 A.3d 505, 515 (D.C. 2015). Probable does not mean certain or even likely; "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Lanton v. United States*, 779 A.2d 895, 905 (D.C. 2001). That standard is met here.

1. *Even if Becton's iPhone records were not "inconsistent" with the defense theory, they made the defense less likely to succeed in practice.*

The iPhone extraction prejudiced Becton even if it was "not, in fact, inconsistent with the defense theory at trial." 6/9/23 Tr. 83:3–9 (A44). Becton's phone records made his defense less persuasive in practice. Not only were Becton's Internet searches harder to explain than his impromptu statements during a live police interview, but the government used the phone records to argue that he had tried to destroy evidence. In particular, the government compared records from Becton's iPhone to T-Mobile's records of Becton's "[i]ncoming and outgoing phone calls and text messages" from September 15 until September 17. 3/27/19 Tr. 125:25–126:6, 128:13–17, 129:8–11; 4/3/19 Tr. 71:1–9.

During closing argument, the government reminded the jury that "users can delete information" from their phones. 4/3/19 Tr. 71:13–18. The government itemized each deleted message and each deleted phone call—including a phone call three minutes after the shooting—and even made sure that the deleted items were "[h]ighlighted in red." *Id.* at 71:10–21, 72:3–4. And the government used these "deleted communications" to argue that Becton was conscious of guilt. *Id.* at 71:1–3, 71:11–13, 71:19–72:9, 73:10–17, 75:19–76:1, 91:12–15.

This argument was powerful, due to the "famous cliche: The cover-up is worse than the crime." David Johnston, *Coverup: Watergate's Toughest Lesson*, N.Y.

Times (Feb. 15, 1998), https://tinyurl.com/bdhykc35. If the government introduced evidence that a defendant shredded documents three minutes after the case's central event, the prejudice to the defendant would be apparent. *See, e.g.*, History, *Iran-Contra Scandal Begins with Shredded Documents* (Nov. 13, 2009), https://perma.cc/TL6T-ZASS. In Becton's case, the evidence of deleted calls and messages turned his iPhone into a document shredder for the digital age.

That is why the government urged jurors "look through [the phone records] once they are sent back with you." 4/3/19 Tr. 76:2–8. By reviewing Becton's phone records, the government said, "you'll be able to see the different searches, the different content that was extracted from the defendant's phone and the content that, frankly, wasn't able to be pulled off the phone." *Id.* "Now, the phone extractions, they corroborate with what Ms. Peoples said, but they also go to the defendant's state of mind as consciousness of guilt. Right?" *Id.* at 91:12–15. It was a pithy refrain: "Those searches, those deletions." *Id.* at 91:14–15.

As the Court has "frequently observed, a prosecutor's emphasis on certain evidence is at least a highly relevant measure of the prejudicial impact of that evidence." *Porter*, 37 A.3d at 260–61 (quotation marks omitted). Whether or not "those searches, those deletions" could, in theory, be reconciled with Becton's defense, in practice the government's refrain made the jury less likely to accept it.

2. The government's evidence disproving self-defense and mitigation was otherwise weak.

The phone records, and the resulting inferences that Becton was conscious of guilt, compensated for the government's weak evidence that Becton acted neither in self-defense or with mitigation. Because the trial court instructed the jury on self-defense, the government bore "the burden of proving beyond a reasonable doubt that [he] did not act in self-defense." *Dawkins v. United States*, 189 A.3d 223, 231 (D.C. 2018) (quotation marks omitted). The government bore the same burden to disprove mitigation beyond a reasonable doubt. *See Brown v. United States*, 584 A.2d 537, 543 (D.C. 1990). Doing so was an uphill battle.

First, the sole eyewitness introduced many reasons to doubt. [redacted] testified, or was impeached with prior statements, that (1) Peoples was having paranoid delusions that people were trying to kill him (3/28/19 Tr. 29:15–19, 95:2–9); (2) Peoples shouted an antigay epithet at the people playing dice, then continued to harangue those players (*id.* at 46:7–18, 98:1–14); (3) Becton asked Peoples to leave, but Peoples admonished Becton that "you don't talk to me like that" (*id.* at 99:4–7, 100:4–18); (4) Peoples grabbed Becton, or hugged then grabbed Becton (*id.* at 48:2–4, 49:9–10, 103:25–104:9, 105:11–23); and (5) Becton tried and failed to escape Peoples' grip (*id.* at 110:16–111:22). [redacted] further testified that Peoples was grabbing at or near Becton's waist, where Becton's gun

was stored. *See id.* at 50:15–17, 52:11–14. This testimony was consistent with the defense argument that Becton shot Peoples in self-defense "at close range" only after Peoples accosted him and "tried to wrestle away his gun in an argument." *Burns*, 235 A.3d at 766 (remanding for new trial).

