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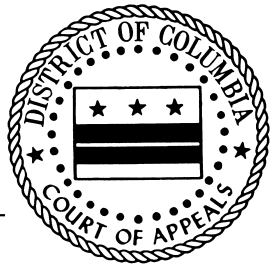

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

SEAN T. GREEN,
Appellant,

v.

UNITED STATES,
Appellee.

On Appeal from the Superior Court of the District of Columbia
Criminal Division, 2015 CF1 014494

REPLY BRIEF FOR APPELLANT SEAN T. GREEN

Gregory M. Lipper
LeGrand Law PLLC
1100 H Street NW, Suite 1220
Washington DC 20005
(202) 996-0919
glipper@legrandpllc.com

Counsel for Appellant

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SUMMARY OF ARGUMENT

The government is unable to defend either the murder conviction or the felon-in-possession conviction. Both should be reversed.

First, the government fails to establish that it met its burden to show either a valid *Miranda* waiver or a voluntary statement. Not only does the government overlook the burden of proof, but it fails to address the specific facts and circumstances of Green's interrogation—including his erratic behavior both before and during questioning, and his demonstrable confusion about his *Miranda* rights. Nor does the government justify the interrogators' inexplicable lack of follow-up questions in the face of red flags or account for the Green's statements and behavior—captured on video—when the detectives left the room. Green not only was behaving erratically during the interrogation, but that erratic behavior specifically prevented him from knowingly waiving his *Miranda* rights or voluntarily giving a statement.

Second, the government fails to meaningfully distinguish the District of Columbia's firearm-possession statute, under which Green was convicted, with the federal statute at issue in *Rehaif*. Given the Supreme Court's extensive reasoning in *Rehaif*—most of which transcended the specific textual differences identified by

the government—*Rehaif* plainly applies to the District's law as much as it does to the federal law.

ARGUMENT

I. The government failed to meet its burden to admit Green's "rambling," "confusing," and "convoluted" statement to police.

The government agrees that, if Green's statement was improperly admitted, "it cannot establish that error was harmless beyond a reasonable doubt." Gov. Br. 40 n.5. Given the details of Green's interrogation—and his erratic behavior preceding the interrogation—the government cannot meet its burden to establish that Green's *Miranda* waiver was valid or that his statement was voluntary.

A. The government failed to meet its burden to establish that Green's waiver of Miranda rights was knowing and intelligent.

Although the government is correct that the trial court's factual findings are reviewed for clear error, the Court's overall review is not as limited as the government suggests. We do not suggest, as the government implies (Gov. Br. 31 n.4), that de novo review applies to factual findings derived from video footage of Green's interrogation. But as the Court recently highlighted, factual findings—and even credibility determinations—are more amenable to clear-error review when, as here, those findings are based on information or exhibits also available on appeal. *See Stringer v. United States*, 301 A.3d 1218, 1228 (D.C. 2023) (explaining, in IPA

appeal, that "where the trial court found a witness not credible on the ground that her story was inconsistent with objective facts, we would not subject that finding to something less stringent than clear-error review, but we might be more likely to find clear error based on our own comparison between the witness's version of events and the objective facts and our assessment of the significance of any inconsistencies.").

In any event, and as described in the opening brief, the Court must conduct its "own independent review" because admissibility is ultimately "a question of law and not just of fact." *Byrd v. United States*, 618 A.2d 596, 599 (D.C. 1992). The decision to admit Green's statements cannot survive that review, and the government fails to justify it.

1. The government tries to sanitize Green's visibly erratic behavior before and during the interrogation.

Because Green's pre- and mid-interrogation conduct was consistently erratic, the government describes it so generally as to obscure its meaning. This approach not only defies the interrogation-room video, but also prevents the government from meeting its heavy burden.

