CONSOLIDATED BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 16-CO-1061 & 24-CO-314,
24-CO-254

RODNEY A. BROWN
LEONARD E. BISHOP — Appellants,

v.

UNITED STATES OF AMERICA, — Appellee.

APPEALS FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. Nos. 1994-FEL-12246 & 1994-FEL-12247

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE CASE 1

The Trial Evidence 3

The Consolidated IPA Motion 6

The Evidentiary Hearing 7

1. Rodney Gordon 7

2. Keith Williams 8

3. Keith Fogle 9

4. Robert Gaulden 11

5. Michael Wonson 14

6. Marcus Johnson 15

7. Tyrone Jones 18

Discovery Request for Detective Rice's Disciplinary File 21

The Trial Court's Order 24

SUMMARY OF ARGUMENT 29

ARGUMENT 31

I. The Trial Court Did Not Abuse its Discretion in Denying Appellants' Consolidated IPA Motion. 31

A. Standard of Review and Applicable Legal Principles 32

B. The Trial Court Correctly Ruled That Tyrone Jones's and Marcus Johnson's Testimony Was Not New Evidence. 34

C. The Trial Court Did Not Abuse Its Discretion in Finding the Defense Witnesses Unreliable. 37

D. The Trial Court Properly Weighed the Weaknesses of the Government's Trial Evidence Against the Defense Evidence of Innocence. 43

II. The Trial Court Properly Denied Appellants' Joint Motion for Discovery Under the IPA. 45

A. Standard of Review and Applicable Legal Principles 45

B. Discussion 46

CONCLUSION 50

TABLE OF AUTHORITIES*

Cases

Allen v. United States, 837 A.2d 917 (D.C. 2003).....36

* *Bangura v. United States*, 248 A.3d 119 (D.C. 2021).....42

Bardoff v. United States, 628 A.2d 86 (D.C. 1993).....46

Bouknight v. United States, 867 A.2d 245 (D.C. 2005)..... 34-35

Brown v. United States, 934 A.2d 930 (D.C. 2007) 1-3

Carter v. United States, 475 A.2d 1118 (D.C. 1984) 36

Caston v. United States, 146 A.3d 1082 (D.C. 2016)..... 32-33, 40, 44

Commonwealth v. Mazza, 142 N.E.3d 579 (Mass. 2020).....37

Diamen v. United States, 725 A.2d 501 (D.C. 1999) 38

Faltz v. United States, 318 A.3d 338 (D.C. 2024).....44

Gibson v. United States, 566 A.2d 473 (D.C. 1989) 46

Hill v. United States, 664 A.2d 347 (D.C. 1995).....33

Long v. United States, 156 A.3d 698 (D.C. 2017).....43

* *Matter of M.W.G.,* 427 A.2d 440 (D.C. 1981) 48

McCray v. Vasbinder, 499 F.3d 568 (6th Cir. 2007).....38

* *Morales v. United States*, 248 A.3d 161 (D.C. 2021).....43

* Authorities upon which we chiefly rely are marked with asterisks.

Neil v. Biggers, 409 U.S. 188 (1972) 43

Parker v. United States, 254 A.3d 1138 (D.C. 2021) 45

* *Ramsey v. United States*, 569 A.2d 142 (D.C. 1990) 38

* *Richardson v. United States*, 8 A.3d 1245 (D.C. 2010) 33-36

Rivas v. United States, 783 A.2d 125 (D.C. 2001) (en banc) 41

Sherer v. United States, 470 A.2d 732 (D.C. 1983) 41

* *Simms v. United States*, 244 A.3d 213 (D.C. 2021) 45

Smith (Kevin) v. United States, 686 A.2d 537 (D.C. 1996) 46

Smith (Shawn) v. United States, 180 A.3d 45 (D.C. 2018) 47

Stringer v. United States, 301 A.3d 1218 (D.C. 2023) 40

United States v. Akers, 374 A.2d 874 (D.C. 1977) 48

Valdez v. United States, 320 A.3d 339 (D.C. 2024) 42

* *Williams v. United States*, 187 A.3d 559 (D.C. 2018) 33, 40-41

Wright v. United States, 387 A.2d 582 (D.C. 1978) 34

Other References

D.C. Code § 14-305 41

D.C. Code § 22-4131(1).....32

D.C. Code § 22-4131(7)(A).....32

D.C. Code § 22-4135(a).....32

D.C. Code § 22-4135(b).....32

D.C. Code § 22-4135(e)(4) 21, 45

D.C. Code § 22-4135(g)(1)(A)-(B).....32

D.C. Code § 22-4135(g)(2).....32

D.C. Code § 22-4135(g)(3).....32

ISSUES PRESENTED

I. Whether the trial court abused its discretion in denying appellants' motion to vacate convictions or for a new trial under the D.C. Innocence Protection Act (IPA), where:

A. The trial court correctly concluded that the testimony of two defense witnesses did not constitute "new evidence" because appellants failed to demonstrate that this testimony was not known to them at the time of trial or could not, in the exercise of reasonable diligence, have been known to them; and

B. The trial court reasonably discredited the testimony and statements of: (1) defense witnesses who claimed that a now-deceased third-party had confessed to the shooting, given the inconsistencies in their accounts of the third-party's motive for the shooting, their decades-long delay in coming forward with evidence of the alleged confession, and the lack of adequate justification for the delay; (2) a defense witness who did not observe the shooting and merely "assumed" that the third-party was the shooter; and (3) a defense witness who never reported to law enforcement that he saw the shooting as a child and did not recount his observations of the shooting in writing or in court until decades later, and who identified the third-party as looking like the shooter from an array of three photographs almost 30 years after the shooting; and

C. The trial court reasonably concluded that appellants did not establish actual innocence after weighing the government's evidence presented at trial against the defense evidence of actual innocence presented at the IPA hearing.

II. Whether the trial court abused its discretion in denying appellants' request for additional discovery under the IPA, where the trial court examined the contents of the officer's disciplinary file in camera and reasonably found that the detective's disciplinary file was irrelevant and inadmissible.

COUNTERSTATEMENT OF THE CASE

Appellants Rodney Brown and Leonard Bishop were charged with various offenses in connection with the November 25, 1994, murder of Andre Newton and shooting of Carrington Harley, Keith Williams, Joey Payne, and Michael Toland, in the 600 block of 46th Place, S.E., in Washington, D.C. *See Brown v. United States*, 934 A.2d 930, 935 (D.C. 2007). After a jury trial before the Honorable Colleen Kollar-Kotelly, the jury found Brown and Bishop guilty on March 28, 1996, of one count of first-degree murder while armed; five counts of possession of a firearm during a crime of violence (PFCV); four counts of assault with intent to kill while armed; one count of mayhem while armed; and one count of carrying a pistol without a license (Brown Record on Appeal Part I (Brown RI.) 2-8 (Docket Entries pp. 2-8); Bishop Record on Appeal Part I (Bishop RI.) 32-38 (Docket Entries pp. 2-8)).[1]

Judge Kollar-Kotelly sentenced both men to aggregate sentences of 101 years and eight months to life in prison (Brown RI. 15-16 (Docket Entries pp. 15-16); Bishop RI. 46-47 (Docket Entries pp. 16-17)). Brown and Bishop filed timely notices of appeal (Brown RI. 17 (Docket Entries p. 17); Bishop RI. 47 (Docket

[1] All page references to the records on appeal are to the PDF page numbers. Brown's record on appeal is comprised of four parts, and Bishop's record on appeal is comprised of three parts. We refer to those parts as I, II, III, and IV. Where a pleading or order is found in both records on appeal, we only cite to Brown's record on appeal.

