No. 22-CF-116

DISTRICT OF COLUMBIA
COURT OF APPEALS

MASON BINION,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The Superior Court for the District of Columbia,
Criminal Division, Case No. 2018-CF1-001370
The Hon. Ronna Beck

REPLY BRIEF OF APPELLANT MASON BINION

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INTRODUCTION

For more than half a century, the Supreme Court has held that a defendant's constitutional right to a fair trial includes the right "to receive an adequate hearing on his competence to stand trial." *Pate v. Robinson*, 383 U.S. 375, 386 (1966). A competency determination in the absence of adequate procedural safeguards is therefore no determination at all, and "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial" constitutes a due process violation that entitles a defendant to remand. *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

These established principles of law, which the government's brief all but ignores, dictate the outcome of this unusual case. The court did not give Mr. Binion an opportunity to retain his own expert, to elicit testimony from the independent expert who twice concluded that he was not competent, or to present any other evidence before deeming him competent. Because this violated Mr. Binion's procedural due process rights, the Court should vacate Mr. Binion's conviction.

The Court should also vacate Mr. Binion's conviction because the trial court erred when it (1) denied Mr. Binion's request for a self-defense instruction; and (2) instructed the jury on aiding and abetting and co-conspirator liability. The government's arguments to the contrary misstate the applicable legal standards and do not justify a different result.

ARGUMENT

I. MR. BINION DID NOT RECEIVE A FAIR OR ADEQUATE COMPETENCY HEARING, IN VIOLATION OF HIS PROCEDURAL DUE PROCESS RIGHTS.

The government does not dispute that when, as here, there exists "substantial doubt as to a defendant's competency to stand trial, the trial judge is under a constitutional duty to order a hearing sua sponte." *Holmes v. United States*, 407 A.2d 705, 706 (D.C. 1979). Instead, the government argues that the short colloquy conducted by the trial court in the face of two reports finding Mr. Binion not competent was constitutionally sufficient. That argument is without merit.

A. The Court's Review is for Abuse of Discretion and Not Plain Error

As an initial matter, this Court's review is for abuse of discretion, and not (as the government contends) plain error. In *Green v. United States*, 389 F.2d 949, 953 (D.C. Cir. 1967), the D.C. Circuit concluded that a court has "judicial discretion . . . regarding the sua sponte conduct" of a judicial competency hearing, "and that the question in all such cases remains whether the trial judge has abused his discretion in the particular case before him." *Id.* Following *Green*, the Court has consistently reviewed a trial court's failure to *sua sponte* hold a competency hearing for abuse of discretion and not for plain error. *See, e.g.*, *Williams v. United States*, 268 A.3d 240, 248 (D.C. 2016); *Phenis v. United States*, 909 A.2d 138, 142 (D.C. 2006).

Notwithstanding this line of unbroken precedent, the government urges the Court to apply plain error review to Mr. Binion's argument challenging the

procedural adequacy of the mental observation hearing, because "Binion did not object" to the trial court's colloquy or ultimate determination of competency. Br. at 15. But the government does not cite to a single decision from this Court applying plain error review to a procedural due process challenge arising out of a competency hearing (or lack thereof), *see id.*,[1] and Mr. Binion is not aware of any.

The absence of such a decision is unsurprising. "[T]he constitutional importance of determining competency" has led courts to adopt different rules around waiver and forfeiture in competency proceedings. *United States v. Silicani*, 650 F. App'x 633, 635 (10th Cir. 2016); *see also Blakeney v. United States*, 77 A.3d 328, 335 (D.C. 2013) (failure of defense counsel to raise competency does not waive or forfeit the issue). Because a court *must* conduct a competency hearing *sua sponte* if there is substantial doubt as to a defendant's competency, this Court reviews a trial court's failure to hold such a hearing for abuse of discretion and not plain error. *See Phenis*, 909 A.2d at 142.

