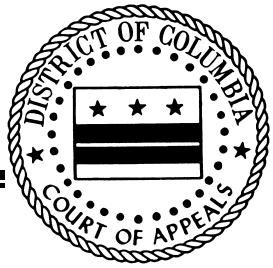
No. 24-CO-198



DISTRICT OF COLUMBIA
COURT OF APPEALS

DANIEL GREENE,

Appellant,

2015 CF3 002834

v.

UNITED STATES,

Appellee.

Appeal from the Superior Court
for the District of Columbia

APPELLANT'S INITIAL BRIEF

Timothy Cone, Esq.
Attorney Appointed by the Court
for Appellant Greene
1615 New Hampshire Avenue N.W.
4th floor (North)
Washington, D.C. 20009
Tel. (202) 862-4333

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Statutes and other authorities:

ISSUES PRESENTED

Issue 1: Whether Greene procedurally defaulted his ineffective assistance of counsel claims.

Issue 2: Whether the Superior Court incorrectly denied on the merits Greene's motion for a new trial based on ineffective assistance of counsel.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Superior Court of the District of Columbia that disposes of all parties' claims.

1. Statement of the Facts and Course of Proceedings.

In *Greene v. United States*, No. 16-CF-0286 (March 1, 2023) (unpublished) (hereafter "March 1, 2023 Decision"), this Court affirmed Greene's convictions for armed carjacking of a senior citizen, in violation of D.C. Code §§ 22-2803(b)(1) & 3601; possession of a firearm during a crime of violence, in violation of D.C. Code § 22-4504(b), and unauthorized use of a vehicle to facilitate a crime of violence, in violation of D.C. Code § 22-3215(d)(2)(A). This Court's decision summarized the evidence at trial, as follows:

> In the early morning hours of August 1, 2014, Mr, Greene, who also went by "Worm" and "Tracy," rode with his friend, Sean Williams, and Mr. Williams's girlfriend, Alayshia Whitted, in a minivan that Mr. Williams had stolen a few hours earlier. With Mr. Williams driving, Ms.

Whitted in the front passenger seat, and Mr. Greene in a rear seat, the three traveled from the Trinidad area in northeast Washington, D.C. to southeast D.C. During the drive, Ms. Whitted saw in the minivan a drawstring bag that was familiar to her: she had seen it on previous occasions in Mr. Greene's car. Ms. Whitted opened the bag and saw a gun with shiny black tape around the handle. Mr. Greene told Ms. Whitted that she was "nosey" and added, "[N]ever leave the house without it."

At around 1:20 a.m., Don Darden, a 65-year-old retiree, left his house in southeast D.C., got into the driver's seat of his 2010 Toyota Matrix (which was parked on the street), and lowered the driver's side window. Mr. Williams, Ms. Whitted, and Mr. Greene pulled up next to Mr. Darden and Mr. Greene wondered aloud if Mr. Darden was asleep. Mr. Williams got out of the minivan with the drawstring bag containing the gun, pointed the gun at Mr. Darden's face, and ordered Mr. Darden out of his car. Mr. Greene then got into the driver's seat of the minivan. As he did so, he told Mr. Williams to check Mr. Darden's pockets.

Mr. Darden got out of his car as ordered, moved the gun Mr. Williams was holding away from his head, and walked away from the car. Mr. Greene and Ms. Whitted drove away in the minivan and Mr. Williams drove away in Mr, Darden's Toyota. Mr. Darden immediately went into his house and his wife called 911.

Mr. Greene and Ms. Whitted (in the minivan) and Mr. Williams (in the Toyota) drove back to the Trinidad neighborhood and reconvened in an alley. During the drive, Mr. Greene told Ms. Whitted that if they get caught, she should "[t]hrow the police off." In the alley, Mr. Greene told Ms. Whitted to drive Mr. Darden's Toyota Matrix to her home in Suitland, Maryland, where Mr. Greene would pick it up the next day. Despite not knowing

how to drive, Ms. Whitted agreed. Mr. Williams said he would drive the minivan and that Ms. Whitted could follow him until she knew the rest of the way to her house. Mr. Greene stayed in the Trinidad area.