Second, while Becton was eleven years younger than Peoples, Peoples was taller than Becton and nearly 35 pounds heavier. See R4 at 1; 3/26/19 Tr. 59:22–25; 4/1/19 Tr. 128:11–14; 4/2/19 Tr. 32:15–19. Toxicology reports confirmed that Peoples was intoxicated from PCP (4/2/19 Tr. 64:1–14), and the defense's toxicology expert testified that PCP intoxication causes aggression and violence and reduces sensitivity to pain (*id.* at 107:23–108:2, 109:2–110:8).

Third, even [redacted] did not claim to see the second, fatal gunshot, and the government was forced to speculate about its circumstances. The government asked the jury to infer that a smudge on a nearby car resulted from Peoples sliding to the ground after the first gunshot, and that Becton fired the second shot after Peoples fell onto the car and was "falling." 4/3/19 Tr. 53:7–16. But as the trial court recognized at the time, "No one testified to that. No one testified as to what caused the smudge mark." *Id.* at 95:2–11. The defense, which did not have the burden of proof, also was able to offer a simpler explanation: Becton reasonably

believed that Peoples was reaching for the gun, and the first gunshot did not stop Peoples—who was bigger than Becton and high on a potent painkiller.

Fourth, there were many reasons for the jury not to credit [redacted]'s inculpatory testimony beyond a reasonable doubt. Even the most reliable witness would struggle to see details from 30 feet away in the dark; unlike the forensic investigators, [redacted] had no flashlight and no camera with a flash and a night mode. 3/27/19 Tr. 108:11–23. In any event, [redacted] was an uncommonly unreliable witness. In September 2016, she was suffering from untreated hallucinations, not seeing her psychiatrist, and not taking her medicine; [redacted] also denied most of these basic facts, sometimes even after reviewing medical records documenting her own statements at the time. *See, e.g.*, 3/28/19 Tr. 124:21–126:13, 132:14–133:3, 144:15–146:10, 147:15–148:12, 150:12–151:19. She also likely was under the influence of alcohol and crack cocaine during the shooting; although she denied it at trial, she had signed an earlier statement admitting to smoking crack and drinking a half-pint of alcohol before going to Mellon Street. *See id.* at 76:12–14, 77:22–25. She likely lost even more credibility by denying the truth of the written statement that she had signed and affirmed to be truthful. *See id.* 81:18–82:25.

Not only was [redacted] a poor personal historian, as her doctors concluded (*id.* at 135:11–136:9), but her memory of several details about the incident—about

which she claimed to be "clear" or "certain"—was refuted by video footage or physical evidence. *Compare id.* at 116:3–23 ([redacted] testimony about location of gunshots), *and id.* at 120:1–19 ([redacted] testimony about number of people getting into red car), *with* 3/27/19 Tr. 100:20–101:14 (location of shell casings), *and* Gov. Ex. 305A (video of one person getting into car). These confirmed errors allowed the defense to argue that "with Ms. [redacted] . . . certainty doesn't equal accuracy" and to undermine critical parts of her testimony "for which we don't have video to corroborate it." 4/3/19 Tr. 113:21–23, 115:18–21.

The Court has rejected analogous harmless-error arguments when the government bore the burden to disprove self-defense and "there were substantial reasons for the jury not to credit either of [the government's two key] witnesses." *Dawkins*, 189 A.3d at 237. Here, the government had just one eyewitness, and her testimony was even more worthy of doubt.

Tellingly, the jury acquitted Becton of first-degree murder, a charge depending exclusively on [redacted]'s testimony. 4/3/19 Tr. 85:5–15 ("And in this case, we have [redacted] explaining to you the sequence of events . . . And then he begins that countdown. That's deliberating. That's premeditated."). For second-degree murder and the accompanying charges, conversely, the government was able to rely on Becton's phone records—"those searches, those deletions."