Entries p. 17)). This Court affirmed the convictions and remanded for merger of the PFCV convictions. *See Brown*, 934 A.2d at 935, 944-45.[2]

On January 17, 2020, Brown and Bishop, through counsel, filed a consolidated motion to vacate their convictions under the D.C. Innocence Protection Act (IPA) (Brown RI. 29 (Docket Entries p. 29); Bishop RI. 62 (Docket Entries p. 32)).[3] The government filed its opposition on August 30, 2021 (Bishop RI. 68 (Docket Entries p. 38)), and appellants filed their reply on October 29, 2021 (Brown RI. 59-73 (Pet'rs Reply)).

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[2] While their direct appeals were pending, Bishop filed a motion pursuant to D.C. Code § 23-110, which the Honorable Russell Canan denied after holding an evidentiary hearing (Bishop RI. 48-49 (Docket Entries pp. 18-19)). This Court affirmed the denial of Bishop's § 23-110 motion. *See Brown*, 934 A.2d at 935, 944-45.

Brown and Bishop also filed motions for relief under the Incarceration Reduction Amendment Act (IRAA) (Brown RI. 38-39 (Docket Entries pp. 38-39); Bishop RI. 73 (Docket Entries p. 43)). Bishop's IRAA motion was denied (Bishop RI. 77 (Docket Entries p. 37)), but Brown's motion was granted (Brown RI. 40-41 (Docket Entries pp. 40-41)). Brown was resentenced to time served and placed on five years of supervised probation (Brown RI. 295-97 (Amended Judgment pp. 1-3)).

[3] Appellants' consolidated IPA motion (Pet'rs IPA Mot.) and the government's opposition to this motion (Gov't Opp.) were not included in either Brown's or Bishop's record on appeal. The government will move to supplement the records on appeal with these pleadings.

Before filing their consolidated IPA motion, Brown and Bishop had each filed pro se motions seeking to vacate their convictions under the IPA (Brown RI. 17 (Docket Entries p. 17); Bishop RI. 52 (Docket Entries p. 22)). In their consolidated IPA motion, appellants made clear that they were submitting their joint motion "to supplant and replace their prior filings" (Pet'rs IPA Mot. p. 1).

On September 22, 23, and 30, 2022, and October 11 and 25, 2022, the Honorable Jason Park conducted an evidentiary hearing on appellants' consolidated IPA motion (Brown RI. 45-47 (Docket Entries pp. 45-47); Bishop RI. 78-82 (Docket Entries pp. 48-52)). After the parties submitted post-hearing briefing (Brown RIV. 89-131 (Pet'rs Post-Hearing Br.), 133-161 (Gov't Post-Hearing Br.), 485-505 (Pet'rs Post-Hearing Reply Br.)), Judge Park denied appellants' consolidated IPA motion by order issued on March 7, 2024 (Brown RIV. 537-87 (Order)). Brown and Bishop each noted timely appeals from the denial of this motion (Brown RIV. 588-90 (Notice); Bishop RIII. 517-18 (Notice)).

The Trial Evidence[4]

Andre Newton and Carrington Harley were close friends. Harley testified that in the summer of 1994, Newton started selling drugs for Roy Tolbert. On November 25, 1994, Newton and Harley drove to Tolbert's apartment in Maryland. While in the apartment, Newton told Tolbert that he did not "want to go up there by [him]self," and Tolbert gestured toward Harley saying, "He'll go with you." Tolbert then drove Newton and Harley to the 600 block of 46th Place, S.E., with two bags

[4] This factual summary is taken from the Court's published opinion affirming appellants' convictions. *See Brown*, 934 A.2d at 935-36.

of drugs and two guns. When they arrived, Newton placed one of the bags near a trash can and the other one by an apartment building.

Three people approached Newton and asked him about Tolbert. Two of them bought what appeared to be marijuana from Newton. When another man drove up and announced that the police were nearby, Newton handed Harley his gun, and Harley stashed the guns behind a wall. They then began to walk away from the stash.

Keith Williams was friends with Brown and Bishop. He testified that on November 25, 1994, he went to Alabama Avenue after work to meet two friends. His friends, however, were not there, so he went to 46th Place, S.E., where he met Joey Payne, Michael Toland, and "Deion." Williams saw Brown and Bishop with drugs on the hood of Brown's car, while Andre Newton and Carrington Harley stood nearby. Brown and Bishop then moved Brown's car, and, at Toland's behest, Deion moved his van which was parked nearby. Because Joey Payne insisted that they leave immediately, Williams, Payne, and Toland began walking towards Payne's car. As the group walked to the car, Williams turned to watch Newton and Harley, who were walking behind them. Williams saw Brown and Bishop run through a "cut" near the parking lot and begin shooting at Newton and Harley. Williams testified that Bishop fired first with what appeared to be a .44 magnum revolver with a long barrel, which made a booming noise. Brown's gun, which was not as loud,

fired rapidly. Harley testified that, at that point, he and Newton began to run, with Brown and Bishop pursuing them. Harley was hit in the chest and fell.

James Jones lived in an apartment at 620 46th Place, S.E. He testified that on November 25, 1994, at approximately 5:20 p.m., he and his wife were returning home, and as he parked his truck, he heard gunshots and saw Brown standing in the parking area firing a pistol. He saw a man fall to the ground, and then saw Brown walk over to the man and fire several more shots into his body. Jones had known Brown for seven or eight years and identified him in court. Jones stated that he saw another man with Brown but could not identify him.

Carol Jeffries lived in an apartment on the 600 block of 46th Place, S.E. Jeffries knew Brown and Bishop from the neighborhood and identified them in court. She described how, immediately after she heard gunfire on November 25, 1994, Brown and Bishop ran into her apartment. Brown was "very emotional, very nervous"; he hid a "square gun with a clip" under her sofa, and quickly left by jumping off her balcony. Bishop, who stood still and looked "shocked," ran out the front door. Jeffries further testified that several days after the shooting, she overheard Brown say to a group (that did not include Bishop): "Man, I punished them n*****s, coming on my turf."[5]

[5] This statement had been redacted to eliminate a possible reference to Bishop.

Harley sustained injuries to his hip, stomach, prostate, rectum, groin, and urethra. A bullet found in the sole of his boot months after the shooting was consistent with bullets used in a .44 magnum revolver. Newton, who died from multiple gunshot wounds, had been shot in the back of the leg (consistent with having been running away from the shooters) and had a contact wound in the front of the neck (consistent with having been shot with the muzzle of the gun touching him).

The Consolidated IPA Motion

In their consolidated motion, appellants contended that "new evidence" clearly established their actual innocence for the murder of Andre Newton and armed assaults on Carrington Harley, Keith Williams, Joey Payne, and Michael Toland. Specifically, their claim of actual innocence was premised on the theory that Eugene Nixon, who died on May 10, 1996, was responsible for the shooting on November 25, 1994 (Pet'rs IPA Mot. at 3-4, 16, 19 n.8, 30, 32). To support their claim of actual innocence, Brown and Bishop provided statements from: (1) Keith Fogle, Robert Gaulden, Rodney Gordon, and Michael Wonson, each of whom claimed that Nixon had confessed to them that he was the shooter (Pet'rs IPA Mot. at 19-23, Exhs. 12-15); (2) Tyrone Jones, who claimed he was an eyewitness to the shooting and that Brown and Bishop were not the shooters (Pet'rs IPA Mot. at 23-27, Exh. 10); and (3) Keith Williams, a victim of the shooting and a witness at trial, who recanted his

trial testimony identifying Brown and Bishop as the shooters (Pet'rs IPA Mot. at 27-28, Exh. 7).

