Appeal No. 23-CF-196

Regular Calendar: September 24, 2025

DISTRICT OF COLUMBIA COURT OF APPEALS

RAKEEM WILLIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

REPLY BRIEF FOR APPELLANT

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I. THE MOTIONS COURT REVERSIBLY ERRED IN ADMITTING THE CSLI EXPERT TESTIMONY WITHOUT REQUIRING COMPLIANCE WITH RULE 16 AND WITHOUT PROPERLY APPLYING RULE 702.

The most important evidence in this exceptionally weak murder case was FBI Agent Shaw's expert testimony and report about the CSLI, which the government argued placed Mr. Willis at the crime scene at the time of the shooting. As Mr. Willis contended in his main brief, the motions judge reversibly erred in admitting Agent Shaw's expert testimony, for two independent but related reasons. First, Judge Lee failed to require government compliance with Rule 16, and instead accepted the prosecutor's vague oral proffer that the testimony would "look exactly like [that of] every cell site expert who has ever testified in Superior Court." 6/17/22 at 15. Second, because Judge Lee did not know what Agent Shaw would say in *this* case about the phones' locations relative to the towers they activated, or how and why Agent Shaw reached these conclusions, Judge Lee could not fulfill his gatekeeping role under Rule 702 to vet whether these opinions were the product of "reliable principles and methods" that were "reliably applied" to the facts of this case. *Motorola Inc. v. Murray*, 147 A.3d 751, 757 (D.C. 2016) (en banc).

The government does not dispute that any error in admitting Agent Shaw's expert testimony would be prejudicial and require reversal, and therefore has waived any claim to the contrary. *See Randolph v. United States*, 882 A.2d 210, 222-23 (D.C. 2005); *Rose v. United States*, 629 A.2d 526, 535-37 (D.C. 1993). Instead, the government defends Judge Lee's admission of the expert testimony on three grounds: (1) that Mr. Willis "waived his Rule 16 challenge" by failing to join his

codefendant's pretrial request for expert disclosure, Br. for Appellee at 28; (2) that the government's discovery letter of September 16, 2020, and pretrial disclosure of the draft CSLI reports satisfied Rule 16, *id.* at 31-33; and (3) that Judge Lee "properly admitted Agent Shaw's expert testimony pursuant to Rule 702," *id.* at 35, based on his "deep reservoir of knowledge [about CSLI expert testimony] amassed over 12 to 15 trials," *id.* at 43. None of these arguments have merit.

A. THE RULE 16 CLAIM IS PRESERVED FOR APPELLATE REVIEW BECAUSE IT WAS RAISED, FULLY LITIGATED, AND DECIDED BELOW.

Contrary to the government's contention, Mr. Willis's Rule 16 claim is fully preserved for appellate review, despite his trial counsel's failure to formally join his codefendant's request for expert disclosure under Rule 16. Br. for Appellee at 28-29.[1] As this Court has repeatedly held, the waiver rule "is not meant to 'punitive.'" *(Gualyn) Williams v. United States*, 966 A.2d 844, 847 (D.C. 2009) (quoting *(Kirk) Williams v. United States*, 382 A.2d 1, 7 n.12 (D.C. 1978)). "[I]nstead, its purpose is to allow the trial judge fully to consider issues and thereby avoid potential error, and to afford prosecutors the opportunity to present evidence on the issue raised." *Id.* (internal quotation marks omitted). Where, as here, the claim raised on appeal was raised at trial by appellant's codefendant, the prosecutor had full opportunity to respond at trial, and the trial judge had full opportunity to rule on the issue, this Court has held that "justice would not be served" by enforcing the waiver rule against the

[1] The government has not contended, and therefore has waived any claim, that Mr. Willis's Rule 702 claim is not properly preserved for appellate review. *Randolph*, 882 A.2d at 222-23.

appellant based on his failure to join his codefendant's claim at trial. *Id.*; *see also Johnson v. United States*, 756 A.2d 458, 462 n.2 (D.C. 2000).