The same principle applies to the Court's review of the procedural *adequacy* of any *sua sponte* competency hearing. A trial court's independent constitutional duty to conduct a competency hearing necessarily includes conducting a

[1] The Court's decision in *Hooker v. United States*, 70 A.3d 1197 (D.C. 2013), does not (as the government's brief suggests) "imply[]" that plain error review would be appropriate here. Br. at 15. As the decision makes clear, the Court discussed plain error review only because the *defendant* seemed to be arguing under a plain error standard. *Hooker*, 70 A.3d at 1201 n.4.

procedurally adequate hearing. *See Pate*, 383 U.S. at 384-35. Any other conclusion would render the trial court's constitutional duty meaningless. Accordingly, the Court's review of both the initial decision not to hold a competency hearing *sua sponte* as well as the procedures for the *sua sponte* hearing is for abuse of discretion, irrespective of defense counsel's actions *Cf. Walker v. State*, 826 P.2d 1002, 1006 (Okla. Crim. App. 1992) (applying abuse of discretion review to procedural argument regarding a competency hearing that was not raised below).

The government's request for plain error review does not make any logical or practical sense. By definition, a *sua sponte* hearing can take place only after defense counsel has failed to raise or identify competency as an issue. Defense counsel is thus unlikely to argue a defendant's right for *more* process in any *sua sponte* proceeding. Yet the government's position, if adopted, would have the Court apply abuse of discretion review as to *whether* a competency hearing should have been ordered *sua sponte* but plain error review as to *how* the trial court conducted that hearing—even though defense counsel's failure to act is the same. No rational basis exists for applying such a distinction, where both the decision to hold a competency hearing *sua sponte* and the procedures put in place for that hearing are intended to protect the defendant's right to procedural due process.

Moreover, applying plain error review in this instance assumes a level of mental competency that is inconsistent with the underlying competency inquiry.

Plain error review is typically applied when the appealing party forfeited an objection below on the assumption that the party "could have" but did not make the objection. *Davis v. United States*, 984 A.2d 1255, 1259 (D.C. 2009). An appellate court, however, cannot make that assumption when the underlying issue concerns the defendant's competency because an incompetent defendant does not in fact possess the capacity to object. *See, e.g. Pate*, 383 U.S. at 384; *Blakeney*, 77 A.3d at 345. As one federal court has explained, "in the competency context an appellate court may be reluctant to hold that an incompetent defendant could forfeit his rights . . . , so plain-error review could be justified only if the appellate court were to assume an affirmative answer to the very question to be resolved—whether the defendant was competent." *Silicani*, 650 F. App'x at 636.

This contradiction—the same contradiction that renders waiver inapplicable to competency proceedings—forecloses the government's attempt to invoke plain error review on appeal. The Court's review of the adequacy of the trial court's competency proceedings is for abuse of discretion.

B. The Trial Court's "Mental Observation Hearing" Violated Mr. Binion's Procedural Due Process Rights

Regardless of which standard the Court applies, the conclusion remains the same: The trial court's cursory mental observation hearing did not comply with the procedural due process requirements set forth in *Pate* and its progeny. The Court should vacate Mr. Binion's conviction and remand for further proceedings.

1. The Mental Observation Hearing Was Procedurally Inadequate

"[S]tate procedures must be adequate to protect" the due process right of the accused to not be tried if he is legally incompetent. *Pate*, 383 U.S. at 378. Federal and state courts alike have concluded that at a minimum, a constitutionally adequate hearing includes (1) "the opportunity to examine all witnesses who testify," *United States v. Caldwell*, 543 F.2d 1333, 1348 (D.C. Cir. 1974); (2) the "opportunity to call . . . court-appointed witnesses" and examine them, *Jackson v. State*, 880 So.2d 1241, 1243 (Fla. Dist. Ct. App. 2004); and (3) "adequate notice" of a competency hearing that provides the defendant with sufficient opportunity to contest his competency, *Metzgar v. State*, 741 So.2d 1181, 1183 (Fla. Dist. Ct. App. 1999). *Accord Stone v. United States*, 358 F.2d 503, 506 n.4 (9th Cir. 1966) (""[T]here can be no valid final determination of the issue [of competency] without notice and opportunity for the accused to present evidence and be heard." (citation omitted)); *Hansford v. United States*, 365 F.2d 920 (D.C. Cir. 1966) (same). In all events, the competency hearing "must be as careful and complete as reasonably feasible in order to insure a fair trial," *United States v. Crosby*, 462 F.2d 1201, 1203 (D.C. Cir. 1972). "Only by the expenditure of reasonable time and effort in an exploration of all the facts and circumstances may the trial judge exercise sound discretion." *Id*.