The Evidentiary Hearing

1. Rodney Gordon

In Rodney Gordon's sworn statement to defense investigator, Sherrie Forester, dated November 7, 2018,[6] Gordon asserted that Nixon, who was his best friend, told him that "he had got[ten] into it with Roy [Tolbert] over a crap[s] game" (Pet'rs IPA Mot., Exh. 14 at 2-3). A day or two after the craps game, Nixon was driving, when Tolbert chased after Nixon and shot at him from his car (*id*. at 3). On the night of Newton's murder, Nixon told Gordon that he had "rolled past the Circle and saw [Tolbert]" and he "was about to go up there and shoot him" (*id*. at 4). Nixon drove away, and about three or four minutes later, Gordon heard gunshots (*id*. at 4-5). Four or five days later, Nixon asked Gordon what he had heard, and Gordon answered that he heard "a couple of people got shot and killed" (*id*. at 6-7). When Nixon asked him specifically about Tolbert, Gordon told Nixon that he had missed Tolbert (*id*. at 7). Nixon then asked Gordon if his name had come up in connection

[6] Rodney Gordon did not testify at the evidentiary hearing. Gordon died on April 1, 2019, several years before the evidentiary hearing took place (Pet'rs IPA Mot. at 22). Sherrie Forester testified at the hearing about the procedure she utilized to obtain Gordon's statement (9/30/22 Tr. 107-10).

with the shooting, and Gordon told him no and assured him that that "he should be good" (*id*.). Many years later, Gordon decided "to do what [wa]s right" and "c[o]me forward with this information on [his] own free will," and contacted Brown, whom Gordon knew from the neighborhood, and Brown's attorney (*id*. at 1, 8-9).

2. Keith Williams

In Keith Williams's sworn statement to defense investigator, Ronetta Johnson, dated July 19, 2011,[7] Williams recanted his trial testimony and claimed that he remained "face down on the ground and never saw who was doing the shooting" (Pet'rs IPA Mot. at 27-28, Exh. 7 at 3-4). Williams further claimed that the detectives refused to let him leave until he said that Brown and Bishop were the shooters (*id.* at 6-10). Williams was so scared that he provided the detectives with the statement they wanted, even though he really did not know who the shooters were (*id*.). Williams also claimed that he testified falsely at Brown's and Bishop's trial because he had agreed to testify as a part of his plea agreement, and he was scared to change his testimony from the testimony he had provided before the grand jury (*id*. at 13-

[7] Although the defense was initially going to call Keith Williams, Williams ultimately did not testify at the IPA hearing (10/25/22 Tr. 10, 17-18). Moreover, as discussed infra, the defense withdrew Williams's sworn statement recanting his trial testimony (10/25/22 Tr. 17-18).

18). Williams "felt so bad about lying" that he decided to "tell[ ] the truth now" (*id*. at 19).

3. Keith Fogle

In 1994, Keith Fogle lived in the neighborhood around 46th Place, S.E., which was known as Simple City (9/22/22 Tr. 43-44).[8] Fogle "hung out" on Alabama Avenue with his friends Rodney Gordon, Eugene Nixon ("Gene"), and Michael Wonson ("Pretty B"), among others (9/22/22 Tr. 46-47, 49). He and his friends would typically stay on their end of the neighborhood and did not venture much onto 46th Place, an area known as the Circle (9/22/22 Tr. 46, 49-50). Fogle was close friends with Nixon, and the two men often shared personal information with each other (9/22/22 Tr. 47, 70). Fogle and Nixon were also good friends with Michael Raymond (9/22/22 Tr. 48-49).

Fogle knew Roy Tolbert, but he and his friends were not close with Tolbert and Tolbert's friends (9/22/22 Tr. 50). In fact, Nixon and Raymond had engaged in several shooting incidents with Tolbert (9/22/22 Tr. 51). On one occasion, a year or two before Nixon was killed, Tolbert chased Raymond in a car and shot at

[8] Fogle was previously convicted of: (1) first-degree burglary in 1995 in Maryland; (2) attempted possession of marijuana in 1997 in D.C.; (2) attempted robbery in 2001 in D.C.; (3) distribution of cocaine in 2005 in D.C.; (4) and involuntary manslaughter in 2012 in D.C. for an offense he committed in 1999 (9/22/22 Tr. 42, 90-92).

Raymond's car (9/22/22 Tr. 51). While Raymond was not hurt during this incident, Nixon was very upset that Tolbert had shot at Raymond (9/22/22 Tr. 51-52).

The day after Newton was shot, Fogle was standing on the corner of Alabama Avenue and Falls Terrace, when Nixon pulled up in his car (9/22/22 Tr. 54, 62). Nixon got out of his car and told Fogle, "[Y]ou see the work I put in the Circle [i.e., 46th Place] yesterday" (9/22/22 Tr. 54-55). Fogle understood Nixon's phrase about "the work [he] put in" to mean that Nixon had done "some bodily harm to someone" (9/22/22 Tr. 55). Fogle responded, "[O]h yeah," and Nixon further stated, "I tried to get Roy [Tolbert] but he got away, but I got his mans and them and shit" (9/22/22 Tr. 54-55). Nixon elaborated that he had parked in the rear of G Street, ran through "the cut" by the woods into the parking lot of the Circle, and tried to hit Tolbert but hit Tolbert's men instead (9/22/22 Tr. 56-60). Fogle explained that Nixon was "tr[ying] to get" Tolbert due to their past altercations (9/22/22 Tr. 55-56).

Fogle later learned that Brown (whom he knew as "June") and Bishop (whom he knew as "Dink") were arrested and convicted of shooting Newton on November 25, 1994 (9/22/22 Tr. 52-53, 63). Brown and Bishop and their friends hung out in the Circle and were not a part of Fogle's and Nixon's "Alabama Avenue friend group" (9/22/22 Tr. 64-65). Fogle did not believe that either Brown or Bishop was responsible for the shooting because Nixon had confessed to him that he had shot Newton (9/22/22 Tr. 53-54). Fogle did not tell Brown or Bishop or anyone else at

the time that Nixon was the shooter because Nixon was his friend, and Fogle would have feared for his own life and safety and that of his family had he disclosed this information (9/22/22 Tr. 63-65, 96-97).

On January 30, 1996, before Brown's and Bishop's trial, Fogle gave a statement to Bishop's investigator from the Public Defender Service (9/22/22 Tr. 67, 85-87). At that time, Fogle told Bishop's investigator that he did not know anything about Newton's murder (9/22/22 Tr. 67, 85-88, 95-96). Over 20 years later, on December 19, 2019, Fogle provided a statement to Sophie Vick, a defense investigator for Brown and Bishop from the Mid-Atlantic Innocence Project (MAIP) (9/22/22 Tr. 67-68, 76-81, 94-95; Pet'rs IPA Mot., Exh. 12). This time, he decided to come forward with the information he had about Nixon because, he claimed, it was "the right thing to do" (9/22/22 Tr. 67-68).