Indeed, the government invoked Becton's phone extractions as "objective evidence" that would enable the jury to trust the testimony of witnesses like [redacted]. According to the government, "when you see that their testimony is aligning with the objective evidence"—including "the phone extractions"—"that's how you know that they're telling the truth." *Id.* at 90:22–91:11. This non-testimonial evidence was "critically important to the prosecution" because the lone eyewitness's "credibility was tarnished and in serious question throughout the trial." *Green v. United* States, 231 A.3d 398, 415 (D.C. 2020).

3. In deeming the evidence against Becton to be "incredibly strong," the trial court conflated undisputed evidence of identity with disputed evidence relevant to self-defense and mitigation.

The trial court downplayed these problems and overestimated the strength of the case, concluding that the government's evidence was "incredibly strong." 6/9/23 Tr. 80:20–21 (A41). To support this conclusion, the trial court relied primarily on evidence that confirmed Becton's identity but did not disprove mitigation or self-defense.

a. The "very compelling dying declaration" was probative only of the shooter's identity.

For example, the trial court pointed to "the very compelling dying death declaration that was made by Mr. Peoples." *Id.* at 84:10–13 (A45). The dying declaration may have clearly identified Becton, given that Peoples called the

shooter "Dre from Trenton Park." *Id.* at 80:21–25 (A41). But Peoples' statement did not clarify how or why he was shot: He said improbably that Becton shot him "because I was old" and "was shooting up everybody." 3/26/19 Tr. 22:19–24, 52:17–25.

b. The "ballistics evidence" and "surveillance evidence" were probative only of the shooter's identity.

Similarly, the "ballistics evidence" that was "observed and recovered from the scene" linked Becton to the gun used in the shooting, but otherwise confirmed that Becton had fired only two shots. 6/9/23 Tr. 81:12–14 (A42). The defense, in fact, argued that the number of shots was a reason to believe that Becton was acting in self-defense. *See* 4/3/19 Tr. 120:4–8 ("But in this case, it's not the second shot that's the most important one. It's the third shot that never happened."). And the Court has rejected harmless-error claims in self-defense cases even when ballistics evidence suggested that the defendant had shot the decedent repeatedly. *See Burns*, 235 A.3d at 781 (police found "five spent cartridge casings").

What is more, the location of the shell casings discredited [redacted]'s memory of where the shots were fired from—about which she claimed to be certain. *See* 3/28/19 Tr. 116:3–23 ([redacted] was "certain" that the shots were fired from the sidewalk "by the crate"); 3/27/19 Tr. 100:20–101:14, 106:9–107:10 (shell casings recovered from the street, not from the sidewalk or near the crate, and "can give

you a general idea of where a gun was fired"). By comparing [redacted]'s "certain" memory to the ballistics evidence, the defense illustrated that "when you don't have anything else to corroborate what she's claiming, you can't rely on her beyond a reasonable doubt." 4/3/19 117:12–16.

The same limits apply to the "surveillance evidence" and other "evidence concerning the appearance of Mr. Becton's car on the scene," which reinforced that Becton had gotten into the maroon car after the shooting, as did the "evidence concerning the appearance of Mr. Becton's car on the scene, including a partial license plate of the vehicle." 6/9/23 Tr. 81:14–18 (A42). None of this evidence clarified the circumstances of the shooting itself. And as with the ballistics evidence, the surveillance video exposed [redacted]'s memory problems. Although surveillance footage showed only one person enter the red car (Gov. Ex. 305A), [redacted] claimed to be "very clear" that four people did so. 3/28/19 Tr. 120:1–19.

c. The portions of [redacted]'s testimony corroborated by other witnesses were probative only of the shooter's identity.

For similar reasons, the government's case did not materially benefit from the "portions" of [redacted]'s testimony that were "corroborated by other witnesses, including witnesses who were friends or associates of Mr. Becton." 6/9/23 Tr. 81:9–11 (A42). Becton's friends did corroborate details related to identity, including his attire, the color and tag number of the car he arrived in. *See, e.g.*,

4/3/19 Tr. 89:7–16 (government summarizing testimony from Becton's friends about "the red car," "the attire the defendant was wearing," and "the tag number"). But they did not witness the shooting and did not otherwise corroborate [redacted]'s testimony about the shooting.

d. The autopsy results confirmed the number of gunshots but not the circumstances under which they were fired.