Unlike the cases cited by the government, where no party requested expert notice or challenged the government's compliance with Rule 16 in the trial court, *see* Br. for Appellee at 28-29, here Mr. Willis's failure to join Mr. Winston's Rule 16 request made no difference to the government's disclosure obligations or to the judge's admission of the expert testimony. Prior to trial, the government made identical expert disclosures to Mr. Willis and Mr. Winston: the four draft CSLI reports prepared by FBI Agent Thomas, and the September 16, 2020, discovery letter referencing those reports. App. 90-184. On July 27, 2022, counsel for Mr. Winston sent to the prosecutor and filed in Superior Court a letter requesting, *inter alia*, expert disclosure "[p]ursuant to Superior Court Criminal Rule 16(a)(1)[(G])".[2] This request triggered the government's obligation to provide a "written summary" of the expert testimony that "describe[d] the witness's opinions" and "the bases and reasons for those opinions." D.C. Super. Ct. R. Crim. P. 16(a)(1)(G) (2017).

Despite this obligation, the government provided no additional information about the testimony of its CSLI expert to either Mr. Winston or Mr. Willis. As Mr. Winston argued in his pretrial motion to exclude the expert testimony under Rule 16, and as Mr. Willis now contends on appeal, the draft reports referenced in the expert notice failed to "describe the expert's opinions and . . . the basis for those opinions" because they "merely plot[ted] the cell towers to which certain cell phones

[2] Mr. Willis is filing a contemporaneous motion to supplement the record with this letter.

connected on a map and show[ed] angle shaped segments purportedly indicating that tower's coverage area," App. 185-86, without providing the "scientific bases, reasoning, or methodology for how [the expert] reach[ed] these conclusions," *id.* at 188. After hearing extensive argument from Mr. Winston's counsel and the prosecutor on this issue on June 17, 2002, and July 28, 2022, the motions court accepted the prosecutor's oral representation that the expert testimony in this case "would look exactly like [that of] every cell site expert who has ever testified in the Superior Court," 6/17/22 at 15, and denied the defense motion to exclude the expert testimony without requiring the government to make any additional disclosures to the defense. This litigation and ruling preserved Mr. Willis's claim of error on appeal.

Contrary to the government's oblique suggestion that Mr. Willis may have acted strategically in failing to join Mr. Winston's Rule 16 request, Br. for Appellee at 29 n.26, there is "no plausible tactic behind his attorney's silence," and thus no reason to apply the waiver rule. *(Gualyn) Williams*, 966 A.2d at 848. Because Mr. Willis's attorney did not present any evidence at trial, let alone call an expert witness, he did not avoid "reciprocal discovery duty vis-à-vis his own expert" by not requesting discovery—the only potential strategic advantage the government hypothesizes, *see* Br. for Appellee at 29 n.26. Indeed, when Mr. Winston won judgment of acquittal, meaning that his previously noticed CSLI expert would no longer testify in Mr. Winston's case, Mr. Willis's attorney declined to call that CSLI expert in Mr. Willis's defense. 11/8/22 at 17. Nor did the silence of Mr. Willis's attorney put the government at a disadvantage, given that the issue was fully litigated

by Mr. Winston's attorney. The more accurate explanation for Mr. Willis's failure to join his codefendant's Rule 16 request is that his attorney was "asleep at the switches," *(Gualyn) Williams*, 966 A.2d at 847, as evidenced by his counsel's failure to file any written motions in this serious triple homicide case.

Under these circumstances, where the Rule 16 claim raised on appeal was fully litigated and ruled on below, "justice would not be served," *id.*, by enforcing the waiver rule against Mr. Willis based on the nonstrategic silence of his court-appointed trial counsel.

B. THE GOVERNMENT'S EXPERT DISCLOSURE DID NOT COMPLY WITH RULE 16.

The import of Agent Shaw's expert testimony was his opinion about the locations of the target cell phones in relation to the towers they activated, and the potential distance these phones reasonably could have been from those towers. Rule 16 required the government to provide a "written summary" of the expert testimony "describ[ing] the witness's opinions" and "the bases and reasons for those opinions." D.C. Super. Ct. R. Crim. P. 16(a)(1)(G) (2017). That notice must be reasonably specific about the expert's opinion, *see Ferguson v. United States*, 866 A.2d 54, 63-65 (D.C. 2005), and it must include "necessary details" about the bases and reasons for that opinion, *Miller v. United States*, 115 A.3d 564, 568 (D.C. 2015). The government's expert notice, which was substantially similar to the CSLI notice held deficient under the analogous federal rule in *United States v. Machado-Erazo*, 47 F.4th 721, 732 (D.C. Cir. 2018), fell short of that standard.