4. Robert Gaulden

In 1994, Robert Gaulden lived in Suitland, Maryland, but hung out around Benning Terrace, S.E, with Michael Wonson, Eugene Nixon, Rodney Gordon, Winston Robinson, and Michael Raymond ("Little Mike"), where he and Nixon sold drugs (10/25/22 Tr. 24-25, 27, 69).[9] Raymond and Gaulden were first cousins and

[9] Gaulden testified under a limited use-immunity agreement with the government (10/25/22 Tr. 11). Gaulden had previously been convicted of: (1) possession with intent to distribute marijuana and failure to appeal in D.C. in 2002; (2) carrying a (continued . . .)

were close; Gaulden and Raymond were also close friends with Nixon, and Gaulden described himself, Gordon, and Nixon as being "best friends" (10/25/22 Tr. 27-28, 30-31, 64-65).

In 1994, before Newton's murder, Raymond was involved in a shooting (10/25/22 Tr. 28, 57). Raymond was in a car with Ronnie Brisbon, who at the time was "beefing" with Roy Tolbert and some other men (10/25/22 Tr. 28-29). Tolbert and these men pulled up to Brisbon's car and shot the car up (10/25/22 Tr. 28). Despite getting hit, Raymond survived the shooting without any permanent disabilities (10/25/22 Tr. 28). At the hospital, Gaulden spoke to Nixon about Raymond's shooting, and Nixon said, "We going to kill [Tolbert]" (10/25/22 Tr. 31, 34). Nixon, Gaulden, Gordon, and another man named Chris agreed to look for Tolbert and kill him or his friends (10/25/22 Tr. 33-35, 37, 57, 62, 68, 80).[10]

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pistol without a license, possession of an unregistered firearm, unlawful possession of ammunition, and possession of a controlled substance in in D.C. in 2006; (3) conspiracy to prevent truthful testimony and obstruction of justice in D.C. in 2008; (4) obstruction of justice and threats in D.C. in 2008; and (5) theft greater than $300 in Maryland in 1997; (6) possession with intent to distribute a controlled substance in Maryland in 1997; (7) CPWL in D.C. in 1994; and (8) fourth-degree sexual offense in Maryland in 1994 (10/25/22 Tr. 23-24, 87-88).

[10] Michael Wonson and Winston Robinson were incarcerated at the time and were not part of the conspiracy to kill Tolbert (10/25/22 Tr. 34). Nixon, Gordon, Chris, and Raymond were all dead by the time of the evidentiary hearing (10/25/22 Tr. 34, 48, 64-66, 70).

The day after Newton's murder, Nixon told Gaulden that he was driving through the Circle the previous night when he saw Tolbert (10/25/22 Tr. 35). Nixon parked his car, went back to the Circle, and shot at Tolbert (10/25/22 Tr. 35-36, 52-53, 56, 59-62, 73, 77-79). Nixon thought he had killed Tolbert but subsequently found out that he had killed another man who was with Tolbert (10/25/22 Tr. 35, 37-38, 52-56). Gaulden did not know the person who was killed (10/25/22 Tr. 38, 53, 80). Gaulden later learned that the victim of the shooting was Andre Newton, and that Brown and Bishop were arrested for Newton's murder (10/25/22 Tr. 32-33, 38-39, 49-50, 55). Gaulden knew Brown and Bishop but was not friends with them (10/25/22 Tr. 82). Gaulden did not contact the police or Brown's and Bishop's defense counsel to inform them that Nixon was responsible for Newton's death because Nixon was his friend (10/25/22 Tr. 32-33, 40-41, 54).

Ultimately, Gaulden and his co-conspirators failed to achieve the primary object of their conspiracy, i.e., to kill Tolbert, who was alive at the time of the evidentiary hearing (10/25/22 Tr. 73, 77-79). Gaulden claimed that he was coming forward now with information regarding Brown's and Bishop's innocence because Brown's investigator approached him, and the government granted him immunity (10/25/22 Tr. 43-44). Brown's investigator prepared a statement for him, which he signed in December 2018 (10/25/22 Tr. 45-46, 50-51, 61).

5. Michael Wonson

Michael Wonson was close friends with Nixon whom he had known since 1991; Nixon trusted Wonson and would often confide in him (9/22/22 Tr. 156-57, 167-68, 193).[11] Wonson also knew Brown and Bishop and was good friends with them in 1994 (9/22/22 Tr. 154-57, 163, 165, 187). Wonson testified that he did not believe Brown and Bishop were responsible for Andre Newton's murder because Nixon had confessed to him that he had shot Newton (9/22/22 Tr. 156).

In November 1994, Wonson was detained at Oak Hill Youth Center on a drug-distribution charge (9/22/22 Tr. 157, 166-67). On a phone call, Nixon told Wonson that "he took care of Slim" (referring to "Dre" or Andre Newton) in the Circle with "Bessie," which was Wonson's nickname for his .40 caliber gun (9/22/22 Tr. 157, 160-61, 172-77, 180, 183-84; 10/25/22 Tr. 108-09).[12] Wonson understood Nixon to

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[11] At the time of the IPA hearing, Wonson had been convicted of: (1) two counts of first-degree murder, AWIKWA, two counts of PFCV, and destroying property in D.C. in 2000; (2) PFCV and two counts of felon-in-possession of a firearm in federal district court in D.C.; and (3) unlawful possession of contraband in D.C. in 2010 (9/22/22 Tr. 153-54, 194). Wonson was serving a life sentence (9/22/22 Tr. 153-54, 194-95).

[12] Wonson's testimony that "Bessie" was a .40 caliber gun was impeached with prior inconsistent statements he had made to Vick, the defense investigator from MAIP (9/22/22 Tr. 171-76; 10/25/22 Tr. 90-92). On March 14, 2019, Wonson told Vick that he was not sure what type of weapon "Bessie" was because he had a couple of guns in 1994 that Nixon had picked up from his house (9/22/22 Tr. 171, 173-74; 10/25/22 Tr. 94, 108). In January 2020, Wonson spoke with Vick a second time, and during this interview, he told Vick that Nixon had several of his guns, including a .45 caliber, a 9 mm, and a rifle-type gun (9/22/22 Tr. 174-78; 10/25/22 Tr. 108).

mean that he had harmed Dre (9/22/22 Tr. 157, 176-77). Before this phone call, Nixon had told Wonson about a confrontation he had had with Newton over Nixon's girlfriend, Rochelle, and Nixon had said that "he was going to try and take care of [Dre]" (9/22/22 Tr. 159-60, 177). According to Wonson, Nixon's motive for shooting Newton arose from this prior altercation between the two men over Rochelle (9/22/22 Tr. 159, 177, 180-81). Before Brown's and Bishop's trial, no one questioned Wonson about Newton's murder, nor did Wonson tell anyone about Nixon's confession; Wonson wanted to "hold on to [ ] Nixon's secrets" and protect his friend (9/22/22 Tr. 162-64). Wonson claimed that he was coming forward now because he knew Brown and Bishop were innocent and he wanted to help them (9/22/22 Tr. 164, 200-01).