Meanwhile, officers of the Metropolitan Police Department (MPD) were looking for both Mr. Darden's Toyota and the minivan. At around 2:00 a.m., an MPD officer saw the Toyota Matrix traveling on Good Hope Road in southeast D.C. and activated his lights and sirens. Mr. Williams, who was driving the minivan in front of Ms. Whitted, began speeding away, and Ms. Whitted, driving the Toyota, followed suit. After making multiple turns at high speeds on residential streets, Ms. Whitted eventually lost control and crashed the Toyota. Ms. Whitted tried to flee but was captured by police officers. Mr. Williams stopped the minivan in the middle of the street, got out, and watched as officers arrested Ms. Whitted.

Mr. Williams called Ms. Whitted's mother, Cilenia Whitted (to whom we will refer as Cilenia to avoid confusion), and asked her to come to D.C., because, he falsely claimed, Ms. Whitted had gotten into a fight and was being treated roughly by the police. Around 2:15 a.m., Cilenia drove from Suitland, Maryland, and met Mr. Williams near the police presence involving Ms. Whitted. Cilenia approached a police car in which Ms. Whitted was being held and told the officer that the woman in the back was her daughter. Officers, curious how Cilenia could have been aware of the situation, saw Mr. Williams in the back of Cilenia's car and detained him. Mr. Darden, who had been brought to the scene by police officers, identified Mr. Williams as the individual who had taken his car at gunpoint.

At the police station, Ms. Whitted told officers that Mr. Williams and a person named Tracy were involved in the

> carjacking; and, to "throw off" the police, she added that an individual named "Mike" had also been with them. The investigation eventually led officers to Mr. Greene. Cell-site location information showed that a phone used by Mr. Greene was near in time and location to the crime and other locations where, according to Ms. Whitted, she, Mr. Greene, and Mr. Williams had been together that night. Cell phone records also showed several phone calls that night between two phones used by Mr. Williams and Mr. Greene.
>
> Approximately two months later, Mr. Greene went to Ms. Whitted's house and told her to stay quit and "keep everything on the hush."

March 1, 2023 Decision, pp. 1-4.

Ms. Whitted pled guilty to being an accessory after the fact to an armed carjacking and Mr. Williams pled guilty to carjacking a senior citizen and possession of a firearm during a crime of violence. March 1, 2023 Decision, p. 4. Mr. Greene went to trial and was convicted of the three offenses noted above. The trial court imposed a sentence of 181 months. March 1, 2023 Decision, p. 5.

2. Greene's Motion for New Trial Based on Ineffective Assistance of Counsel.

On March 13, 2023 (shortly after this Court's March 1, 2023 affirmance of his convictions), Greene filed a motion in Superior Court pursuant to D.C. Code § 23-110 (the "23-110 Motion"), seeking a new trial based on ineffective assistance of counsel. Docket Entry No. ("DE") 252. Greene's 23-110 Motion claimed that counsel was

deficient in failing to object to the appearance before the jury of witness Williams, who indicated that he was unwilling to testify and then refused to answer questions in front of the jury, and in failing to object to and/or eliciting prejudicial testimony by another government witness, Cilenia Whitted. DE252:1-20. Greene requested an evidentiary hearing. DE252:20. The government opposed the 23-110 Motion, DE264, and Greene filed a Reply to the government's opposition. DE267. Without holding an evidentiary hearing, the Superior Court entered an order denying the 23-110 Motion. DE268.

The Superior Court first found that Greene had procedurally defaulted his 23-110 Motion, because he failed to raise his ineffective assistance claims earlier, while his conviction was on direct appeal. DE268:2-3. The Superior Court then ruled that even if the ineffective assistance claims were not procedurally barred, they should be denied on the merits. DE26833-6. Greene filed this timely appeal. DE269.

