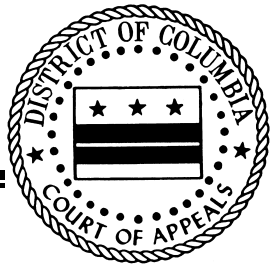
No. 24-CO-198



DISTRICT OF COLUMBIA
COURT OF APPEALS

DANIEL GREENE,

Appellant,

2015 CF3 002834

v.

UNITED STATES,

Appellee.

Appeal from the Superior Court
for the District of Columbia

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

1. Greene's appellate counsel had good reason not to claim in her briefs that trial counsel had been ineffective at trial in waiving the very issues she was raising on appeal, because this position could have been fatally detrimental to her client's interest.

In his Initial Brief, Greene argued that there was "cause" for his appellate counsel's decision not raise ineffective assistance at trial as an issue on direct appeal, because she would have been arguing that trial counsel *failed to fully preserve* for appeal the two very issues that she was arguing in her appellate brief. Br. 9 ("Clearly it would have been adverse to Greene's position on the two issues he was raising on appeal for his counsel to also claim that trial counsel had *waived* these issues.") (citing Rule 1.7 of the D.C. Professional Rules of Responsibility). The government responds that Rule 1.7 "imposed no barrier," because the commentary to this Rule states that "an 'adverse' position does not include inconsistent or alternative positions advanced by counsel on behalf of a single client." Gov't Br. 26 (quoting Rule 1.7, Comment to 2007 Revision at [3]). Greene disagrees. The position that appellate counsel would have taken would not have been merely "inconsistent or alternative," but potentially fatal to her client's chances of prevailing on the merits.

A crucial difference exists between an "inconsistent position" and the situation

presented here. An inconsistent position in an appellate brief occurs when, for example, as in this very appeal, the government argues in Section C of its response brief that Greene's ineffective-assistance-of-counsel issue *is* procedurally barred, and then, in the ensuing Section D, argues that if this Court nonetheless elects to find no default and reaches the merits of whether trial counsel was ineffective, Greene's arguments on this substantive question lack merit. In this latter situation, the two Sections of the brief are simply inconsistent: they're saying, if you reject my brief's first line of argument in Section, take a look at its backup argument in Section D, and our side still prevails.

But Greene's appellate counsel faced a different situation. To argue ineffective-assistance-of-counsel, she would have had to signal to the government, and to the court: you *need not consider* my merits arguments, or consider them only under the "demanding standard" of "plain error,"[1] because, in the trial court, trial counsel ineffectively failed to preserve the very issues that Greene is now raising on appeal. In the latter circumstance, appellate counsel is not offering a first line of argument, and then saying, alternatively, check out our backup argument. Appellate counsel is significantly reducing the odds that her client's merits argument will even

[1] *See*, *e.g. Wint v. United States*, 285 A.3d 1270, 1281 (D.C. 2022).

be considered by the appellate court because trial counsel invited the error, or, appellate counsel is conceding that the merits argued could be considered only for "plain error," a standard under which it is "highly unlikely" to succeed. *Cf. Mack v. State*, 223 A.3d 1191, 1212 n. 3 (Md. Ct. of Sp. Appeals 2020) ("the odds against the granting of a request to notice plain error are so heavy that it is highly unlikely that such a post-appeal contention would ever succeed."). It is at odds with Rule 1.7's proscription against conflicts of interest for a lawyer representing a client to advance an argument on appeal that may completely foreclose another argument, or render this merits argument's chance of success "highly unlikely."

Moreover, the government's reliance on the *commentary* to Rule 1.7 is of questionable force. The government cites no case from this Court applying this commentary in the circumstances of this case, and undersigned counsel has found no case from this Court applying this commentary in any context.

The government claims that parties "routinely raise alternative positions on appeal." Gov't Br. 26, n. 8. But the only case the government cites to support this view of what "routinely" happens is *Bell v. United States*, 677 A.2d 1044, 1046, 1048 (D.C. 1996). Br. 26, n.3. In *Bell*, this Court summarily rejected the merits of the evidentiary issue advanced by defense counsel, and then (naturally) concluded that since there was no merit to the evidentiary issue, there necessarily could be no merit

to a claim that trial counsel was ineffective for failing to raise this meritless issue. *See id*. This is not the situation here, where an ineffective assistance of counsel claim would have been highly detrimental to the chances of success of the two issues raised on appeal. This situation is a true conflict of interest. Greene should not be penalized for his prior counsel's understandable decision not to tread in the perilous waters of conflict of interest.