To begin, the government does not address any of the following behaviors—behaviors which lasted for nearly an hour before the interrogation began and then continued into the interrogation itself:

- Green talked to and argued with himself when he sat alone before questioning began.
- He addressed both himself and other people not in the room;
- His mood changed on a dime when people entered and exited the room, and he wondered if he had been arrested in retaliation for visiting his kids before enrolling in drug treatment.
- He spoke in long, expository paragraphs, as if he were narrating an autobiography.
- Both before and during his interrogation, Green often fixated on past grievances, including previous financial disputes with his half-brother, and shared bizarre personal details, such as how he was fired for discharging pus at work.
- Twice, he wished that his previous car accident had been fatal.

Even these examples barely scratch the surface of Green's erratic and agitated monologues and dialogue while he sat in the interview room for several hours. *See* Green Br. 6–12, 15, 17–18, 20, 33–35.

Rather than address these facts and circumstances, the government responds with generalities. There have been cases, the government observes, in which courts have upheld *Miranda* waivers by defendants with low IQs or other cognitive limitations. Gov. Br. 34–35 (citing cases). But while cognitive deficits on paper do not necessarily prevent a defendant from waiving his *Miranda* rights, that potential alone does not allow the government to ignore Green's actual, erratic behavior in the interview room, both before and during the interrogation.

When attempting to characterize Green's behavior, the government deviates even further from the actual circumstances of this case. According to the government, Green was "unhappy about being arrested" and displaying "rational responses to having been arrested." Gov. Br. 33. The government's argument proves too much. Yes, Green was "unhappy" and it is "rational" for arrestees to be unhappy. But given what Green was actually saying and doing, calling Green "unhappy" is akin to saying that The Incredible Hulk "has trouble managing stress." In both cases, the generic labels fail to capture the person's bona fide mental state.

The government makes the same mistake when describing Green's unprecedented attempt to negotiate an official pardon with a local police detective. In the government's view, Green's request "showed that he appreciated his predicament." Gov. Br. 34. Again, the government distorts the events by describing them so generally. Yes, a pardon is one way to halt criminal liability, but no rational defendant would believe that Detective Patterson has a line to the President of the United States.

2. The government mistakenly focuses on Detective Patterson's subjective understanding of Green's mental state, rather than the objective inquiry required by the Fifth Amendment.

Especially given the extent of Green's erratic behavior before and in between questioning—when he was alone—the government improperly conflates Detective Patterson's perception of Green's mental state with Green's objective mental state. The waiver inquiry is objective: Did "the defendant knowingly and intelligently waived his privilege against self-incrimination." *Beasley v. United States*, 512 A.2d 1007, 1012 (D.C. 1986). But rather than evaluate whether Green's waiver was objectively knowing and intelligent, the government describes how Green appeared to Patterson. *See, e.g.*, Gov. Br. 27 ("At no time during the *Miranda* waiver did it appear to Detective Patterson that Green was incapable of understanding the conversation, and at no time during the subsequent interview did it appear that Green did not understand the questions or was not providing responsive answers."); *id.* at 29 ("Detective Patterson testified that he understood Green's later statements of confusion to be about the reason for Green's arrest, and also evidenced that understanding in real time . . . .") (citation omitted); *id.* at 31–32 ("Detective Patterson understood Green's confusion to be about the reason for his arrest"). Given that Detective Patterson failed to learn about several factors

preventing Green from knowingly waiving his rights, the government's mistaken perspective further undermines its defense of the waiver.

Indeed, if the test depended on the interrogator's subjective understanding, then police interrogators would have limited incentive to discover the full set of circumstances relevant to the waiver. When Detective Patterson began the interrogation, he did not know that his subject "had been talking to himself" for nearly an hour. 7/30/18 Tr. 29:10–15. He then inexplicably failed to ask Green about his mental health until after he finished questioning him. *See* R37, Ex. B at 155. Patterson further curtailed discussion when Green's answer suggested he was struggling cognitively: When Green answered, "How am I feeling brain-wise or—" Detective Patterson interrupted to say, "just overall." *Id.*

In response, the government reverses the burden of proof. The government notes, for instance, that "Green did not testify at the suppression hearing or provide any evidence other than the interview to support a finding that he did not understand his rights." Gov. Br. 32; *cf. id.* ("Green did not present any evidence other than the interview video"). Even this is wrong on the facts: Green's monologues and other erratic behavior before the interview, and during its breaks, reinforces what is also visible during the interrogation itself.