It is indisputable that the trial court's mental observation hearing fell well short of these requirements. Not only was Mr. Binion deprived of a meaningful

opportunity to introduce testimony or evidence on the subject of his competency, it is not even clear that defense counsel knew that purpose of the hearing was to "determine [Mr.] Binion's competency."[2] Br. at 19. When asked to state their positions for the record, defense counsel asked for "leave to hire our own expert" and the government questioned whether "we've made any progress" evaluating Mr. Binion's competency. App36-37. These are not the remarks of counsel who believe they are participating in a substantive competency hearing.

In any event, it was virtually impossible for Mr. Binion to adequately prepare for the hearing. Dr. Rohlehr's final competency report was filed on May 6, 2019 at 2:05pm. App30. The trial court held its mental observation hearing at 9:54am the next day. App34. Setting aside that defense counsel had *no notice* that the trial court would disregard Dr. Rohlehr's findings, she had just a few business hours to collect evidence, subpoena the examiner's notes, retain and consult any experts, and speak with Dr. Rohlehr prior to the mental observation hearing—an impracticable timeline.

The result was a mental observation hearing devoid of expert testimony or evidence presented by either of the parties. *See generally* App.34-45. Such an outcome cannot be squared with this Court's precedents, which require the trial court

[2] Although the government baldly asserts that a mental observation hearing is just a competency hearing by another name, Br. at 19, the record suggests the opposite. The trial court held two identically titled "mental observation hearings" in the spring of 2019, the first of which was administrative. *See* App.18-29.

to "inquire of the examining doctors the basis for their conclusions," *Holloway v. United States*, 343 F.2d 265, 268 (D.C. Cir. 1964), to ensure as "careful and complete" a competency hearing as reasonably feasible, *Crosby*, 462 F.2d at 1203.

The government attempts to paper over these deficiencies by arguing that D.C. Code § 24-531.04(b) states only that a court "may" call its own witnesses. Br. at 21. That argument misses the point. The issue on appeal concerns Mr. Binion's *constitutional* due process rights. Whether the D.C. Code requires a trial court to call its own witnesses has no bearing on whether the Constitution requires the trial court, under the specific factual circumstances presented, to hear from the expert who examined the defendant to ensure a procedurally adequate and informed judicial determination of competency. *Cf. Virginia v. Moore*, 553 U.S. 164, 176 (2008) ("[S]tate restrictions do not alter the Fourth Amendment's protections."). It is therefore no answer to rely, as the government does, on the permissive language of the D.C. Code when binding precedent has held that "it [is] necessary for the trial judge to inquire of the examining doctors the basis for their conclusions" to protect the rights of defendants in competency proceedings. *Holloway*, 343 F.2d at 268.

The government's argument that the mental observation hearing was procedurally sufficient because "the defense did not ask for witnesses" is similarly misguided. Br. at 20-21. First, as the government acknowledges, defense counsel *did* ask for witnesses—in fact, she specifically asked for the opportunity to retain an

independent expert and informed the trial court that she "can't answer" how Mr. Binion's mental health concerns would "present" in the "weeds" of his defense. Br. at 21 n.8; *see also* App38. Second, as discussed *supra* p.7, it is not clear that as a practical matter, defense counsel *could have* called any witnesses at all given that less than twenty hours elapsed between the filing of Dr. Rohlehr's report and the start of the mental observation hearing.

Indeed, the facts in this case stand in stark contrast to *Higgenbottom v. United States*, 923 A.2d 891, (D.C. 2007), upon which the government relies. In *Higgenbottom*, the trial court delayed sentencing for *four months* so that the defendant could be evaluated. *Id.* at 898. Following that evaluation, which found the defendant competent, the trial court "postponed sentencing for eight more weeks" and "offered to authorize funds for additional psychiatric evaluation" so that the defendant could "proffer any rebuttal evidence" in response to the report. *Id.* Under the circumstances, the Court rightly concluded that "[t]he trial court fulfilled its obligation to inquire into appellant's competency." *Id.*

Here, by contrast, the trial court gave defense counsel less than twenty-four hours to prepare for a "mental observation hearing," and gave no indication that the court was *disinclined* to credit DBH's evaluation that Mr. Binion was incompetent to stand trial. The court also made a competency determination notwithstanding defense counsel's request to retain an independent expert. All of this ran roughshod

over Mr. Binion's procedural due process rights to a fair competency hearing. *See* Am. Bar Ass'n, *Criminal Justice Standards on Mental Health* 7-4.9 (2016) ("In all hearings regarding competence, a defendant should have . . . the right to adequate notice and time to prepare for the hearing.").