The government's efforts to defend its notice are unavailing. The September

16, 2020, discovery letter was generic, with no case-specific details. It merely recited background principles about how cell phones work generally and proffered that the expert would "interpret the call detail records he analyzed" in this case. App. 95. Absent was any information about what the expert would opine about the locations of the target phones based on the call detail records in *this* case. Nor did the maps in the draft reports "describe" Agent Shaw's "opinions," let alone the "bases and reasons" for his opinion. D.C. Super. Ct. R. Crim. P. 16(a)(1)(G) (2017). Although the government now characterizes these maps as "visual estimations of where the cell phones associated with Willis and his co-conspirators were during the times relevant to this case," Br. for Appellee at 32 (brackets removed), neither the draft reports nor the discovery letter made any representation about what the expert would say about the locations of the phones in relation to the cell sites depicted on the maps. Not only did the government not provide this critical "opinion" in "written" form, as required by Rule 16(a)(1)(G), but its characterization of the maps as "visual estimations" of the phones' locations, Br. for Appellee at 32, contradicts the prosecutor's oral representation to the court that the expert would testify only about the phone's "general direction" "from the tower," and could *not* opine on the potential distance it might be from the tower, 7/28/22 at 17-18. As for the "bases and reasons" for Agent Shaw's opinions, the government points to the boilerplate language on page 2 of the draft reports stating that the maps showing the locations of the activated cell sites were generated by inputting "call detail records and a list of cell site locations" into "a mapping software." Br. for Appellee at 33 (quoting App. 99). But the reports did not disclose what "mapping software" was used; what

the pie-shaped sector illustrations on the maps purported to represent about the phones' locations; or how the varying sizes of the pie-shaped sector illustrations were determined.

The government concedes that it did not disclose "what level of confidence or precision Agent Shaw would express" about the phones' locations; what "software was used to generate the report" (or the software's built-in assumptions and changeable parameters); or "how the pie-shaped 'sector illustrations' were constructed," but downplays these "omissions" as inconsequential. *Id.* at 34-35 (brackets omitted). These "omissions," however, were "necessary details," *Miller*, 115 A.3d at 568, for understanding the import and reliability of the expert testimony, and "provid[ing] the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination," *Ferguson,* 866 A.2d at 63. In order to prepare an effective cross-examination and meet the force of the expert testimony (and to challenge the reliability of the testimony under Rule 702), defense counsel needed to know what the expert would opine the pie-shaped wedges represented with respect to the phones' locations and the methodology he used to create these variably sized wedges.

The D.C. Circuit's persuasive Rule 16 analysis in *Machado-Erazo,* 47 F.4th 721, a case the government does not discuss in defending its disclosure, is on all fours with this case. As in this case, the government's expert disclosure in *Machado-Erazo* amounted to "a series of slides showing the location of cells towers and the cell sector for particular calls without explanation." *Id.* at 732. The prosecutor's representation that the expert would not "claim to have determined the exact location

of the phone" "did little to clarify the scope of [the expert] testimony." *Id.* The D.C. Circuit held that "the notice was deficient under Rule 16" because it "left both the District Court and the parties to presume what the testimony would be." *Id.*

Here, as in *Machado-Erazo*, defense counsel and the court were left to "presume" what Agent Shaw would opine about the locations of the phones—the very heart of his expert testimony. Would Agent Shaw testify that the phones were located *within* the pie-shaped wedges emanating from the activated cell sites? Did the differing *sizes* of the wedges represent the maximum distance a phone could be from the tower? In other words, did a smaller wedge signify that the universe of possible locations where the phone could be was limited to a smaller geographic area than where the wedge was bigger? Or were the wedges intended to show only the *direction* of the phone from the tower such that wedge size was irrelevant, as the prosecutor orally represented pretrial? Would Agent Shaw opine that there was an outer limit on how far a phone could be from an activated tower, and if so, what was it? And to the extent that the sizes of the wedges were significant, *how* were those sizes determined, and *why*? Without disclosure of such "necessary details," the defense could not evaluate the import or reliability of the expert opinion and prepare to meet its force. *Miller*, 115 A.3d at 568.