SUMMARY OF THE ARGUMENT

The Superior Court erred in finding that, because Greene should have raised his § 23-110 claim of ineffective assistance of counsel while his earlier direct appeal was pending, this claim was now procedurally defaulted. As the Superior Court noted, Greene's direct appeal raised the "same" issues as his ineffectiveness assistance of counsel claim. For Greene to have simultaneously claimed that trial

counsel *preserved* issues for appeal and ineffectively *waived* these issues would have been taking adverse positions in the same case. The Rules of Professional Responsibility do not countenance taking adverse positions in the same case. A procedural default is surmounted when a party can show "cause" for the default; here Greene had cause not to bring an ineffective assistance of counsel claim while his direct appeal was pending.

Turning to the merits, Greene's § 23-110 Motion argued that defense counsel's failure to object to the jury being present while prosecution witness Williams refused to answer any questions, coupled with having elicited testimony that Williams had said that Greene was a very dangerous person, was ineffective assistance of counsel. The Superior Court erroneously found this claim to lack merit. Yet, counsel was clearly deficient. Not only did allowing Williams to take the stand fail to cash in on the tactical advantage of having a previewed prosecution witness fail to appear, Williams' refusal to testify invited the jury to infer that he was doing so out of fear of Greene's recrimination, an inference supported by testimony of another witness, that defense counsel inexplicably elicited, that Greene was a "very dangerous young man." Greene's guilt or innocence should have been based on the evidence, not on improper inferences that he was a dangerous person.

The Superior Court found that even if trial counsel was deficient, the prejudice

was mitigated by its curative instructions. Yet the prejudice here was so prejudicial that it could not be overcome by curative instructions. The Superior Court also found that the outcome would not have been different in light of "overwhelming" evidence of guilt. But the evidence was far from overwhelming.

ARGUMENT

1. Greene did not procedurally default his ineffective assistance of counsel claims.

A. Standard of Review.

A determination whether a defendant procedurally defaulted a claim requires the application of "legal principles." *White v. United States*, 146 A.3d 101, 106 (D.C. 2016). This Court reviews such questions *de novo*. *Lasché v. Levin*, 26 A.3d 717, 721 (D.C. 2011) ("Our review of the application of the legal principles involved is *de novo*.").

B. The default of Greene's ineffective assistance of counsel claim during his direct appeal was surmounted by "cause," because an ineffective assistance of counsel motion would claim that trial counsel deficiently *waived* Greene's challenge to the trial court's decision to allow Williams to refuse to answer questions in front of the jury, whereas Greene's argument on direct appeal was premised on trial counsel's *preservation* of this very issue.

Citing *Shepard v. United States*, 533 A.2d 1278 (D.C. 1987), the Superior Court ruled that Greene procedurally defaulted his ineffective assistance of counsel

claims, because Greene was "aware" of the grounds for his claims – as evidenced by the fact that "[i]n the direct appeal, [Greene] raises the same two issues alleged here [in the ineffective assistance of counsel motion]." DE268:2. Greene agrees that he was raising the same issues on appeal and in his subsequent motion. But, far from erecting a procedural bar, the fact that Greene was raising these same issues on appeal establishes "cause" for his failure to file an ineffective-assistance-of-counsel motion that would have argued that his trial counsel waived, and therefore failed to preserve, the very issues he was pursuing on appeal.

As the Superior Court noted, in *Shepard* this Court held that procedural default is a barrier to consideration of a claim of ineffective assistance of counsel if a defendant fails to raise this claim during the pendency of his direct appeal, when at the time the defendant knew of the grounds for alleging counsel's ineffectiveness. 533 A.2d at 1280. But the Superior Court failed to note that *Shepard* added that a defendant who showed "cause and prejudice" could "surmount" the procedural default barrier. *Id*. at 1282. One example of cause occurs when "the factual or legal basis for a claim was not reasonably available to counsel." *Washington v. United States*, 834 A.2d 899, 903 n. 8 (D.C. 2003) (citation omitted). This example of "cause" applies here.