The trial court's voir dire—which even the government acknowledges was "relatively brief," Br. at 25—only underscores the hearing's procedural deficiencies. The test for competency is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). Critically, the test is "disjunctive—a defendant is incompetent if he or she is unable to perform either of these functions." Wright & Miller, 1A Fed. Prac. & Proc. Crim § 209 (5th ed. 2023); *see also* D.C. Code § 24-531.01.

Notwithstanding this, the trial court's voir dire addressed only Mr. Binion's *factual* understanding of the proceedings against him. The trial court asked Mr. Binion to describe the charges against him as well as his understanding of the prosecution, defense, and court's role in his case. *See* App39-41. Setting aside the fact that Mr. Binion struggled to answer even those factual questions, *see* Op. Br. at

7-8, the trial court's questioning was incomplete. At no point did the trial court ask Mr. Binion about his ability to communicate with and assist defense counsel.[3]

The trial court's failure to ask Mr. Binion or even his defense counsel these questions[4] resulted in a voir dire that was an inadequate as it was inexplicable. Dr. Rohlehr's report opined that Mr. Binion was incompetent to proceed specifically because "his . . . *ability to consult with counsel* [is] likely to be affected by his current mental state." App33 (emphasis added); *see also* App37. Her report identified multiple red flags concerning Mr. Binion's ability to consult with counsel, including

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[3] Among other questions, the trial court should have asked whether Mr. Binion believed that defense counsel was "trying to help him"; whether he felt he could "communicate with his attorney"; and whether he had been able to assist in "planning legal strategy." 40 Am. Jur. Proof of Facts 2d 171 § 59 (2023) (providing exemplar list of questions); *see also* Am. Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* 37 (2007) (listing standard competency instruments, all of which test the defendant's ability to assist the defense attorney).

[4] Notably, defense counsel did not assert during the hearing that Mr. Binion was capable of assisting in his defense. *See generally* May 7 Tr. at App34. In fact, she specifically noted that she could *not* "answer" how Mr. Binion's "mental health concerns" would present "when we really get into the weeds" of his defense. *Id.* at 5. The government's brief nonetheless assumes that Mr. Binion "had clearly effectively consulted with his lawyer" because he told her he did not have mental health problems. Br. at 17-18. That assumption is unfounded. As the Court recognized in *Blakeney*, the fact that a defendant does not "desire . . . to raise the issue of his competency" does not mean the defendant is in fact competent. 77 A.3d at 345. It is well-documented that "individuals who are seen as having genuine psychiatric diagnoses" may nonetheless "fail to believe they have mental illness" and instruct their defense counsel to refrain from raising competency. Andrew D. Reisner, et al., *Competency to Stand Trial and Defendants Who Lack Insight Into Their Mental Illness*, 41 J. Am. Academy of Psychiatry and the Law 85, 85 (2013).

Mr. Binion's belief that his prior attorney was "doing illegal things behind his back," and that people "were trying to send silent messages to [his new defense counsel]" about him.[5] App32-33. To the extent the trial court was concerned that Dr. Rohlehr did not conduct a "standard competency evaluation," the court should have called her as a witness so she could elaborate on her conclusions. *See Holloway*, 343 F.2d at 268. What the court could not do was substitute its own judgment for Dr. Rohlehr's based on a voir dire that omitted one half of the competency test.