The government sidesteps the pertinent Rule 16 case law and instead emphasizes that CSLI analysis "enjoys widespread use by law enforcement" and has been admitted in numerous courts, Br. for Appellee at 30 (internal quotation marks omitted)—a fact that in no way lessens the government's disclosure obligations under Rule 16 or mitigates the surprise to defense counsel. As Mr. Willis explained

in his opening brief, and as the government does not dispute, agents from the FBI Cellular Analysis Survey Team (CAST) often testify differently about what can be inferred about a phone's location based on the cell tower it activated, what the pie-shaped wedges represent, and the maximum distance a phone can reasonably be from the tower it activates. *See, e.g.*, *United States v. Jones*, 918 F. Supp. 2d 1, 5 (D.D.C. 2013) (opining that pie-shaped wedges did *not* represent the sector's "coverage area" but only the "*direction* of the sector to which the phone connected") (emphasis added); *State v. Burney*, 298 A.3d 1080, 1086 (N.J. 2023) (opining, based on "rule of thumb," that a particular tower had a one-mile coverage area, represented by a 120-degree wedge); *Machado-Erazo*, 47 F.4th at 731 (opining phones were "within a half mile" of tower) (brackets omitted); *United States v. Hill*, 818 F.3d 289, 298 (7th Cir. 2016) (opining that Chicago tower's signal could travel up to five miles). Thus, the prosecutor's representation that Agent Shaw's expert testimony "would look exactly like [that of] every cell site expert who has ever testified in the Superior Court," 6/17/22 at 15, was not only meaningless but misleading. The government offers no response to this argument.

This case illustrates the pitfalls of presuming what a CAST agent will say based on the testimony of other CAST agents in other cases, instead of enforcing Rule 16's requirement to disclose an expert's case-specific opinions in writing. For example, contrary to the prosecutor's pretrial oral representation that Agent Shaw would, like "every cell site expert," 6/17/22 at 15, acknowledge that the tower activated by the cell phone may not be the one closest to the phone, depending on factors such as the "number of calls being made on the network at a time," "the

strength of the tower," the presence of "large bodies of water," the topography of the land, and tower maintenance, *id.* at 14-15; 7/28/22 at 18-19, Agent Shaw dismissed these factors as speculative or practically nonexistent when defense counsel sought to secure his concession on them in front of the jury. *See* 11/3/22 at 76, 83-84, 92. The same was true of the prosecutor's prediction at the motions hearings that Agent Shaw would not (and could not) opine on a phone's distance from the tower and would limit his opinion to the phone's "general direction" from the tower, 7/28/22 at 17-18. When defense counsel tried to elicit this expected testimony from Agent Shaw in order to blunt the visual impact of the variably sized sector illustrations, which conveyed precision about the universe of locations where the phones could be, Agent Shaw unexpectedly asserted that the sizes of the pie-shaped wedges were not only meaningful, but determined and verified by pre-set "parameters" built into specific software programs, ESPA and CASTViz, 11/3/22 at 65-67, 116—none of which had been disclosed previously to the defense.

Because the government never disclosed Agent Shaw's actual opinion about what the sector illustrations represented or the specific software programs used to make them, the defense was left flat-footed and ill-equipped to effectively meet the force of the expert testimony. It did not have the benefit of prior research to understand the manufacturers' claims about these programs, what assumptions are built into them, whether the programs have been tested and validated, what their margin of error is, or whether Agent Shaw had used them as intended. Because the government's expert notice failed to disclose Agent Shaw's actual opinions about the relationship between the activated towers and the locations of the phones, and

the bases and reasons for those opinions, as required by Rule 16, the motions court erred in admitting his expert testimony, and reversal is required.

C. JUDGE LEE ABUSED HIS DISCRETION IN ADMITTING AGENT SHAW'S EXPERT TESTIMONY UNDER RULE 702 WITHOUT A FIRM FACTUAL FOUNDATION.