6. Marcus Johnson

Marcus Johnson grew up in Simple City, and even after he moved from the neighborhood in 1992, he visited often (9/22/22 Tr. 102-04).[13] Andre Newton was one of Johnson's best friends, and Roy Tolbert was Johnson's first cousin and a drug dealer (9/22/22 Tr. 105-06, 129-30, 144).[14] Johnson knew Nixon from the

[13] Johnson had previously been convicted of assault with a dangerous weapon in 1996 (9/22/22 Tr. 104).

[14] According to Johnson, in all the years he had known Tolbert, he had never known Tolbert to gamble or shoot craps; if someone said that Tolbert was shooting craps, "[t]hat would be a lie" (9/22/22 Tr. 129-30).

neighborhood, but he was not friends with Nixon (9/22/22 Tr. 135, 142-43). Nixon "hung out" with, among others, Rob, Winston, and Michael Raymond; Nixon's "crew" did not like Johnson's "crew," which included Tolbert and Newton (9/22/22 Tr. 135-36, 143). Johnson also knew Brown and Bishop from the neighborhood; he had grown up with them, and although they did not "hang out" together, "they were cool" with each other (9/22/22 Tr. 106-07, 129).

At the time of Newton's murder, Johnson was at home when he received a call informing him that Newton had been shot (9/22/22 Tr. 107, 130-31). Upon receiving this news, Johnson immediately went to the Circle and saw several ambulances and the police on the scene (9/22/22 Tr. 108). Newton had already been taken to the hospital by the time Johnson arrived (9/22/22 Tr. 132). Approximately 15 minutes later, Johnson saw Tolbert in the Circle (9/22/22 Tr. 132).

About a week after Newton's shooting, on December 1, 1994, Johnson and his friends went to the East Side Club in Southwest, D.C., to confront some people from the neighborhood – i.e., Gene, Ricky, Rob, and Winston – with whom they had ongoing issues (9/22/22 Tr. 108, 121-22, 145). Johnson "assumed" that this group of men was responsible for Newton's murder, stating, "[i]t was just an assumption, because we had ongoing problems with them," "like serious problems," including "engag[ing] in violent acts against each other" (9/22/22 Tr. 122-24, 137, 145).

Johnson and Tolbert were arrested that evening for stabbing Ricky Skipper (9/22/22 Tr. 109, 120, 137).

At the police station, Johnson told the police that he knew something about the Newton murder and informed the police that he had seen Brown running away from the scene of the shooting (9/22/22 Tr. 110-11, 120, 137). Johnson provided a written statement to the police, which he now claimed was false, because he thought it would help him get released on personal recognizance (9/22/22 Tr. 111, 138-41, 147-48).[15] Johnson named Brown as a possible suspect in the Newton shooting because he "latched onto" "the rumor mill going around" and tried to use it to his advantage to get himself out of jail (9/22/22 Tr. 138, 145-46). Johnson had no first-hand knowledge as to whether the rumor was true or not (9/22/22 Tr. 146).[16]

After Johnson learned that Brown and Bishop had been charged with Newton's murder, Johnson did not speak with either defense counsel about the

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[15] Johnson's statement to the police was dated December 1, 1994, and taken by Metropolitan Police Department Detective Robert Rice (Brown RIV. 167-69 (Gov't Post-Hearing Br., Gov't Exh. 3)). In his statement, Johnson agreed that he had been treated fairly by the homicide office and by Detective Rice and that no one had promised him anything in exchange for this statement (Brown RIV. 169 (Gov't Post-Hearing Br., Gov't Exh. at 3)). When confronted with his statement on cross-examination, Johnson testified that he was "pretty sure" that he had been treated fairly and that he had not been promised anything for his statement (9/22/22 Tr. 139-41).

[16] The government subpoenaed Johnson to testify at Brown's and Bishop's trial, but Johnson did not testify because he claimed that the statement he had given to the police was false (9/22/22 Tr. 111-12).

murder (9/22/22 Tr. 117-18). Subsequently, a woman from the Innocence Project subpoenaed Johnson to appear in court; Johnson did not speak with her before testifying at this hearing (9/22/22 Tr. 118). Johnson had not been in touch with either Brown or Bishop, and he was no longer friends with them (9/22/22 Tr. 118-19).

7. Tyrone Jones

On November 25, 1994, Jones was 11 or 12 years old (10/11/22 Tr. 24, 43, 97).[17] At the time of Newton's murder, Jones claimed to have been in a car parked in the Circle, i.e., 46th Place, S.E., approximately 20 feet away from the scene of the shooting (10/11/22 Tr. 24, 28, 49-50, 99-103). Jones was waiting for his cousin, Dion Hunt, who was visiting his girlfriend (10/11/22 Tr. 24-25, 56-57). While waiting for Hunt, Jones heard gunshots, looked up, and saw some men running (10/11/22 Tr. 27-28, 62-63, 106). Two men came out of the "cut," the wooded area between some apartment buildings and the parking lot, chasing after another man who fell in front of some cars parked near Jones (10/11/22 Tr. 27-28, 74-76). After the man fell to the ground, one of the men stood over the fallen man and continued to shoot him and then raised his gun, lifted his mask (not entirely off his face), and started to shoot down the street at others (10/11/22 Tr. 27-28, 57, 62-64, 102). Jones

[17] Jones had previously been convicted of: (1) armed robbery and carrying a pistol without a license in 2001; (2) assault with intent to rob while armed, PFCV, assault with a dangerous weapon, and carrying a pistol without a license in 2006; and (3) a Bail Reform Act (BRA) violation in 2006 (10/11/22 Tr. 22-23, 95).

only saw one man shooting; the second man was standing "a little back" behind the shooter (10/11/22 Tr. 62, 71, 77-78). The two men ran back toward the parking lot and into the wooded area, while a lady approached the injured man and tried to help him (10/11/22 Tr. 28, 32). Jones later learned from one of his cousins that the victim of the shooting was Andre Newton (10/11/22 Tr. 29, 54-55).

Jones claimed that he was able to get a good look at the man who had shot Newton when he lifted his mask, but he did not get a good look at the second man (10/11/22 Tr. 29, 78-80). Jones was shown a photograph of Nixon, and he testified that the man in the photograph looked like the man who had shot Newton (10/11/22 Tr. 32). Jones was first shown this photograph two to three days before the hearing in preparation for his testimony, and he was confident that the person in the photograph looked like the person who had shot Newton that evening (10/11/22 Tr. 33, 87, 106).[18]

At the time of the shooting, Jones's cousins – Juan Green ("Juan T"), Antwan Pulliam ("Little Pete"), and Juan Pulliam ("Shorty") – were good friends with Brown and Bishop, and Jones knew Brown and Bishop through his cousins (10/11/22 Tr.

[18] Three photographs were presented to Jones, and Jones claimed that he "instantly pointed to [Nixon's photograph] and said that looked like the shooter" (10/11/22 Tr. 106). Jones stated that he had never previously seen a photograph of this person and that he did not know the person's name (10/11/22 Tr. 107).

33-36, 43, 45-46, 58).[19] Jones had met Brown five to seven times, and Bishop "a few" times through "minor interactions" (10/11/22 Tr. 34, 43). Shortly after the incident, Jones learned from Green that Brown and Bishop were arrested for Newton's murder (10/11/22 Tr. 35, 36-37, 55). Jones, however, did not believe that either Brown or Bishop was responsible for Newton's death because neither fit the build of the two men that Jones had seen (10/11/22 Tr. 34-35, 43, 57, 78, 80-82). Jones told his cousins that he had witnessed the shooting, and that Brown and Bishop were not the shooters (10/11/22 Tr. 36-37). Jones expected his cousins to relay this information to Brown and Bishop, but he did not know if they did; Jones had told his cousins because he wanted them to help Brown and Bishop (10/11/22 Tr. 37, 60-61).[20] Jones did not go to the police to tell them what he had witnessed (10/11/22 Tr. 38, 60-61, 98).