The government devotes pages of its brief to attacking Dr. Rohlehr's report and argues that "the report did not conclusively rebut the presumption of competence." Br. at 24. That argument confuses Mr. Binion's *procedural* due process argument for a *substantive* due process argument. The issue on appeal is whether, as a predicate matter, the trial court provided Mr. Binion with adequate *process* prior to making its competency determination. Because a court may not "arbitrarily disregard, disbelieve, or reject" an expert competency report, *Prost v. Greene*, 652 A.2d 621, 629 (D.C. 1995) (citation omitted & alterations accepted)—especially a report finding the defendant incompetent—the trial court could not, consistent with Mr. Binion's due process rights, discard Dr. Rohlehr's report without

[5] From January 25, 2018, when Mr. Binion was first charged, to March 22, 2019, when his competency was first raised, Mr. Binion cycled through three defense attorneys, two of whom withdrew. *See generally* Docket, Case No. 2018-CF1-1370 ("Docket"). Dr. Rohlehr's concerns about Mr. Binion's ability to assist in his defense were not unfounded.

providing him an opportunity to address the issue. That is especially true here, where the trial court's decision to discount the report was predicated on a mistaken understanding of *Dusky*, which the government tacitly acknowledges. Br. at 25 n.9.

Finally, throughout its brief, the government suggests that the trial court acted appropriately because "all parties believed [Mr. Binion] to be competent," Br. at 16, and defense counsel was in the best position to know if Mr. Binion was not actually competent. That is untrue. During the mental observation hearing, counsel for defense stated that "[m]aybe" there "are . . . mental health concerns" but that *Mr. Binion* "doesn't think so." App38. She never directly proffered her own views on whether she actually thought that Mr. Binion was competent.

Even if in the mine-run of cases, defense counsel is typically well-positioned to know something of the defendant's competency to stand trial, that was not the case here. Ms. McGough was Mr. Binion's *third* attorney in fourteen months and she entered her appearance in the case just two weeks before the Court ordered the first competency evaluation. *See generally* Docket. Because the Court made its competency determination less than twenty-four hours after Dr. Rohlehr filed her final report, Ms. McGough had been Mr. Binion's defense counsel for barely two months (in the early days of the pandemic) when the second mental observation hearing took place. It is therefore unclear that Ms. McGough could have formed a meaningful opinion regarding Mr. Binion's competence at the time of the hearing.

A procedurally adequate competency hearing "must" give both parties "the opportunity to examine all witnesses who testify or report on the accused's competence" and enable the trial court to make a determination based on a "full and scrupulous" review of the evidence. *Blunt v. United States*, 389 F.2d 545, 547 (D.C. Cir. 1967). The trial court's failure to abide by these constitutional standards was both an abuse of discretion and plainly erroneous. *See, e.g.*, *State v. Johnson*, 551 N.W.2d 742, 757 (1996) ("[I]t seems abundantly clear that it is plain error when the trial court fails" to hold "a full, fair, and adequate" competency hearing), *rejected on other grounds by State v. Harms*, 996 N.W.2d. 859 (Neb. 2023).

2. The Court Should Vacate Mr. Binion's Conviction

Because Mr. Binion was tried in violation of his procedural due process rights, the Court should vacate Mr. Binion's conviction and remand for further proceedings. Seeking to avoid this outcome, the government argues that a retrospective competency hearing is appropriate because "all authority" suggests that four years is not too long a delay for a retrospective hearing. Br. at 28. But courts have recognized "the difficulties inherent in conducting a retrospective competency hearing four years after the initial trial . . . and which led the [Supreme] Court . . . to prefer new trials rather than competency hearings." *U.S. ex rel. McGough v. Hewitt*, 528 F.2d 339, 344 (3d Cir. 1975). Moreover, there simply isn't sufficient evidence to reconstruct Mr. Binion's competency at the time of trial. *See State v. Johnson*,

395 N.W.2d 176, , 184-85 (Wis. 1986). Unlike in *Blakeney*, Mr. Binion's mental health history was *not* "well-documented" because defense counsel never had an adequate opportunity to develop that evidence or history. 77 A.3d at 350.

II. MR. BINION WAS ENTITLED TO A SELF-DEFENSE INSTRUCTION.

The Court should also vacate Mr. Binion's conviction because the trial court erroneously denied Mr. Binion's request for a self-defense instruction. At the trial, witnesses testified that Mr. Taylor was armed on the night in question and that he had been seen firing a gun earlier in the day. App53-54, App99-101, 134-135. Cartridges recovered from the scene suggested the presence of two firearms, and an ear witness overheard a pause and exclamation of pain between the first gunshot and the next two gunshots. App83-84, 181-184, 188. Viewing the evidence in the light most favorable to Mr. Binion, a jury could have reasonably concluded that Mr. Taylor, the decedent, was the aggressor in any confrontation and that to the extent Mr. Binion shot and killed Mr. Taylor, he had done so in legitimate self-defense. *See* Op. Br. at 29-31. The trial court was therefore legally obligated to instruct the jury on self-defense and its failure to do so was reversible error.