Judge Lee also abused his discretion in admitting Agent Shaw's expert testimony without conducting a proper reliability inquiry as required by Federal Rule of Evidence 702, which this Court adopted in *Motorola Inc. v. Murray*, 147 A.3d 751, 752 (D.C. 2016) (en banc). Because the government never disclosed Agent Shaw's actual conclusions about the locations of the cell phones or the specific methodology he used to reach those conclusions, Judge Lee lacked a firm factual foundation for assessing whether Agent Shaw's opinions were the product of "reliable principles and methods that have been reliably applied." *Id.* at 757; *see also Machado-Erazo*, 47 F.4th at 732.

In defending the factual foundation of Judge Lee's ruling, the government points to the judge's "own significant experience with historical cell site evidence" from having "presided over 12 to 15 trials where such testimony had been elicited." Br. for Appellee at 37. But the government does not explain how that experience could be relevant if Judge Lee did not know—because the government did not disclose—what Agent Shaw would say about the locations of the phones *in this case*, and what principles and methodologies he used to reach his conclusions. Here, as in *Machado-Erazo*, the government's deficient expert disclosure "left both the [trial] court and the parties to presume what the testimony would be." *Machado-Erazo*, 47

F.4th at 732.

The government maintains that Judge Lee "did not have to presume anything" because he "understood Agent's Shaw's cell-site methodology," citing Judge Lee's statement that "the [CAST] experts come in and they look at the cell site data and they kind of plot where they think the area where the phone might be connecting to towers," as "correctly" characterizing Agent Shaw's "methodology." *Id.* at 42. But while Judge Lee's statement may accurately describe what CAST agents purport to do at the highest level of generality, *id.*, it does not reflect an understanding of Agent Shaw's specific opinions and methodology in this case—for example, his opinion that the differently sized pie-shaped wedges on the maps depict the sizes of the coverage areas for the activated towers, which will not extend past the next closest tower, *see* 11/3/22 at 65-66, 88-89, and his reliance on the preset "parameters" of the "ESPA" and "CASTViz" software to determine the sizes of those wedges, *id.* at 65, 116. The government does not and cannot dispute that, when it comes to identifying the universe of potential locations that a phone can be in relation to the tower it activates, CAST agents differ widely in their opinions and methodologies, and Judge Lee had no way of knowing Agent Shaw's opinion and methodology on that crucial point because the government had not disclosed it. *See supra* p. 9. In fact, as explained above, and as the government does not dispute, the prosecutor's pretrial oral representations about what Agent Shaw would and would not say at trial on that matter turned out to be wrong. *See supra* pp. 9-10. Here, as in *Machado-Erazo*, Judge Lee abused his discretion under Rule 702 by "infer[ring] the bases and reasons underlying the [expert's] opinions" and admitting them based on "other

decisions admitting other cell-site expert testimony." *Machado-Erazo*, 47 F.4th at 732.[3]

Contrary to the government's argument, Judge Lee's experience of having "presided over at least 12 trials where other CAST agents had testified about their historical cell site analyses" did not provide a firm factual foundation for his ruling. Br. for Appellee at 42. As an initial matter, because the government failed to disclose Agent Shaw's actual opinions and methodology prior to trial, Judge Lee could not, as a factual matter, "compare and – if necessary – contrast Agent Shaw's methodology to the methods used by other CAST agents" in his past cases. *Id.* at 43. Moreover, even assuming arguendo that Judge Lee could conclude from the government's meager disclosure that Agent Shaw's expert opinion and methodology were substantially similar to those of the CSLI experts in his prior cases, these similarities would not be legally significant unless the admissibility of this testimony had been challenged in those other cases, and Judge Lee had conducted a proper

[3] The government offers no response to this aspect of *Machado-Erazo*'s holding. Instead, it claims that Agent Shaw's testimony in this case was more circumspect than the testimony in *Machado-Erazo*, Br. for Appellee at 45, where the expert opined at trial about the target phone's "specific location"—for example, that it was "within a half mile of the tower"—even though the government's pretrial notice had stated that the expert "would discuss only the 'general range of cell towers,'" *Machado-Erazo*, 47 F.4th at 732. But while the expert opinions in this case and *Machado-Erazo* were not identical, the judicial *errors* in admitting the opinions were the same. The judges lacked a firm factual foundation for their Rule 702 rulings because the government had failed to properly and accurately disclose the expert opinions. In both cases, the trial court "abused its discretion" by "admitting [the] expert testimony without giving defendants sufficient prior notice and without first finding it to be relevant and reliable under *Daubert*." *Id.* at 732.