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[19] Both Antwan Pulliam and Juan Pulliam had died before the IPA proceedings (10/11/22 Tr. 36). At the time of the evidentiary hearing, Jones did not know the whereabouts of either Green or Hunt, and he was not aware of anyone in his family who knew where they were (10/11/22 Tr. 45-46, 97-98).

[20] Vick testified that she interviewed Juan Green on July 14, 2022 (10/25/22 Tr. 90-91, 97-98). During this interview, Green confirmed that Jones had told him that he (Jones) was an eyewitness to Newton's shooting (10/25/22 Tr. 98). Green further stated that he had conveyed what Jones had told him to Brown before Brown's arrest (10/25/22 Tr. 98, 109-12). Vick reported the substance of Green's interview to her superiors (10/25/22 Tr. 99). On August 31, 2022, Vick, accompanied by attorneys Tom Carter, Maggie Abernethy and Ben Rossen, reinterviewed Green (10/25/22 Tr. 99, 111-13). This time, Green claimed that he never told Brown or Bishop what Jones had told him about Newton's murder (10/25/22 Tr. 99, 112-16). Vick had

(continued . . .)

In 2009, Jones was incarcerated at Big Sandy in Kentucky at the same time as his cousin Hunt; Jones found out through his cousin that Brown was also incarcerated there (10/11/22 Tr. 38-39, 88). At Big Sandy, Jones spoke to Brown about Newton's murder and told Brown about what he had seen on November 25, 1994 (10/11/22 Tr. 40-41, 89). In 2011, after Brown's investigator, Ronetta Johnson, contacted him, Jones provided an affidavit (10/11/22 Tr. 42-43, 47, 86, 89-90). Jones claimed that his only motive in doing so was "to get to the truth" (10/11/22 Tr. 91).

Discovery Request for Detective Rice's Disciplinary File

On June 22, 2022, Brown and Bishop filed a joint motion for leave to obtain discovery under the IPA, D.C. Code § 22-4135(e)(4) (Brown RI. 326-60 (Joint Mot. for Discovery)). Metropolitan Police Department (MPD) Detective Robert Rice had been administratively suspended sometime between November 1994 and October 1995 (Brown RI. 328 (Joint Mot. for Discovery at 3)). Brown and Bishop contended that, because Detective Rice had interviewed both Keith Williams and Marcus Johnson, and Williams and Johnson alleged that the police had coerced them to identify Brown and Bishop as the shooters, "it "[wa]s critical for [the defense] to view Detective Rice's disciplinary file to determine whether his suspension was

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looked for Green since the August 2022 interview but was unable to locate him (10/25/22 Tr. 99-100).

related in any way to witness intimidation or coercion, or if he ha[d] a history of similar misconduct that would support [their] theory that material witnesses in their case were coerced" (Brown RI. 328-29 (Joint Mot. for Discovery at 3-4)). Brown and Bishop further suggested that the court could view Detective Rice's disciplinary file in camera (Brown RI. 329 (Joint Mot. for Discovery at 4)).

The government opposed the petitioners' discovery request for Detective Rice's disciplinary file, contending that the information was "highly private" and that the belated request was "overbroad and based on speculation" (Brown RI. 365 (Gov't Response at 5)). However, the government would not oppose in camera review by the court (*id*.).

At the hearing on September 23, 2022, the government represented that it had received Detective Rice's personnel file from MPD but had not yet received his disciplinary file (9/23/22 Tr. 72). The government informed Judge Park that it had interviewed Detective Rice regarding his disciplinary matter and proffered to the court the substance of that interview, which had already been disclosed to the defense (9/23/22 Tr. 72-73). Specifically, Detective Rice had "misused a subpoena to obtain a cell phone record on a man who he thought was having an affair with his wife"; he was placed on leave but ultimately resigned from MPD (9/23/22 Tr. 72-74).

Upon receiving Detective Rice's personnel and disciplinary file from the government, Judge Park conducted an in camera review and found nothing that spoke to the defense theory of witness intimidation (9/30/22 Tr. 18-19; 10/11/22 Tr. 6, 116; 10/25/22 Tr. 13-14). The only allegation of misconduct against Detective Rice involved his misuse of a grand-jury subpoena for personal reasons, as the government had previously proffered in open court (10/25/22 Tr. 14). Judge Park had initially indicated, when he understood that Detective Rice would be testifying on behalf of the government, that Detective Rice's misuse of a grand-jury subpoena would be relevant for cross-examination under a corruption-bias theory (10/25/22 Tr. 13-14).

The government later informed the court that, because the defense was no longer calling Keith Williams as a witness, the government would not be calling Detective Rice to rebut or impeach Williams's allegations that Detective Rice had coerced him into identifying Brown and Bishop (10/25/22 Tr. 10, 17-18). Given that Williams and Detective Rice would not testify at the IPA hearing, the government contended that Detective Rice's disciplinary file was no longer relevant (10/25/22 Tr. 17-18). When Judge Park asked defense counsel whether the petitioners were also withdrawing Williams's statement, defense counsel responded, "We are no longer relying on Mr. Williams'[s] statement" (10/25/22 Tr. 18).

In light of "this change of circumstance," Judge Park denied the defense request for production of Detective Rice's disciplinary file (10/25/22 Tr. 18-19). Because neither Williams nor Detective Rice were testifying at the hearing, and the defense was withdrawing Williams's statement, the court did not see "how Detective Rice's credibility [wa]s relevant at this juncture" (10/25/22 Tr. 18). The court further noted "significant privacy concerns that [we]re raised by the file," and thus "on balance, [it] d[id] not believe that that information should be turned over" (10/25/22 Tr. 19).

The Trial Court's Order

In a 51-page order, the trial court denied Brown's and Bishop's consolidated IPA motion (Brown RIV. 537 (Order p. 1)). After viewing the evidence presented by Brown and Bishop "as a whole," and "considering the weaknesses in the government's trial evidence," the court concluded that appellants had not established their actual innocence even by a preponderance of the evidence (Brown RIV. 585-87 (Order pp. 49-51)). The court found that the defense evidence of innocence was not outweighed by the government's trial evidence, especially the trial testimony of three independent eyewitnesses – Keith Williams, Carol Jeffries, and James Jones – who were familiar with Brown and Bishop and implicated them in Newton's murder (Brown RIV. 585-87 (Order pp. 49-51)). The court explicitly recognized the weaknesses in the trial testimony of Keith Williams, Carol Jeffries, and James Jones

(Brown RIV. 541-42, 572, 585-86 (Order pp. 5-6, 36, 49-50)).[21] But, as the court noted, these witnesses were extensively cross-examined at trial and the jury nonetheless credited their account of the events (Brown RIV. 585-86 (Order pp. 49-50)).