3. The government fails to establish that Green understood his *Miranda* rights.

Nor does the government establish that Green understood the *Miranda* rights he was waiving. Again, the government fails to consider the full record, including the full interrogation.

To begin, the government is also incorrect in suggesting that we "nowhere assert[] that the trial court's finding regarding the source of Green's confusion was clearly erroneous." Gov. Br. 31. Our opening brief quotes the clear-error standard. *See* Green Br. 32 ("The trial court's findings about 'disputed facts' are reviewed for clear error.") (quoting *Hood v. United States*, 28 A.3d 553, 564 (D.C. 2011)). And it identifies clear problems with the trial court's factfinding. *See* Green Br. 34 ("Far from considering this behavior, the trial court invoked one of Green's most bizarre moments—his request for a pardon—as a reason to believe that he 'engaged in a conversation and he understands what's happening in the conversation.'") (quoting 7/30/18 Tr. 39:25–40:4); *id.* at 36 ("The trial court likewise erred in concluding that none of the 'statements that Mr. Green made about being confused related to any confusion about his rights.' Several times, Green explicitly tied his confusion to the *Miranda* warnings.") (quoting 7/30/18 Tr. at 40:18–20); *id.* ("Green specifically linked his confusion to the *Miranda* waiver."); *id.* at 38 ("The trial court offered minimal reasoning to conclude that

Green was confused about other topics entirely, and the ruling did not address Green's specific statements and questions that invoked the warnings explicitly.").

On the merits, the government fails to justify the trial court's omissions. As detailed in our opening brief, Green repeatedly expressed confusion while Detective Patterson was reading his rights; once, he did so while he was staring at the rights card. *See, e.g.*, Green Br. 36–39. The government also ignores the elephant in the room. Although the government insists that Green was confused only about why he had been arrested, he reiterated his confusion even after Detective Patterson told him that he had been arrested and charged with murder and that his DNA was found on objects recovered from the scene. R37, Ex. B at 23. Detective Patterson's question—"[W]hat's confusing you? I just—I kind of explained to you what you're charged with." *Id.*—reinforces that Green's confusion arose from something else. Gov. 29.

And while a waiver may be valid even if police tell the defendant that he will not have access to a lawyer during questioning or while at the police station (Gov. Br. 30), during this particular interrogation the gap between the oral and written warnings exacerbated Green's confusion. After Patterson recited the oral warnings—including the amendment that Green would not have access to a lawyer during the interrogation—Green asked whether the oral warnings were all found

on "this paper?" R37, Ex. B at 22. Already, this response suggested that Green had not understood the oral warnings.

Patterson then confused Green even further: He told Green that he had recited the warnings written on the PD-47 form. This, however, was inaccurate, because the oral warnings, unlike the written form, told Green that he would not be provided a lawyer during questioning. Green then reinforced his confusion: After the colloquy about the relationship between the oral *Miranda* warnings and the written *Miranda* warnings, Green suggested that Patterson has provided too much information at once: "I mean, you just gave me a whole lot all in one." R37, Ex. B at 22.

It is also inaccurate to say that "Green did not ask any questions about his rights." Gov Br. 30. Indeed, after Patterson recited the *Miranda* warnings he asked Green whether he had been read his rights—the simplest possible question under the circumstances. Green's answer—"Was it this paper?" (R37, Ex. B at 22)—revealed that he was baffled. Perhaps he was reading the paper and not listening to the oral warnings—which differed materially from the written form—or perhaps Green was confused more generally. Either way, his answer did not reflect comprehension.