It is well-settled that a defendant can show "cause" for not bringing an

ineffective assistance of counsel claim while his case is on appeal when he "was represented on appeal by the same counsel that represented him at trial." *Little v. United States*, 748 A.2d 920, 923 (D.C. 2000). In such circumstances, "[i]t would be a conflict of interest for a lawyer to appeal a ruling premised on the lawyer's own ineffectiveness." *Id*. (citation omitted). Analogous reasoning applies here.

As the Superior Court noted, Greene's claim that his trial counsel was ineffective for waiving two issues involved the "same" issues that he had raised on direct appeal. Clearly, it would have been adverse to Greene's position on the two issues he was raising appeal for his counsel to also claim that trial counsel had *waived* these issues. Rule 1.7 of the D.C. Rules of Professional Responsibility provides: "A lawyer shall not advance two or more adverse positions in the same matter." Thus, here, the waiver-based ineffective assistance claim was not reasonably available to Greene's appellate counsel.

Moreover, as to the testimony of Williams, it was not clear, *ex ante*, whether trial counsel had in fact waived this issue, since, as this Court noted in its opinion, trial counsel "initially expressed significant misgivings about the government's repeated efforts to call Mr. Williams, stated that she had a 'big objection,' and answered 'yes' when the court asked if her proposal was that Mr. Williams 'not do that in front of the jury.'" March 1, 2023 Decision, p. 7. Greene's appellate counsel

could reasonably have decided that a challenge to the trial court's ruling that allowed Williams to refuse to answer questions in front of the jury was viable on direct appeal, and that a contemporaneous adverse argument that his appellate challenge had been waived was not permitted under Rule 1.7 of the Rules of Professional Responsibility. In short, there was "cause" to surmount the procedural default.

In addition to showing "cause," a defendant must show "prejudice" in order to surmount a procedural default. *Shepard*, 533 A.3d at 1282. "When [a defendant] claims ineffective assistance of counsel, our analysis of a procedural bar is inextricably linked to the merits of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984)." *St John v. United States*, 227 A.3d 141, 144 (D.C. 2020) (citation omitted). Just as *St John* blended its analysis of procedural bar default "prejudice" with its analysis *Strickland* ineffectiveness "prejudice," *id*. , this Brief addresses "prejudice" in Section 2 below.

2. Defense counsel was deficient both in opening the door to testimony that the defendant was a "very dangerous young man," and in aggravating this prejudice by allowing the witness who made this statement to testify in the jury's presence that he refused to answer any questions.

A. Standard of Review.

Ineffective assistance of counsel claims present "mixed questions of law and

fact." *Dugger v. United States*, 295 A.3d 1102, 1111 (D.C. 2023). This Court defers to a trial court's factual determinations unless they are unsupported by the record, *see id.,* and reviews *de novo* a trial court's legal conclusions on such claims. *Shepherd v. United States*, 296 A.3d 389, 395 (D.C. 2023).

B. Defense counsel was deficient both in (a) eliciting hearsay testimony, on cross-examination of prosecution witness Cilenia Whitted, that Williams told her that the defendant "wanted to hurt my daughter," because this opened the door for prejudicial hearsay testimony on redirect that Greene was "a very dangerous young man," and (b) aggravating this prejudice later in the trial when counsel failed to object to having Williams refuse to testify in front of the jury.

The theory of the government's case was that Greene was guilty of carjacking, and possession of a firearm, *as an aider and abettor*. This theory was attested to by (a) the government's closing argument that Greene "aided and abetted Sean Williams in his armed carjacking [and] in possessing a firearm during a crime of violence," 08/03/15 Tr. 89, (b) the trial court's instructions (at the prosecution's request, 07/28/15 Tr. 382) on "aiding and abetting," 08/03/15 Tr. 58-61, and (c) the jury's note during deliberations seeking clarification on "aiding and abetting." 08/04/15 Tr. 8. In other words, the evidence was admittedly insufficient to show that Greene *personally committed* the carjacking, and the firearm possession; as the trial court instructed the jury, proof of his liability depended on whether he "facilitate[d]" the

offenses, whether he "*knew* that some type of weapon would be used to commit the [carjacking] from the surrounding *circumstances*." 08/03/15 Tr. 60 (emphasis added). The prosecutor succinctly put it in closing argument: the government's case rested on proof that Greene, though not the one who committed the carjacking, "[i]ntended to make [the carjacking] succeed." 08/03/15 Tr. 85.