The government's argument to the contrary suffers from three fundamental legal errors. *First*, the government applies the wrong legal standard. The test is not, as the government says, whether *sufficient* evidence tends to support the requested instruction. It is whether there is *some* evidentiary support for the instruction,

however weak. Contrary to the government's argument in a footnote, (Br. at 30-31 n.10), the Court's decision in *McCrae v. United States*, 980 A.2d 1082 (D.C. 2009), did not overrule this standard. The Court has consistently recited and applied the "however weak" standard to jury instruction arguments in the decade and a half since *McCrae* was decided.[6] *See, e.g.*, *Wilson v. United States*, 266 A.3d 228, 238 (D.C. 2022); *Kittle v. United States*, 65 A.3d 1144, 1157 (D.C. 2013). That is unsurprising. Because *McCrae* was a panel decision, it could not have overruled the Court's prior decision in *Frost v. United States*, 618 A.2d 653, 662 n.18 (D.C. 1992). *See Rep. of Sudan v. Owens*, 194 A.3d 38, 42 n.4 (D.C. 2018).

The law is settled: "Although the trial judge may properly refuse to give a defendant's requested instruction where no factual or legal basis for it exists, the failure to give such an instruction where some evidence supports it is reversible error." *Kittle*, 65 A.3d at 1157 (internal quotation marks omitted). "The test for some evidence is a minimal one: a defendant is entitled to a jury instruction on a theory of the case that negates his guilt if the instruction is supported by any evidence, *however weak*." *Id.* (emphasis added & internal quotation marks omitted).

Second, the government's argument repeatedly views the evidence in the light most favorable to the government. *See, e.g.*, Br. at 32-33 (claiming that "Taylor was

[6] Contrary to the government's assertion, Br. at 39 n.17, the Court has held that a defendant is entitled to any instruction for which there is "the required modicum of evidentiary support." *Hernandez v. United States*, 853 A.2d 202, 206 (2004).

shot, execution-style in an alley shortly after pleading for his life" based on contradicted testimony). But "[i]n reviewing claims of instructional error," the Court "view[s] the evidence in the light most favorable to the *defendant*." *Jones v. United States*, 999 A.2d 917, 922 (D.C. 2010) (emphasis added & internal quotation marks omitted).

Third, the government argues that each piece of evidence discussed in Mr. Binion's opening brief is on its own insufficient to warrant a self-defense instruction. *See* Br. at 34 (arguing that evidence that decedent was armed is "an insufficient basis on which to ground a self-defense instruction"); *id.* at 35 (earwitness testimony "falls far short of establishing any recognizable self-defense claim"). But the proper inquiry is whether the evidence, taken as a whole, supports such an instruction.

The answer to that question is yes. The evidence showed (and the government does not dispute) that the decedent was armed. The government's insistence that the decedent's gun was unloaded, Br. at 34-35, improperly weighs the evidence and views the evidence in the light most favorable to the government.[7] Similarly, the earwitness testimony and the ballistics evidence supported a reasonable inference that there was a gun battle in the alleyway. The government's contention that the

[7] Although one witness testified that he did not see a clip in the gun before Mr. Taylor allegedly met up with Mr. Binion, App100-101, a different witness testified that he saw Mr. Taylor firing a loaded gun earlier that day. App53-54. If, as the first witness testified, Mr. Taylor had brought the gun for protection, it would not make much sense for Mr. Taylor to have *unloaded* a loaded gun prior to a potential altercation.

earwitness did not see the shooting itself, *id.* at 35, again improperly weighs the evidence under the wrong legal standard. The government's arguments about the significance (or lack thereof) the Court should attribute to the different firing pin impressions from the recovered .22 casings or the lack of a "shiny finish" on the 9mm casing also improperly weigh the evidence under the wrong legal standard. These arguments about the proper weight to give to the evidence do not justify withholding a self-defense instruction under the proper legal standards. *See Hernandez*, 853 A.2d at 206. The trial court's erroneous decision to the contrary requires the Court to set aside Mr. Binion's conviction. *Id.* at 205.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT INSTRUCTED THE JURY ON AIDING AND ABETTING AND CO-CONSPIRATOR LIABILITY