The "autopsy findings" likewise were less probative than the trial court suggested. 6/9/23 Tr. 81:17 (A42). Although the autopsy confirmed that Peoples had been shot twice and pinpointed the location of his frontal entry wounds, the autopsy did not confirm how or why the shots were fired. In closing, the government offered an unconfirmed theory that a wounded Peoples caused a smudge on a nearby car when he fell onto it and was trying to break his fall to the ground. *See* 4/3/19 Tr. 52:24–53:4. No witness corroborated this theory, and neither Peoples' DNA nor any blood stains were found on the car. *See id.* at 108:5–24, 127:3–7.

More generally, the autopsy in this case lacked the type of inculpatory details found in other self-defense cases. In *Burns*, the autopsy report contradicted the defense claims "about the way the shooting unfolded" by proving that the decedent was shot in the back at least once and confirming the absence of residue

likely to be present if the defendant had fired at close range as he claimed. *See* 235 A.3d at 766, 783. Peoples' autopsy offered no comparable findings.

e. Under the trial court's own analysis, Becton's statements to law enforcement were not strong evidence of guilt.

Finally, and as recognized by the trial court itself, "defendant's own statements to law enforcement" were not compelling evidence of Becton's guilt. 6/9/23 Tr. 81:15–18 (A42). At trial, the government asked the jury to infer Becton's guilt from his statements to police, in which he disclaimed self-defense on the ground that was not the person who had shot Peoples. 4/3/19 Tr. 81:13–14. But as the trial court explained, when concluding that the Internet searches were not inconsistent with Becton's defense, he "was worried and scared" and "thought he might get charged with murder"—"because as he told you in those clips, he didn't believe that self-defense was a lawful defense." 6/9/23 Tr. 82:12–83:2 (A43–A44).

II. The trial court erred in allowing the government to present evidence and argument that Peoples was jovial and nonviolent, while barring Becton from introducing evidence of Peoples' prior assaults.

In addition to having to defend against the admission of records from his phone, Becton was incorrectly barred from rebutting the government's evidence and arguments that Peoples was a nonviolent jokester. It is well settled that "an accused claiming self-defense in a homicide prosecution may attempt to show that the decedent was the aggressor by showing that the dead person was a bellicose and

violent individual." *(William) Johnson v. United States*, 452 A.2d 959, 961 (D.C. 1982). To do so, the defendant may introduce evidence of "prior acts of violence committed by the victim," and may do so even if those acts were "unknown to the accused." *(Markus) Johnson v. United States*, 960 A.2d 281, 301 (D.C. 2008).

Of course, a trial court generally has discretion to limit or exclude bad-acts evidence if "its probative value is outweighed by the danger of undue prejudice." *Shepherd v. United States*, 144 A.3d 554, 559 (D.C. 2016) (quotation marks omitted). But the trial court's evidentiary rulings must also preserve the constitutional right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). The evidence rules "must therefore accommodate that right." *Richardson v. United States*, 98 A.3d 178, 189 (D.C. 2014). Here, the evidentiary ruling impaired Becton's defense in three ways.

First, other testimony had already suggested that on the night of September 15, Peoples was paranoid, agitated, and confrontational, but the government argued that he was "joking" and "playing" and that Becton was "the type of person" who might take Peoples "too seriously." 4/3/19 Tr. 60:3–20, 63:16–22. Peoples' past violence would have made the jury more skeptical of the government's effort to sanitize his conduct. As the Court has explained, even if a decedent's "violent or quarrelsome conduct does not prove that [he] committed an act of aggression, it

does increase the probability" when "other evidence suggest[s] such an act of aggression." *Shepherd*, 144 A.3d at 559 (alteration and quotation marks omitted).