Much hinged, therefore, on Greene's state of mind and his character: was he the kind of person who, though sitting in the backseat of the van while Williams, at gunpoint, ordered Darden out of his Toyota and then drove off with Darden's Toyota, nonetheless should be held criminally accountable for Williams' criminal conduct because he "intended to make it succeed." Greene's 23-110 Motion demonstrated that defense counsel's ineffectiveness on this crucial point was clear.

Prosecution witness Cilenia Whitted testified on direct examination about her recollection of the night of the carjacking, namely that after Williams had called her around 2:00am and told her that her daughter Alayshia was with police, she drove up to a police car with Williams, and then saw the police arrest Williams for carjacking. 07/29/15 Tr. 433, 437, 440.

Inexplicably, on cross-examination, defense counsel brought up a conversation Cilenia Whitted had had with Williams – a conversation that had not been brought up on direct examination:

> Q. Did you ever talk with [Williams] about anybody named Worm [one of Greene's aliases?
>
> A. I have.
>
> Q. And did [Williams] indicate his relationship with Worm?
>
> A. Yes.
>
> Q. And what did he say?
>
> A. *He told me that the young man wanted to hurt my daughter*.
>
> . . .
>
> Q. And it was at that time that [Williams] told you that Worm wanted to hurt Alayshia?
>
> A. Yes.
>
> Q. And was it because of jealousy?
>
> A. To my understanding, Alayshia didn't feel like this Young man was a problem to her.
>
> *Me -- my conversations with [Williams] made me feel like my daughter was in danger*.

07/29/15 Tr. 445-447 (emphasis added).

Thus, on cross-examination, defense counsel, whose crucial task in this case was to elicit evidence that Greene was not the kind of person who intended to make Williams' carjacking succeed, instead elicited testimony that Greene "wanted to hurt"

Alayshia Whitted, and put her "in danger."

The prosecution, sensing an unexpected windfall, followed up on redirect examination, as follows:

> Q. When did this conversation with Sean Williams about [Greene] take place?
>
> A. It was on the phone.
>
> Q. Where was Sean Williams at the time?
>
> A. Incarcerated.
>
> Q. Was it before or after Alayshia was incarcerated?
>
> A. Before.
>
> Q. And was it before or after Alayshia told you that [Greene] had come to your house?
>
> A. It was after.
>
> Q. And what is it that Sean Williams told you that made you fearful?
>
> [Defense counsel]: Objection, Your Honor.
>
> THE COURT: What's the basis of your objection? What is the basis for your objection?
>
> [Defense counsel]: I'll withdraw [it].
>
> THE COURT: All right. You may answer the question.
>
> THE WITNESS: [Williams] told me that [Greene] had

> asked him did he want him to get rid of Alayshia. And [Williams] said that he told the young man no, Alayshia, she good. She all right. Ain't that serious.
>
> [The prosecutor]:
>
> Q. Did [Williams] tell you why he was giving you this information?
>
> A. No -- yeah, he did. When I asked [Williams] -- like I said, I don't know none of those young men. *He said that the young man was a very dangerous young man*.
>
> [The prosecutor]: I have no further questions.

07/29/15 Tr. 451-452 (emphasis added).

Thus, defense counsel in effect injected into the case evidence that his client was "a very dangerous young man." In an aiding and abetting case, which hinged on whether Greene knowingly facilitated the violent crime of carjacking, this kind of evidence was extremely damaging to the defense.