2. The "unexpected" nature of a government's witness' answers during her cross-examination demonstrates that trial counsel's questioning violated a cardinal rule of cross-examination.

In his Initial Brief, Greene argued that trial counsel was constitutionally ineffective when, on cross-examination of a government witness, she elicited testimony that Greene "wanted to hurt her daughter" – opening the door for the government, on redirect, to elicit testimony that Greene "was a very dangerous young man." Br. 11-15. The government repeatedly contends that trial counsel was not ineffective, because the witness' testimony was "unexpected." Gov't Br. v ("Greene fails to show deficiency from his trial counsel's *unexpectedly* eliciting prejudicial testimony from a government witness."); Gov't Br. 9 ("The defense then questioned Cilenia about her understanding of Williams' relationship with Greene, eliciting *unexpected* testimony."); Gov't Br. 28 ("The trial court found that this testimony was

unexpected by all parties."); Gov't Br. 29 ("Greene cannot show that counsel's strategic choice in responding to *unexpected* testimony amounted to deficient performance."). But this argument misses the point.

It is a cardinal rule of cross-examination for trial counsel not to ask a question to which she does not know the answer, *i.e.*, to call for "unexpected" testimony. Thus, in *People v. Ortega*, 2021 IL App. 2d 190699-U (Ill. App. 2021) (unpublished), the Appellate Court for the Second District of Illinois reversed a conviction, based on counsel's ineffectiveness, in part because counsel elicited a number of damaging answers from a government witness on cross-examination. In asking questions which elicited these answers, trial counsel violated "a cardinal rule of cross-examination [which is] to avoid asking a question to which the answer is not already known." *Id*. at * 22 ("One of the basic 'don'ts' of the cardinal principles of cross-examination involves *never* asking a question on cross-examination unless you know what the answer will be and that it will be favorable to your side of the case") (emphasis added) (quoting 4 Lane Goldstein, Trial Technique Section 19:74 (3d. ed)).

Violating a cardinal rule of legal practice creates a presumption of ineffective assistance of counsel. Here, moreover, there was nothing to gain, and lots to lose, for trial counsel to inquire of a government witness whether she had been told by Greene's accomplice, Williams, in a hearsay conversation, that Greene "wanted to

hurt [the witness's daughter] Alayshia." Br. 13 (quoting 07/29/15 Tr. 445- 447). Indelible prejudice immediately ensued: the witness answered "yes" – and added: "my conversations with [Williams] made me feel like my daughter was in danger." *Id*. And on redirect, the government elicited testimony that Williams told the witness that Greene "was a very dangerous young man." Br. 14 (quoting 07/29/15 Tr. 451-452). It is hard to conceive of more prejudicial evidence than having a witness testify that a defendant is "very dangerous." Federal Rule of Evidence 404(b) (which is applicable in District of Columbia courts) exists precisely to prevent such evidence about "a person's character" from influencing the outcome of a criminal trial.

3. The prejudice of the testimony that Greene was a "very dangerous young man" was compounded by Williams' appearance on the witness stand only to refuse to answer questions in the jury's presence, leaving the impression that he was afraid of Greene's retaliation.

During the trial, it was learned that Williams, an alleged accomplice who had pled guilty and who was expected to testify for the government, was now declining to testify. Ultimately, Williams was called to the witness stand, and, in the jury's presence, refused to answer questions. The unfair prejudice to Greene in this intimation that Williams was so scared of Greene that he refused to answer questions was clear to everyone: the trial court instructed the jury not to "guess" how Williams

would have testified, adding: "you must not hold it against the defendant that Mr. Williams took the stand and refused to answer any questions." Br. 21 (quoting 08/03/15 Tr. 45).

In his Initial Brief, Greene stated that his trial counsel was clearly deficient when, in response to this situation, she told the trial judge that she believed that the law requited Williams "to refuse [to answer questions] in front of the jury." Br. 17. As the government appears to acknowledge in its brief, Gov't Br. 33, n. 11, and as the trial court found, DE268:4, counsel was completely mistaken: the law is that a witness should *not* be put on the stand to refuse to answer questions. Br. 17 (citation omitted).