The trial court likewise erred when it instructed the jury on aiding and abetting and co-conspirator liability. The government does not dispute that theories of secondary liability require evidence that someone other than the defendant must have committed the substantive offense for which the defendant is charged. *See* Br. at 42-48. The parties therefore agree that for the instruction to have been properly given, there must have been evidence that someone else killed Mr. Taylor.

No such evidence existed. As set forth in Mr. Binion's opening brief, the government's entire theory at trial was that Mr. Binion shot and killed Mr. Taylor, and all the evidence it submitted to the jury was in support of that theory. *See* Op.

Br. at 35-37. Consistent with the government's single-minded focus on Mr. Binion as the principal offender, the government *dropped* its first-degree murder charges against Mr. Carvajal—who was set to be jointly tried with Mr. Binion and whom the government now suggests "in particular was a possible alternative triggerman," Br. at 44—after the jury had been selected but before opening statements began. *See United States v. Carvajal*, Docket, Case No. 2018-CF1-016139. The trial court thus specifically informed the jury on the first day of trial that "[t]he charge against Mr. Carvajal is no longer pending before you and thus is of no further concern to you." App48. And throughout trial, the government repeatedly told the jury that "*all* the evidence" pointed to Mr. Binion as the shooter. App327 (emphasis added).

The government now tries to argue on appeal that it did, in fact, introduce evidence that someone else could have been the shooter because Mr. Massaquoi testified on direct that he thought Mr. Binion was the shooter but did not "actually see Binion pull the trigger." Br. at 43. That argument makes no sense. Testimony that the witness believed Mr. Binion to be the shooter cannot possibly be evidence that someone else was the shooter. And in any event, Mr. Massaquoi testified clearly on cross-examination that his testimony was "Mason [Mr. Binion] shoots him." 2-4 Tr. at 59. On re-direct, the government elicited testimony from Mr. Massaquoi that he "provide[d] [the] gun that killed Michael Taylor" and gave that gun "to this man sitting right here, Mason Binion." *Id.* at 125. As even the trial court

acknowledged during trial, the notion that someone else might have been the shooter simply "isn't the government's theory."[8] App320.

Because there was no evidence indicating that someone other than Mr. Binion was the principal offender, the trial court abused its discretion when it instructed the jury on non-principal liability. That error was not harmless. The jury deliberated for four days and specifically asked the Court whether it needed to find that Mr. Binion had fired the gun to convict him. App337. In response, the Court directed the jury to its aiding and abetting and conspiracy instructions. App338-339. This exchange suggests that the jury had doubts as to whether Mr. Binion was the principal offender—the only theory the government advanced at trial. It is therefore possible, if not probable, that the jury convicted Mr. Binion based on instructions that the Court should not have given. The Court should reverse his conviction.

CONCLUSION

For the foregoing reasons, Mr. Binion respectfully requests that the Court vacate his conviction for first-degree murder and remand for a new trial.

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[8] The government's assertion that its closing argument "allowed for the possibility" that someone else killed Mr. Taylor misses the point. Br. at 45. The test is not whether the government mentions in passing that maybe someone else "actually pulled the trigger" but whether there was any evidence that would *actually* allow the jury to reasonably determine that was the case. Br. at 45; *see Brooks v. United States*, 599 A.2d 1094, 1100 (D.C. 1991). There was not. In fact, the part of the closing argument upon which the government relies specifically says "But what if someone else had actually done it? What if—*and all the evidence shows that it was Mason Binion who shot him*, what if it was [someone else]?" App327 (emphasis added).

DATED: January 17, 2024 MUNGER, TOLLES & OLSON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024, a copy of the foregoing Reply Brief of Appellant was served electronically on all counsel of record.

DATED: January 17, 2024 MUNGER, TOLLES & OLSON LLP

By: */s/Xiaonan April Hu*
Xiaonan April Hu

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.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

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.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

Signature

22-CF-0116

Case Number(s)

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