After Cilenia Whitted's testimony, the parties and the trial court learned that Williams, who had pled guilty to the carjacking and agreed to testify against Greene a week earlier, was now refusing to testify at trial: Williams so stated in court, out of the presence of the jury. 07/29/15 Tr. 472-476. Williams's refusal to testify presented the defense with a potential tactical gain, because the prosecution, in opening statement, "previewed for the jury that Mr. Williams would testify and would

inculpate Mr. Greene." March 1, 2023 Decision, p. 5.[1] *See* Thomas A. Mauet, *Fundamentals of Trial Techniques* (1980 ed.), p. 52 ("Nothing is more damaging than to overstate your case in your opening statement.").

On the next day of trial, after Williams again refused to answer questions out of presence of the jury, the parties discussed how to address the situation, and whether to have Williams refuse to answer questions in the presence of the jury. 07/30/15 Tr. 531-33. Yet, instead of benefitting from the windfall of having a previewed prosecution witness fail to appear before the jury, defense counsel forfeited it, telling the trial court: "I think you have to order him to testify in front of the jury." 07/30/15 Tr. 534. Defense counsel noted a "concern" about Williams refusing to testify in front of the jury in light of Cilenia Whitted's testimony "that Mr. Greene is a dangerous man." 07/30/15 Tr. 535. Counsel added: "However, I think the caselaw is that he needs to refuse [to answer questions] in front of the jury. I may

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[1] The prosecutor told the jury (07/27/15 Tr. 74):

> Both Sean Williams and Alayshia Whitted have pled guilty in connection with their roles in this offense. They're both going to come into the courtroom in their prison garb and with their handcuffs on. They're both going to tell you what they did, why they pled guilty, and why they're sitting here today. Most important, they're also going to tell you what Daniel Greene did.

be wrong about that." 07/30/15 Tr. 535. Defense counsel was wrong about that:

> Putting a witness on the stand in front of the jury for the sole purpose of observing his refusal to testify invites the jury to speculate and draw impermissible inferences.

Martin v. United States, 756 A.2d 901, 905 (D.C. 2000).[2]

The trial court then called Williams into the courtroom, and asked him whether he was going to answer questions; Williams answered: "no." 07/30/15 Tr. 540. The trial court then stated:

> And you know the question becomes obviously whether to allow [Williams' refusal to answer questions] to happen in front of the jury because there is the risk that there will be prejudiced to the defendant to make it appear that they can speculate as reasons why Mr. Williams is not wanting to answer questions that somehow reflect on Mr. Greene.
>
> And so you all have acknowledged those are some concerns allowing it to be in front of the jury.

07/30/15 Tr. 541. The trial court noted defense counsel's position that "if [Williams] is going to be questioned and answering questions, it really should be done in front of the jury." 07/30/15 Tr. 541. The trial court then ordered the jury to be brought in. 07/30/15 Tr. 542. Now, in the presence of the jury, Williams repeatedly stated: "I

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[2] The trial court's order denying Greene's 23-110 Motion acknowledged that defense counsel "mistakenly concluded that a witness must indicate in front of a jury any refusal to testify; the *Martin* case demonstrates that this is not the law on this issue." DE268:4 (citing *Martin*, 756 A.2d at 905).

don't want to talk." 07/30/15 Tr. 542-543. Williams also gave no response to some questions. 07/30/15 Tr. 543-544. Subsequently, out of the presence of the jury, the trial court held Williams in contempt of court. 07/30/15 Tr. 545. The trial court thereafter stated that it was "a little bit concerned to do anything more in front of the jury. . . . We may end up doing something that obviously doesn't seem to be a good decision." 07/30/15 Tr. 546. Defense counsel stated: "He [Williams] can't testify outside [the presence] of the jury. If he's not going to testify in front of the jury then I don't see where we're going." 07/30/15 Tr. 547. This was ineffective assistance of counsel.