Rule 702 inquiry to assess its reliability. The record contains no support for such a conclusion, and the government cites none. As explained in Mr. Willis's main brief, Judge Lee's Rule 702 ruling was based on the factually and legally erroneous premises that all CSLI experts espouse the same principles and methods; that those principles and methods are necessarily reliable because there is a "general acceptance in court" of "this type of information," 6/17/22 at 16; and that any remaining questions about reliability were for the jury to decide. *See* Br. for Appellant at 36-41. The government does not contend that such errors would be harmless, and thus has waived any claim to the contrary.

II. THE TRIAL JUDGE REVERSIBLY ERRED IN REFUSING TO REPLACE A JUROR WHO WAS DEMONSTRABLY INATTENTIVE TO THE MOST CRITICAL PORTIONS OF THE TRIAL.

Throughout opening statements, the presentation of evidence, and summation, Juror #2 repeatedly closed his eyes, slumped his body, and hung his head, even during the visual presentation of the most important evidence in the case: the CSLI maps. On six separate occasions, counsel for both defendants reported Juror #2's sleep-like or inattentive behavior, which was corroborated by the trial judge's and prosecutors' own observations, as well as the juror's concession that his eyes were closed for "numerous portions" of the trial. 11/2/22 at 55. Nevertheless, because the juror summarily denied sleeping and claimed to have been "paying attention" with his eyes closed, *id.* at 55-56; 11/8/22 at 138-39, Judge Ryan denied the defense requests to replace Juror #2 with an alternate pursuant to Superior Court Rule of Criminal Procedure 24(c). *See* D.C. Super. Ct. R. Crim. P. 24(c).

That ruling was an abuse of discretion. As explained in Mr. Willis's main

brief, Judge Ryan repeatedly expressed the erroneous view that, because it is "very difficult" to discern whether a juror is actually sleeping or merely closing his eyes while paying attention, he could not disqualify Juror #2 under Rule 24(c) unless the juror essentially confessed to having been asleep or inattentive. Br. for Appellant at 58-59. He treated the juror's summary denials of inattention as dispositive, without considering a juror's inherent tendency toward self-justification and likely inability to recognize his own inattention. *See Dimas-Martinez v. State*, 385 S.W.3d 238, 245 (Ark. 2011) (holding that trial judge erred in relying on "juror's assertion that he did not miss much," given that an inattentive juror "has no way of knowing what he may have missed during the presentation of the evidence"). And he inexplicably rejected the inescapably logical conclusion that Juror #2 could not pay attention to the visual presentation of the CSLI maps with his eyes closed. 11/3/22 at 109. On this unparalleled record of repeated juror inattention during the most critical portions of the trial, the judge was compelled to conclude as a matter of law that Juror #2 was unable or unqualified to serve as juror. The judge's erroneous retention of this juror violated Mr. Willis's "Fifth and Sixth Amendment rights to a fair trial before a tribunal both impartial and mentally competent to afford a hearing," *Samad v. United States*, 812 A.2d 226, 230 (D.C. 2002) (internal quotation marks omitted), and requires reversal.[4]

The government contends that "the trial court correctly concluded it had an insufficient basis to disqualify Juror #2 pursuant to Rule 24(c)" because, although

[4] The government does not contend that any error in retaining Juror #2 would be harmless and therefore has waived any such claim. *Randolph*, 882 A.2d at 222-23.

there was no dispute that the juror's eyes were closed during numerous portions of the trial, it was unclear whether the juror was "actual[ly] sleeping," as opposed to simply "listen[ing] carefully with eyes closed." Br. for Appellee at 55-56 (internal quotation marks omitted). That argument is unavailing.