The court also found that the evidence provided by Keith Fogle, Robert Gaulden, Michael Wonson, and Rodney Gordon – the four IPA witnesses who claimed that Eugene Nixon had confessed to shooting Andre Newton – was unreliable and did not establish appellants' actual innocence (Brown RIV. 551-63 (Order pp. 15-27)). The court noted that the conversations between Nixon and each of these four men occurred nearly three decades ago (Brown RIV. 552-53, 558, 560, 588 (Order pp. 16-17, 22, 24, 50)). Moreover, these witnesses came forward with evidence that Nixon was the shooter approximately two decades after Brown's and Bishop's trial and Nixon's death, and only after being contacted by defense investigators working on the IPA motion (Brown RIV. 553-54, 558, 560, 586 (Order

[21] Williams testified pursuant to a favorable plea agreement in an unrelated drug-distribution case, and he initially told the police that he did not know who had shot him (Brown RIV. 541-42, 588 (Order pp. 5-6, 50)). Jeffries had entered the witness-protection program and had received over $6,000 in housing benefits; she also admitted to drinking alcohol every day and occasionally using marijuana and cocaine around the time of Newton's murder (Brown RIV. 544 (Order p. 8)). James Jones moved out of the area sometime after the shooting, and his new landlord was MPD Detective William Toland, who was involved in the Newton murder investigation (Brown RIV. 545 (Order p. 9)).

pp. 17-18, 22, 24, 50)). Some of these witnesses testified that they did not come forward earlier because they were protecting their friend Nixon (Brown RIV. 553-55, 559-60, 586 (Order pp. 17-19, 23-24, 50)). However, as the court pointed out, Nixon died less than two months after Brown's and Bishop's trial concluded (Brown RIV. 553-54, 560, 588 (Order pp. 17-18, 24, 50)). Because Nixon had been deceased since 1996, he could not refute the allegations being made against him decades later (Brown RIV. 553, 558 (Order pp. 17, 22)). Given their lengthy delay in coming forward with this exonerating evidence, their lack of an adequate explanation for the lengthy delay, and the fact that they placed the blame on a person who was long deceased, the court found the evidence provided by these four witnesses particularly suspect and unreliable (Brown RIV. 553-54, 560 (Order pp. 17-18, 24)).

Furthermore, the court highlighted that Fogle, Gaulden, Wonson, and Gordon provided varying motives and targets for the shooting (Brown RIV. 553 (Order p. 17)). Fogle stated that Nixon tried to shoot Tolbert (but hit Newton) because Nixon and Tolbert had been shooting at each other (Brown RIV. 553 (Order p. 17)). Gordon, who was allegedly Nixon's best friend, stated that Nixon tried to shoot Tolbert (but hit Newton) because Nixon and Tolbert had gotten into an argument over a craps game (Brown RIV. 553 (Order p. 17)). Wonson stated that Nixon specifically targeted Newton (not Tolbert) because Nixon and Newton had gotten into an altercation over Nixon's girlfriend (Brown RIV. 552 (Order p. 17)). Gaulden

stated that he had conspired with Nixon, Gordon, and someone named Chris (all of whom were deceased) to kill Tolbert in retaliation for Tolbert's shooting of Gaulden's cousin, Michael Raymond (Brown RIV. 554, 558 (Order pp. 18, 22)). These "starkly inconsistent" accounts of Nixon's purported motive and intended target cast significant doubt on the reliability of these conversations with Nixon that had occurred 30 years ago (Brown RIV. 553, 558 (Order pp. 17, 22)).[22]

As to Tyrone Jones and Marcus Johnson, the court ruled as an initial matter that their testimony and statements did not constitute "new" evidence under the IPA (Brown RIV. 566-67, 569 (Order pp. 30-31, 33)). Jones testified that he told his cousins, including Juan Green, that he had witnessed the shooting, and he expected his cousins to tell Brown and Bishop what he knew (Brown RIV. 566 (Order p. 30)). Vick interviewed Green on July 14, 2022, and Green told Vick that he believed he had conveyed to Brown what Jones had told him before Brown was arrested (Brown RIV. 566 (Order p. 30)). Vick and three attorneys interviewed Green a second time, and during this second interview, Green stated that he did *not* tell Brown what Jones

[22] The court also noted, as to Gaulden in particular, that Gaulden "ha[d] amassed a number of convictions" that undermined his credibility, and after having observed his "demeanor and manner of testifying," it did not find Gaulden to be a reliable witness (Brown RIV. 558 (Order p. 22)). The court further found that Gordon's statement did not constitute credible evidence because the court was unable to assess Gordon's credibility, as Gordon had passed away and had not testified at the IPA hearing (Brown RIV. 563 (Order p. 27)).

had told him (Brown RIV. 566 (Order p. 30)). Because Green did not testify at the hearing, the court was not presented with an explanation as to why his account changed (Brown RIV. 566-67 (Order pp. 30-31)). Accordingly, on this record, the court found that Brown and Bishop had failed to establish that Jones's account was not known to them or could not have become known to them through the exercise of reasonable diligence (Brown RIV. 567 (Order p. 31)).

The court found that Johnson's testimony was not new because Johnson was identified as a potential government witness at Brown's and Bishop's trial based on the statement he gave to the police on December 1, 1994 (Brown RIV. 569 (Order p. 33)). Thus, if Brown's and Bishop's trial counsel had exercised reasonable diligence in interviewing Johnson, the information Johnson provided at the IPA hearing could have become known to counsel (Brown RIV. 569 (Order p. 33)).

In any event, even if this evidence was "new," the court concluded that the testimony and statements of Jones and Johnson would not support a finding of actual innocence (Brown RIV. 567, 569-70 (Order pp. 31, 33-34)). As to Jones, the court found Jones's identification testimony of Nixon to be of "limited value" and "entitled to little weight" (Brown RIV. 567 (Order p. 31)). The court noted that Jones was shown three photographs two to three days before the hearing and he selected a side-profile photograph of Nixon as someone who looked like the shooter (Brown RIV. 565, 567 (Order pp. 29, 31)). Jones's tentative identification of Nixon in 2022

was based on observations he had made nearly three decades ago when he was 13 years old and from approximately 20 feet away (Brown RIV. 567 (Order p. 31)). The court thus found Jones's identification testimony to be unreliable (Brown RIV. 567 (Order p. 31)).

As to Johnson, the court noted that Johnson was not a witness to the shooting and had no direct knowledge of who the shooters were (Brown RIV. 569 (Order p. 33)). Although Johnson testified that he believed Nixon and his associates played some role in Newton's murder, Johnson made clear that this was "just an assumption" on his part, given the ongoing feud at the time between Nixon and Tolbert and their associates (Brown RIV. 569-70 (Order pp. 33-34)). Accordingly, the court found that Johnson's testimony did not support a claim of actual innocence (Brown RIV. 570 (Order p. 34)).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying appellants' IPA motion. First, the trial court correctly concluded that Marcus Johnson's and Tyrone Jones's testimony was not new evidence. Johnson's testimony could have been discovered through reasonable diligence at the time of appellants' trial. Appellants knew Johnson from the neighborhood and knew that Johnson was listed as a potential government witness at trial. Appellants, however, made no attempt to contact Johnson. Appellants likewise failed to meet their burden of demonstrating due

diligence as to Jones's testimony. Jones's cousin made contradictory statements on whether he had told Brown before trial about Jones's alleged observations. Because Jones's cousin did not testify at the IPA hearing, the court could not determine whether Jones's cousin had, in fact, relayed the information to Brown before trial.