First, as noted above, it inured to the defense's advantage to have a previewed prosecution witness now fail to appear. Williams's failure to appear exposed a gap in the prosecution's case: it was offering less proof of guilt than it had promised in opening statement, undermining both the strength of its case, and the credibility of the prosecution.

Second, Williams' testimony that he "can't talk" naturally gave rise to the inference that he was scared to testify because of possible retaliation by the defendant. *See* 07/30/15 Tr. 54 (trial court notes the "risk" that Williams's refusal to answer questions could "reflect on Mr. Greene"). This was prejudicial in itself. And this prejudice significantly compounded the prejudice that defense counsel had

already created by opening the door to hearsay testimony from Cilenia Whitted that Greene was "a very dangerous young man."

The Superior Court's order denying Greene's 23-110 Motion gave a number of reasons for finding that this motion lacked merit. None are persuasive.

The Superior Court first stated that "it was not clear to the parties or to this Court that [Williams] would refuse to answer any questions since he had answered some substantive questions outside the presence of the jury." DE268:4. But, from the defense perspective, Williams' answers to substantive questions would be prejudicial, since he was being called as a prosecution witness, and was expected, having pled guilty to the carjacking and agreed to testify against Greene, to inculpate Greene in this crime. The overriding defense goal should have been to keep Williams off the witness stand, regardless of whether he would be giving prosecution-favorable substantive testimony, or, as occurred, by refusing to testify, opening the door to speculation and impermissible inferences. *Martin*, 756 A.3d at 905.

The Superior Court stated that "trial counsel may also have had strategic reasons for not objection to testimony of Mr. Williams." DE268:4. Admittedly, defense counsel stated that "there are things that if he decides to testify that obviously, I would ask him about that I think would be beneficial to my client. There are also things that I think if he doesn't testify that is fine too." 7/30/15 Tr. 535. This

passing statement fails, without more factual development, to establish that the "strategic reasons" defense counsel "may have had" outweighed the prejudice of having a witness refuse to testify in the jury's presence, or give substantive testimony adverse to the defense. *See Smith v. United States*, 608 A.2d 129, 131 (D.C. 1992) ("The court has long observed that claims of ineffective assistance of trial counsel raised pursuant to D.C. Code § 23-110 will usually require a hearing since the trial record will not typically provide the trial court, or this court, with a basis on which to determine whether allegations of ineffectiveness can be rationally explained as reasonable tactical decisions by trial counsel."). Here, Greene requested an evidentiary hearing, DE252:8, but the Superior Court denied Greene's 23-110 Motion without holding a hearing. This was error. Nothing in the record of the trial proceedings indicates defense counsel's basis for believing that it might be "beneficial" to the defense for Williams, a prosecution witness, to give substantive testimony. Consequently, there is no basis for determining whether this belief can be rationally explained as a reasonable tactical decision. *See Massaro v. United States*, 538 U.S. 500, 505 (2003) (because evidence introduced at trial goes to guilt or innocence, the resulting record will often not disclose whether counsel's action "had a sound strategic motive").

The Superior Court noted that this Court, in its decision on direct appeal, stated

that "the trial court provided a clear and thorough curative instruction with regard to Mr. Williams' refusal, thereby mitigating any harm." DE268:5 (quoting March 1, 2023 Decision, p. 11). But, first, this Court's statement was *dicta*, because in the preceding sentence its decision stated: "Because we conclude that Mr. Greene waived any challenge to Mr. Williams's refusal to testify, *we do not reach this claim*." March 1, 2023 Decision, p. 11 (emphasis added). The March 1, 2023 Decision's *dicta* about the curative instruction does not carry conclusive weight.

The trial court's curative instruction stated:

> In this case, Sean Williams refused to answer questions after being instructed by the Court to do so. You must not guess what Mr. Williams would have said if had not refused to answer any questions and you must not hold it against the defendant that Mr. Williams took the stand and refused to answer any questions.