As an initial matter, juror replacement under Rule 24(c) does not require a finding that the juror was actually asleep. A defendant's Fifth and Sixth Amendment rights to a fair trial are jeopardized by "[p]rolonged juror inattentiveness." *Samad*, 812 A.2d at 230. A juror could be inattentive for a host of reasons other than sleeping—e.g., doing the crossword, texting, or daydreaming, to name a few. Accordingly, Rule 24(c) authorizes juror replacement where "there is a *serious risk* that the juror's ability to deliberate fully and fairly will be compromised because the juror. . . *cannot or will not pay adequate attention*." *Hinton v. United States*, 979 A.2d 663, 690 (D.C. 2009) (en banc) (emphases added). That serious risk existed here, where the most critical and controverted evidence at trial—Agent Shaw's CSLI maps and his opinions about the locations of the phones—required the jurors to pay *visual* attention to the exhibits displayed on the screen, and where Juror #2 repeatedly closed his eyes, hung his head, and failed to look up during significant trial transitions, evincing at least prolonged inattention if not actual sleeping. As defense counsel argued in support of his motion to replace Juror #2 under Rule 24(c), a juror "cannot focus on the exhibits" with his eyes closed, 11/8/22 at 136, and the most "reasonable inference" from Juror #2's behavior was that he had not "paid enough attention" during the trial to deliberate fully and fairly. *Id.* at 133-34.

The government does not dispute that Juror #2 had his eyes closed and head

slumped during numerous portions of the trial. Mr. McEachern's and Mr. Irving's reports of Juror #2's inattentive behavior reinforced each other and were largely corroborated by Judge Ryan, the prosecutor, and even the juror himself. For example, when Mr. McEachern approached the bench in an attempt to "jolt" the juror into attention, 11/2/22 at 29, Mr. Irving reported having watched Juror #2 since the opening statement and seen that his "eyes were closed almost the entire time during some of the direct, through presentation of publishing exhibits," *id.* at 30. Judge Ryan then shared that he too had "seen the type of behavior which has been described, which is either looking down or eyes closed with head straightforward." *Id.* at 32. Similarly, Juror #2 conceded, when pressed, that his eyes had been closed for "numerous portions" of the trial (though he simultaneously insisted that he had not missed any testimony and had seen every exhibit). *Id.* at 55. Following that voir dire, Judge Ryan stated that he personally had "seen times when . . . everything is in full floor in the courtroom, and [the juror's] head was down and his eyes were shut." *Id.* at 57. Judge Ryan's observation, in turn, was reinforced by Mr. Irving's representation that "when everyone else is up and looking at the screen, [Juror #2's] eyes stay closed. And he[']s done that on numerous exhibits." *Id.* at 57.

Importantly, defense counsel, Judge Ryan and the prosecutor all observed Juror #2 closing his eyes, slumping over, and drooping his head during the all-important direct and cross-examination of Agent Shaw, and while his CSLI maps were on display for the jury to view. *See* 11/3/22 at 68-70 (Mr. McEachern reporting that Juror #2's eyes were closed and his head was "hanging" or "slumped" during Agent Shaw's "particularly important testimony," "a point in the trial where you

most absolutely must be paying attention"); *id.* at 71 (Mr. Irving reporting that he "twice" saw Juror #2's eyes closed and head hanging while the CSLI slide deck "was being shown at different phases," and the juror did not look up until "*after* that page was gone") (emphasis added); *id.* at 71 (Judge Ryan stating that he "looked over and saw the posture that Mr. McEachern described"); *id.* (prosecutor acknowledging "some looking down and eye resting behavior"); *id.* at 107 (prosecutor acknowledging seeing juror's head "nod and his eyes close"); *id.* (Judge Ryan observing that juror's "eyes closed and his head went down a little bit, then it went down a little further, then it went down a little further"). In short, there is no dispute that Juror #2 had his eyes closed and head slumped during Agent Shaw's testimony about the CSLI maps. The question is what conclusions should be drawn from this jointly observed and highly unusual juror behavior.