The government's current view is that, despite being animated by a totally incorrect view of the law, trial counsel was not deficient, because counsel could not know "with certainty" that Williams would refuse to testify in the jury's presence. Gov't Br. 33. The government offers up the possibility that, despite her mistaken understanding of the applicable law, trial counsel "made a reasonable strategic choice to allow Williams to appear in front of the jury." Gov't Br. 33.

But, first, counsel cannot make a "reasonable" strategic choice when this choice is driven by a completely mistaken understanding of the law – here, an incorrect belief that the law *required* Williams to refuse to testify in the jury's

presence.

Second, there is no evidentiary basis to support the view that counsel made a "reasonable strategic choice," because there is nothing in the record about the reason for trial counsel's "reasonable strategic choice," as the trial court did not hold an evidentiary hearing on ineffective assistance of counsel. The government quotes trial counsel's statement that Williams' testimony "could be beneficial" to Greene. Gov't Br. 35. But there is no basis in the record for counsel's speculation that Williams' testimony could be "beneficial" to Greene. Was this a hunch? Did counsel even consider the risk of adverse testimony by Williams, or the risk that his recalcitrance to testify would blossom into an outright refusal? At a hearing on ineffective assistance, trial counsel might candidly admit, under questioning: "well, I wasn't sure whether it would benefit my client to put Williams on the stand, but since I incorrectly believed that *the law required him to refuse to testify in front of the jury*, I allowed my mistaken understanding of the law to determine my thinking, *i.e.*, I was thinking that because the law requires Williams to take the witness stand, I might as well waive any objection to his testimony– and deal with the consequences, as prejudicial as they might be – and, candidly, I deficiently lost sight of the tactical advantage of keeping Williams – a government witness, previewed by the prosecution in opening argument – completely off the witness stand."

In short, an evidentiary hearing is necessary on trial counsel's "strategic" thinking.

The government argues that no evidentiary hearing is necessary, because even if counsel was deficient, the evidence against Greene was "overwhelming," and he was therefore not prejudiced by his counsel's ineffectiveness. Gov't Br. 31. Greene disagrees. In its "overwhelming" evidence argument, the government states that a "male voice" was heard saying "check his pockets." Gov't 31. But (obviously) the evidence of a "male voice" is not overwhelming evidence of guilt. Cell-site data placing Greene "near the carjacking" (Gov't Br. 31) is also not overwhelming proof; it is circumstantial evidence. The "physical evidence" that "corroborated" Alayshia's account – screwdrivers, a tank top and phone (Gov't Br. 31, n. 10) – did not bear on the actual *carjacking*. The evidence against Greene was not overwhelming, but wholly circumstantial.

The government also argues that "it is not at all clear" that the jury would have inferred from Williams' refusal to testify that he was scared to testify out of fear of Greene's retaliation. Gov't Br. 34. But, as both sides and the trial court agreed at the time, this was a possible inference – why else give a curative instruction? The government offers up the possibility that the jury "[m]ost likely" would have inferred that Williams did not want to incriminate *himself*. Gov't Br. 34-35. But this too was

a prejudicial inference, by implicitly admitting his own guilt, Williams was incriminating Greene, who was allegedly at the scene of the carjacking, aiding and abetting it. Ultimately, the jury should not have been left to guess as to why Williams refused to answer questions – this was a completely improper basis on which to decide Greene's guilt.

Finally, the government argues that the district court's curative instructions, which instructed the jury to disregard both of the incidents discussed above, sufficed to remove any prejudice. Admittedly, there are cases that hold that curative instructions cure prejudice; and there are cases that hold that they do not. Br. 22. Here the two incidents – the testimony that Greene was a "very dangerous young man," corroborated by the suggestion of Williams' fear of Greene's violent recriminations if he testified (hence the trial court's curative instruction) – left an indelible impression on the jury that Greene was a very dangerous person – the kind of person more likely than not to aid and abet a carjacking. Greene should have a new trial free of this unfairly prejudicial evidence of his dangerous character.

CONCLUSION

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

Respectfully submitted,

s/ *Timothy Cone*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2024, the foregoing Reply Brief of Appellant was filed using the electronic filing system of the D.C. Court of Appeals and thereby electronically served on all counsel of record.

/s/*Timothy Cone*

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