08/03/15 Tr. 45. The trial court also gave a curative instruction with regard to Cilenia Whitted's testimony:

> One of the witnesses yesterday was Ms. Cilenia Whitted, and during her testimony she gave some answers that referred to statements that she claimed Sean Williams had made to her. And what I'm telling you is that those statements should not have been admitted and are without any basis. So any of those statements that Ms. Whitted testified to about things that Mr. Sean Williams had supposedly told her, you're not to consider those statements in any way.

07/30/15 Tr. 590.

The above instructions did not cure the damage caused by Williams' refusal to testify, because this refusal, notwithstanding the instruction, invited the jury to speculate and draw impermissible inferences about Williams' reasons for not testifying – most notably, his fear of Greene's retaliation. *Cf. Walker v. United States*, __ A.3d __, 2024 WL 3058646 at * 5, (D.C. June 20, 2024) (prejudice of prosecution witness's hearsay testimony that "your date just killed Bebe and Mimi" would likely not have been "fully cured" by a curative instruction); *Lucas v. United States*, 102 A.3d 270, 282 (D.C. 2014) ("In cases where comments are particularly prejudicial, however, even a curative instruction may not be relied upon to overcome the prejudice."). Greene's purported "dangerousness" had been twice so indelibly etched into the jurors minds that no curative instruction could dislodge it.

Here, moreover, the curative instruction told the jury not to "guess" about what Williams would have said had he testified. 08/03/15 Tr. 45. But the prejudice to Greene was that the jury, putting Williams's refusal testify together with Cilenia Whitted's testimony (to which defense counsel opened the door) that Greene was "a very dangerous young man," would find that Greene, in the prosecutor's words (08/03/15 Tr. 85), "[i]ntended to make [the carjacking] succeed," not based on the evidence, but on the impression – that it should not have been allowed to consider –

that Greene was a very dangerous person.

Finally, the Superior Court found that because the evidence of Greene's guilt was "overwhelming," there was no reasonable probability that, but for counsel's professional error, "the result of the proceeding would have been different." DE268:5 (citation omitted). Greene disagrees.

The Superior Court noted that "the victim of the carjacking provided detailed testimony about the incident." DE268:5. But the victim, Don Darden, testified that *he did not see* the person who was in the van while Williams was carjacking his Toyota. 07/27/15 Tr. 94. Thus, the victim did not link Greene to the carjacking.

The Superior Court noted that Alayshia Whitted "committed the offense along with Williams and Defendant, also provided detailed testimony about the incident and the Defendant's involvement." DE268:5. But, as the Superior Court instructed the jury, Alayshia Whitted was a witness who had entered into a plea agreement with the government, and "the testimony of such a witness should be considered with caution." 08/03/15 Tr. 45. The jury was permitted to consider whether the plea agreement motivated this witness "to testify falsely against the defendant." 08/03/15 Tr. 46. In short, the testimony of such a cooperating witness is far from "overwhelming evidence."

The Superior Court also noted the "physical evidence" in the case. DE268:5.

But there was no "physical evidence" linking Greene to the carjacking, or to the firearm Williams used to commit it.

Finally, the Superior Court noted that "[c]ell phone records showed that Defendant was in the area of the incident and had communicated with Mr. Williams by phone around the time of the incident." DE268:5. But mere presence "in the area of the incident" and mere communication with Williams "around the time of the incident" is, at most, weak circumstantial evidence. It is not "overwhelming evidence."

CONCLUSION

For the above-stated reasons, this Court should reverse the Superior Court's denial of Greene's motion for a new trial and vacate his conviction, or order an evidentiary hearing.

Respectfully submitted,

s/ *Timothy Cone*
Timothy Cone, Esq.
1615 New Hampshire Avenue NW
4th Floor, North
Washington, D.C. 20009
Appointed Counsel for Appellant Greene

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 29, 2024, the foregoing Initial Brief of Appellant was filed using the electronic filing system of the D.C. Court of Appeals and thereby electronically served on all counsel of record.

/s/*Timothy Cone*
Timothy Cone
Appointed Counsel for Appellant Greene