Here, the context of Juror #2's closed eyes refutes the government's proffered explanation that Juror #2 was an attentive juror who "listen[ed] carefully with [his] eyes closed." Br. for Appellee at 58-59. His slumped posture, droopy head, and failure to look up during significant transitions in the trial—when exhibits changed on the screen, 11/2/22 at 58; 11/3/22 at 71, when the examining attorney changed, *id.* at 28-29; 11/7/22 at 90-91, and when the jury was dismissed for a break, 10/25/22 at 44—all evince *inattention* to what was happening at trial. The first voir dire put Juror #2 on notice that the judge and counsel had observed him with closed eyes and were concerned about whether he was paying attention and had seen all the exhibits. That his eye-closing behavior continued unabated after that voir dire calls into question whether he was aware it was happening, whether he could control it, or

whether he simply did not care. Although the government minimizes the significance of Juror #2's closed eyes, emphasizing the prosecutor's opinion that the juror was "generally attentive," despite "occasionally" closing his eyes, Br. for Appellee at 58-59, Juror #2 provided no explanation during either of the two voir dires for why he closed his eyes during "numerous portions," 11/2/22 at 55, of an exhibit-heavy trial, despite knowing that his attention was being questioned by the parties and the court. While closed eyes may be useful in some contexts, such as focusing on a hard-to-hear audio recording, it is incompatible with taking in and evaluating the *visual* exhibits at the heart of this case: the videos, photographs, and CSLI maps on which the government's case was built.[5] Indeed, as defense counsel argued to Judge Ryan, and as the government does not and cannot dispute, "you can[not] pay attention to something on the screen while your eyes are closed. 11/3/22 at 109. Judge Ryan's

[5] That the exhibits were available for the jury's review during deliberations does not change the analysis. After the prosecutor published Agent Shaw's 28-slide report on the screen, he "walke[ed] through this report," 11/3/22 at 35, with Agent Shaw and asked him what each individual slide represented. *See id.* at 35-49, 50-56. Defense counsel, in turn, directed Agent Shaw to individual slides—3, 5, 7, 8, 9, 13, 21, and 24—in an attempt to undermine the significance of the pie-shaped sector illustrations. *See id.* at 65-67; 74-86; 89-100. For example, Mr. Irving asked Agent Shaw whether the phone on page 9 could have been at the Metro station or as far away as Benning Ridge—a location well beyond the area encompassed by the pie-shaped wedge. *Id.* at 74-75. The force of this cross-examination would have been entirely lost on a juror not looking at the screen.

Notably, jury deliberations did not begin until five days after Agent Shaw's testimony. In order to accurately connect Agent Shaw's oral testimony with a post-hoc review of the report, Juror #2 would have needed to rely on the memories of other jurors who saw and evaluated it in real time, creating a "serious risk" that he could not "deliberate fully and fairly," *Hinton*, 979 A.2d at 680.

rejection of this inescapable logic was clearly erroneous.

Here, as in *Dimas-Martinez*, 385 S.W.3d at 238, Judge Ryan abused his discretion by giving undue weight to Juror #2's own claim that, despite closing his eyes during "numerous portions" of the trial, he had paid attention at all times and had not missed a single exhibit. 11/2/22 at 54-56; 11/8/22 at 139.[6] As Mr. Willis explained in his main brief, and as the government does not dispute, a juror's self-report must be assessed in light of a juror's inherent bias towards self-justification, his likely inability to recognize his own inattention, and the structural limitations that prevent the parties and the court from thoroughly probing the juror about his inattention. *See* Br. for Appellant at 61-63. Judge Ryan's uncritical reliance on the juror's own claim of having paid attention throughout the trial, in the face of such a well-developed and compelling record to the contrary, was an abuse of discretion and requires reversal.

[6] The government's emphasis on Judge Ryan's willingness to voir dire the juror, *see* Br. for Appellee at 56-58, is misplaced, as Mr. Willis does not challenge the sufficiency of the judicial inquiry. His claim is that Judge Ryan's *evaluation* of the totality of the evidence was flawed, as in *Dimas-Martinez*, 385 S.W.3d 238. The government cites no case affirming a judge's refusal to replace a juror in the face of a comparable record evincing juror inattention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been served upon Chrisellen Kolb, Chief, Appellate Division, Office of the United States Attorney, using this Court's e-filing system, and upon David B. Goodhand, AUSA, David.Goodhand2@usdoj.gov, this 3rd day of September, 2025.

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