Second, the government introduced evidence, and then made arguments, about Peoples' personality more broadly; Becton was denied the opportunity to impeach or rebut these claims with evidence of Peoples' history of violence. Cherie Peoples testified not only about Peoples' demeanor on the night of September 15, but also that he "was silly. He was funny. He liked to make people laugh. He liked to make people smile." 3/26/19 Tr. 58:25–59:14. Even when purporting to describe Peoples' demeanor that night, she still described him more generally: Peoples was "[l]aughing, giggling, joking"—"like he normally do." *Id.* at 61:25–62:15. In its closing, the government likewise argued that "the testimony of the people on Mellon Street *and* the people who knew [Peoples] and how [he] behaved is the foundation of the heart of this case." 4/3/19 Tr. 85:24–86:2 (emphasis added).

Third, the government sought to undermine the defense expert's testimony—that violence generally is a side effect of PCP intoxication—by suggesting that the PCP user's personality traits would inform whether that particular PCP user would turn violent. When cross-examining the defense expert, Dr. Blair, the government elicited that PCP will affect different people differently, and that one factor "that could affect the symptoms or effects are the individual

user's personality traits." 4/2/19 Tr. 119:6–14. Yet Becton was not allowed to introduce evidence that would have identified those personality traits.

Because that evidence was excluded, the government could safely argue that "the defense is asserting that the decedent was on PCP so that just inherently makes him aggressive." 4/3/19 Tr. 141:14–17. And that "even when they called the toxicologist [the defense] is arguing stereotypes that aren't even supported by the evidence that they endorse themselves." *Id.* at 142:1–5. Peoples' past assaults would have refuted the government's claims of stereotyping and explained why PCP was likely to make Peoples—qua Peoples—aggressive and violent.

Unlike in other cases, no other admitted evidence had already served this purpose. In *Shepherd*, the defendant argued that the details of the decedent's domestic-violence conviction should have been admitted to rebut another witness's testimony that the decedent "was a 'peaceful' person." 144 A.3d at 559 n.1. But even without the underlying details, the jury already knew that the defendant had been convicted of assault, and that conviction "was enough to counter [the] testimony about [the decedent's] peaceful character." *Id.* at 560. Similarly, in *Richardson* the defendant wanted to introduce a document "to establish that the victim's distress could have led her to react aggressively toward him, but he was able to present other more persuasive evidence of the victim's anger and jealousy

toward him in the months before her death." 98 A.3d at 190. In this case, conversely, Becton was barred from introducing both the details of Peoples' previous assaults and evidence that they happened at all.

There also was no basis to exclude the evidence on the ground that Peoples had apparently been sober when committing his previous assaults. *See, e.g.*, 3/25/19 Tr. 243:11–245:17 (A18). Sobriety might have been relevant if Peoples had been sober on September 15 but intoxicated when he assaulted his previous victims. But in this case, the opposite was true. The previous assaults established that Peoples could turn violent even when sober, and there was no reason to believe that Peoples became more peaceful when high. Instead, Dr. Blair testified that PCP intoxication makes people more violent, not less so. *See* 4/2/19 Tr. 107:23–108:2, 109:20–110:8.

Finally, and as detailed above, "the government's evidence" was "not overwhelming." *Richardson*, 98 A.3d at 192. The government's case disproving self-defense and mitigation was weaker than in *Shepherd*, which featured three eyewitnesses, one of whom "was a disinterested person," who "saw the events immediately before and after the murder." 144 A.3d at 563–64.

III. The cumulative effect of the two errors requires a new trial.

Even if neither of the two errors would individually entitle Becton to relief, a new trial is necessary to redress those errors' cumulative effect. When "more than

one error is asserted on appeal," the Court evaluates "whether the cumulative impact of the errors substantially influenced the jury's verdict." *Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011). The Court considers "the significance of the alleged errors and their combined effect against the strength of the prosecution's case." *Foreman v. United States*, 792 A.2d 1043, 1058 (D.C. 2002).

Here, the errors' combined effect was significant, and the prosecution's case was shaky. Becton's phone records allowed the government to accuse him of destroying evidence amid a guilty conscience, and excluding Peoples' past assaults enabled the government to claim that the defense was smearing a peaceful jokester with a drug problem. Both sets of evidence and arguments helped to alleviate the reasonable doubts introduced by [redacted] and bolster the government's theory that Becton was trying to "outsmart the law." 4/3/19 Tr. 55:11–13.

CONCLUSION

The judgments should be reversed and the case remanded for a new trial.

Respectfully submitted,

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