The government, moreover, does not dispute that Patterson failed to ask specific follow-up questions the source of Green's confusion. Yet the government insists that this "'failure' does not somehow constitute affirmative evidence that Green was confused about his rights." Gov. Br. 32. This response ignores the burden of proof—the government must prove that the waiver was knowing and intelligent. And it overlooks what the Court has said about efforts by Detective Patterson to avoid asking certain questions relevant to the waiver: The Court "is entitled to be skeptical." *(David) Robinson v. United States*, 142 A.3d 565, 571 (D.C. 2016).

B. The government did not meet its burden to show that Green's statement was voluntary.

In arguing that Green's statement was voluntary, the government begins by trying to manufacture forfeiture. Gov. Br. 35–36. The suppression motion identified voluntariness as a separate ground: After arguing that Green's *Miranda* waiver was invalid, the motion separately stated: "Herein, the statement may not have been voluntary. If the statement was not made voluntarily it may be suppressed." R32 at 2 ¶ 5. For this proposition, moreover, the motion cited a voluntariness case, *Greenwald v. Wisconsin*, 390 U.S. 519 (1968), in which the Supreme Court held that "it was error for the Supreme Court of Wisconsin to conclude that they were voluntarily made." *Id.* at 521. Given these sentences and

citation to voluntariness doctrine, the word "may" before "not have been voluntary" did not nullify an otherwise unambiguously preserved argument.

Nor does the government accurately describe the discussion at the hearing itself. The government's brief implies that the trial court directly asked defense counsel what arguments he was asserting and defense counsel answered, "*Miranda* waiver only." *See* Gov. Br. 35–36 ("[W]hen the trial court asked him to clarify the basis for his motion, defense counsel identified only Green's statements of confusion during the *Miranda* waiver.") (citation omitted). No such colloquy took place. Rather, the trial court began by discussing only waiver argument. *See* R32 at 4 ("[T]he defense made an argument that the waiver wasn't knowing, intelligent, and voluntary."). And when the trial court asked about "the basis for suppressing the statements," the question was in the context of the waiver argument—the trial court was asking not about additional doctrinal bases, but rather about the portions of the interrogation: "Is it what happened at the beginning, or is it something that happened later on?" *Id.* The trial court's similar follow-up question— "it wasn't clear to me what was the basis was for a claim that the waiver wasn't knowing and intelligent and voluntary" (*id.* at 5)—again asked trial counsel to elaborate on the waiver argument, not whether he was abandoning the voluntariness argument he

had made in his written motion. And the trial court continued to ask trial counsel questions about the waiver argument.

In sum, trial counsel focused on the waiver argument at the hearing because that is what the trial court wanted to discuss at the hearing. Contrary to the government's misleading excerpting of the record, trial counsel "identified only Green's statements of confusion during the *Miranda* waiver" (Gov. Br. 36) because the trial court was questioning him about the waiver argument. The trial court never asked trial counsel whether he was abandoning the voluntariness argument presented in the motion, and trial counsel did not orally abandon that argument either. The voluntariness argument was fully preserved.

On the merits, the government takes similar liberties. In particular, the government claims that it "is unclear what, exactly, Green believes to have been the coercive police activity in this case." Gov. Br. 36. But the opening brief identifies a series of specific actions taken by Patterson—a detective employed by the Metropolitan Police Department. *See, e.g.*, Green Br. 42 ("Green's wishes [to go home] made him uniquely vulnerable to Patterson's repeated insistence that he would accept nothing less than a confession."); *id.* at 42–43 (describing how Detective Patterson fed details to Green to adopt in his statement); *id.* at 43 ("Patterson directly exploited Green's stress, including his anxiety about being

away from his girlfriend."); *id.* at 44 ("The detectives chose to bring [his girlfriend] in, knowing that Green wanted to talk to her; and to keep the cameras on while the couple conferred."); *id.* at 45 ("Patterson linked cigarettes to more information [from Green]."). Any mystery is of the government's making.

The government misses the point in claiming that it "is not the case" that most of the details supplied by Green came from the officers' suggestion. Gov. Br. 37. Most importantly, Green did not know details matching verifiable information, such as the video footage, the ballistics evidence, or the position of the body; that is why we stated that Green "gave few bona fide answers of his own." Green Br. 42. Even when Green was attempting to confess, he could not tell Detective Patterson what kind of gun was used, where the shooter was standing (about which he twice guessed wrong), and where Black was when he was shot, and how many times he was shot. *See id.* at 42–43. When Patterson tried to supply accurate details—asking Green, "You don't recall shooting him in the middle of the street?"—Green answered, "What do you want me to tell you?" *Id.* at 43 (citing R37, Ex. B at 94).

The government strains even further to suggest that Green "was not" suffering from nicotine withdrawal because "the officers provided him with cigarettes at his request." Gov. Br. 38. Again, the government understates the details: Green smoked nearly a full pack of cigarettes during the three-hour

interview. R37, Ex. B at 124. Especially given that he has asthma, Green was not smoking so many cigarettes for his health. *Id.* at 97. To the extent that the government is suggesting that his withdrawal never became acute because the government was giving him cigarettes, that is our point: Patterson linked cigarettes to Green continuing to answer questions. *See* Green Br. 45 (quoting R37, Ex. B at 56, 87).

It is no answer to say that, at one point, Patterson "handed Green a cigarette even as Green continued to deny having his phone." Gov. Br. 39. Given what Patterson was saying, Green had no reasonable expectation that cigarettes would keep coming if he stopped answering. Tellingly, the government does not cite, let alone address, our analysis of *Gardner v. United States*, 140 A.3d 1172 (D.C. 2016) (cited in Green Br. 45). As in *Gardner*, Green was "led to believe [his requests] would not be honored unless he gave a statement." *Id.* at 1193.

II. *Rehaif* plainly forecloses the government's argument that the D.C. felon-in-possession law overcomes the presumption of scienter.

For the first time since *Rehaif*, the government argues that the knowledge requirement does not apply to the qualifying-conviction element of the D.C. felon-in-possession law. The government's purportedly textual argument collapses on itself and flouts *Rehaif*.

According to the government, the knowledge requirement does not apply to the felon-in-possession element because, unlike the federal law, the D.C. felon-in-possession law "has no express *mens rea* argument, much less a requirement that the defendant must 'knowingly violate' the law." Gov. Br. 43. Already, this argument conflicts with "the presumption in favor of scienter"—a presumption that applies "even when Congress does not specify any scienter in the statutory text." *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019).

In any event, the government does not mean what it says. In the very next sentence, the government concedes that—express *mens rea* requirement or not—Congress did not intend for unlawful firearm possession to be a strict-liability offense. "Congress presumably meant to require knowledge." Gov. Br. 43 (citing *(Leon) Robinson v. United States*, 100 A.3d 95, 105 n.16 (D.C. 2014)). Indeed, given this Court's precedent, it would be plain error to instruct a jury that the government is required to prove only possession, not knowledge of that possession.

Given the statutory presumption and its own concession, the government's purportedly textual argument collapses. Without an express mens rea requirement, argues the government, the statute must be interpreted to require full knowledge for one element (possession) but permit strict liability for the other element (a certain type of prior conviction). This argument is neither textual nor logical. It also

contradicts *Rehaif*, which rejected the government's previous effort to mix and match. Because "everyone agrees that the world 'knowingly' applies to [the federal law's] possession element, which is situated after the status element," there was "no basis to interpret 'knowingly' as applying to the second [statutory] element but not the first." 139 S. Ct. at 2196. The government's approach is no more sensible under the D.C. law, even if the elements' order is flipped.

Looking "[b]eyond the text," *Rehalf* also emphasized "scienter's importance in separating wrongful from innocent acts." *Id.* Rather than address the Supreme Court's reasoning from four years ago, the government quotes cases from more than four decades ago, to suggest that the District's felon-in-possession law involves the "regulation of dangerous or harmful objects." Gov. Br. 44–45 (quotation marks omitted). Again, *Rehaif* holds otherwise. Status-based gun-possession laws "are not part of a regulatory or public welfare program, and they carry a potential penalty of 10 years in prison"—a penalty that the Court has "previously described as 'harsh.'" 139 S. Ct. at 2197. Because "the possession of a gun can be entirely innocent"—and, post-*Heller*, protected by the Second Amendment—it is "the defendant's *status*, and not his conduct alone, that makes the difference." *Id.* (emphasis in original).

The Supreme Court's reasoning, which transcended the statutory text, was unusually plain. "Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful." *Id.* "His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.* This is "a basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called 'a vicious will.'" *Id.* at 2196 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 21 (1769)). And these principles apply to felon-in-possession laws "even where the statutory text is silent on the question" and even if a scienter requirement were not supported by "the most grammatical reading of the statute." *Id.* at 2197 (quotation marks omitted).

This reasoning vitiates the government's outdated claim that the D.C. felon-in-possession law belongs in the same family as statutes regulating toxic chemicals and hazardous waste. Far from having any answer to it, the government is left quoting *Rehaif*'s dissent. Gov. Br. 46 (quoting *Rehaif*, 139 S. Ct. at 2111–12 (Alito, J., dissenting)).

Finally, the government's prejudice argument relies on technical arguments that are unlikely to be persuasive to a jury considering what Green, a layperson, knew or didn't know at the time he possessed a gun. The government cannot dispute that when Green was sentenced for his previous conviction, "all but 6

months" of prison time was suspended. Gov. Br. 48; *cf. Atkins v. United States*, 290 A.3d 474, 482 (D.C. 2023) (defendant, who was "sentenced to 40 months imprisonment for armed robbery and 24 months imprisonment for assault with a dangerous weapon," did not "support his position that he was unaware of his felony status at the time of the charged incident"). Yet the government argues these facts are categorically irrelevant, because the total, pre-suspended sentence was ten years in prison and because the sentencing court "was required to orally pronounce the ten-year sentence with Green present." *Id.* Green, however, is a layperson, not a sentencing manual. And when he was sentenced in Maryland, he was a 23-year-old layperson with an eleventh-grade education provided in special-ed classes. *See* Sealed Record 13 at 16.

Perhaps a jury could be persuaded that Green nonetheless internalized the sentencing nuances as precisely as the government dissects them, remembered them fully fifteen months later, and realized that in Maryland, unlike in the District of Columbia, misdemeanor sentences may exceed six months. But a jury might also conclude that Green remembered only the most salient details—he served only six months in prison, and he was convicted of a misdemeanor—and that those details would have informed his memory or lay understanding of the maximum sentence

associated with his Maryland charge. At a minimum, they might well have produced a reasonable doubt.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

/s/ Gregory M. Lipper
Gregory M. Lipper (Bar No. 494882)
LeGrand Law PLLC
1100 H Street NW, Suite 1220
Washington DC 20005
glipper@legrandpllc.com

Counsel for Appellant

CERTIFICATE OF SERVICE

On November 22, 2023, I served a copy of this brief, through the Court's electronic filing system, on:

Chrisellen Kolb
Daniel J. Lenerz
Assistant United States Attorneys
601 D Street NW, Room 6.232
Washington, DC 20530
(202) 252-6829
Daniel.Lenerz@usdoj.gov

Counsel for Appellee

/s/ Gregory M. Lipper
Gregory M. Lipper

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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Gregory M. Lipper
Name

11/22/23
Date

glipper@legrandpllc.com
Email Address