Second, the trial court did not abuse its discretion in discrediting Keith Fogle, Robert Gaulden, Michael Wonson, and Rodney Gordon, all of whom claimed that Eugene Nixon had confessed to them that he was responsible for Andre Newton's shooting. The glaring inconsistencies in their accounts of Nixon's motive for the shooting, their decades-long delay in coming forward with Nixon's confession, and the lack of adequate justification for this lengthy delay greatly undermined the credibility of their assertions. The trial court also did not abuse its discretion in finding Jones's and Johnson's testimony to be unreliable. Johnson was not a witness to the shooting and testified that he "assumed" that Nixon was the shooter. Jones allegedly witnessed the murder when he was around 12 years old, yet never reported his observations to the police and waited decades before sharing his account.

Third, the trial court did not abuse its discretion in weighing the relative strength of the government's trial evidence against the defense evidence of actual innocence. The trial court specifically discussed the weaknesses in the government's trial evidence, the evidence of innocence presented by the defense, and reasonably concluded that appellants did not establish actual innocence of these crimes.

The trial court also properly denied appellants' request for discovery of Detective Rice's disciplinary file under the IPA. Given that Williams and Detective Rice would not testify at the IPA hearing, Detective Rice's prior discipline for misusing a grand-jury subpoena was irrelevant and inadmissible at the IPA proceedings, and the trial court did not abuse its discretion in denying appellants' discovery request.

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion in Denying Appellants' Consolidated IPA Motion.

Appellants contend that the trial court erred: (1) in ruling that the testimony of Marcus Johnson and Tyrone Jones did not constitute new evidence under the IPA (Brief for Bishop at 7-16); (2) in its assessment of the reliability of defense witnesses Keith Fogle, Robert Gaulden, Rodney Gordon, Michael Wonson, Marcus Johnson, and Tyrone Jones (Brief for Brown at 17-37, 40-44); and (3) in failing to give proper weight to the weaknesses in the government's trial evidence and overlooking critical evidence of innocence presented by the defense (Brief for Brown at 37-40, 44-48).[23] These contentions are without merit, and we address each argument in turn.

[23] Brown and Bishop each incorporate and adopt the arguments contained in the other's brief (Brief for Brown at 1 n.1; Brief for Bishop at 22).

A. Standard of Review and Applicable Legal Principles

"In relevant part, the IPA provides that 'at any time,' 'a person convicted of a criminal offense in the Superior Court . . . may move the court to vacate the conviction or to grant a new trial on the grounds of actual innocence based on new evidence.'" *Caston v. United States*, 146 A.3d 1082, 1089 (D.C. 2016) (quoting D.C. Code § 22-4135(a), (b)). As relevant here, "new evidence" is evidence that "[w]as not personally known and could not, in the exercise of reasonable diligence, have been personally known to the movant at the time of the trial or the plea proceeding." D.C. Code § 22-4131(7)(A). "'Actual innocence' or 'actually innocent' means that the person did not commit the crime of which he or she was convicted." D.C. Code § 22-4131(1).

In determining whether to grant relief, "the court may consider any relevant evidence, but shall consider," *inter alia*: "(A) The new evidence; [and] (B) How the new evidence demonstrates actual innocence . . . ." D.C. Code § 22-4135(g)(1)(A)-(B). If, after considering those factors, "the court concludes that it is more likely than not that the movant is actually innocent of the crime, the court shall grant a new trial." D.C. Code § 22-4135(g)(2). If the court "concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice." D.C. Code § 22-4135(g)(3). *See generally Caston*, 146 A.3d at 1089-90.

A trial court's decision to deny a motion to vacate a conviction or for a new trial under the IPA is reviewed for an abuse of discretion. *Williams v. United States*, 187 A.3d 559, 562 (D.C. 2018). Because this Court "must give great deference to the trial court's role as the trier of fact on the ultimate issue of 'actual innocence' under the IPA," it "appl[ies] the clearly erroneous standard of review to the trial judge's rejection of alleged newly discovered evidence offered to prove 'actual innocence.'" *Richardson v. United States*, 8 A.3d 1245, 1248 (D.C. 2010). Accordingly, "the scope of [this Court's] review is narrow, both on the question whether [a defendant] has been diligent in proffering 'new evidence' and whether that evidence establishes [his] 'actual innocence.'" *Id*.

"[T]he ultimate responsibility to determine [a witness's] credibility and whether [a defendant] is more likely than not actually innocent lies with the Superior Court judge," and "the Superior Court judge's factual findings 'anchored in credibility assessments derived from personal observations of the witnesses [are] beyond appellate reversal unless those factual findings are clearly erroneous.'" *Caston*, 146 A.3d at 1099 (quoting *Hill v. United States*, 664 A.2d 347, 353 n. 10 (D.C. 1995)).

B. The Trial Court Correctly Ruled That Tyrone Jones's and Marcus Johnson's Testimony Was Not New Evidence.

"[T]he diligence requirements in the IPA and [Superior Court Criminal] Rule 33 are the same, as both require 'reasonable' or 'due' diligence." *Bouknight v. United States*, 867 A.2d 245, 255 (D.C. 2005). This Court "ha[s] construed 'reasonable diligence' to require parties to pursue potential evidence of which they were not actually aware at the time of trial." *Id*. (citing *Wright v. United States*, 387 A.2d 582, 587 (D.C. 1978)). Indeed, this Court "hold[s] individuals asserting their right to relief on the basis of new evidence to a high standard of diligence in discovering that evidence." *Richardson*, 8 A.3d at 1249.

First, Marcus Johnson's testimony certainly could have been discovered through reasonable diligence at the time of trial. On December 1, 1994, Johnson provided a statement to Detective Rice placing Brown at the scene of Newton's shooting (Brown RIV. 167-69 (Gov't Post-Hearing Br., Gov't Exh. 3); 9/22/22 Tr. 110-11). Based on Johnson's December 1, 1994, statement, the government subpoenaed Johnson to testify at trial (Brown RIV. 144 (Gov't Post-Hearing Br. p. 12); 9/22/22 Tr. 112). Before the trial, Johnson met with the government and informed the prosecutor that his statement to the police implicating Brown was a lie, and the government decided not to call Johnson as a witness (Pet'rs IPA Mot. at 3; 9/22/22 Tr. 112).

Brown and Bishop knew of Johnson's December 1, 1994, statement to the police and that Johnson was originally supposed to be a government witness at their trial (Brown RIV. 144 (Gov't Post-Hearing Br. p. 12); Pet'rs IPA Mot. at 3). They were also "generally aware prior to their trial that the government would not be calling Johnson to testify as a witness" (Brown RIV. 125 (Pet'rs Post-Hearing Br. p. 33)). Johnson had grown up with Brown and Bishop and knew them from the neighborhood (9/22/22 Tr. 106-07, 129). Nonetheless, there is no indication in the record that counsel for Brown or Bishop made any attempt to interview Johnson. Had counsel done so, Johnson could have informed them that the government decided not to call him because he had recanted his statement that he had seen Brown near the scene of the Newton shooting. Because they made *no* attempt to pursue this potential evidence, appellants have failed to establish due diligence. *See Bouknight*, 867 A.2d at 256; *Richardson*, 8 A.3d at 1249-50 (no reasonable diligence where defendant learned of witness's existence on the first day of trial, and witness lived next door to the crime scene at the time of trial).[24]

[24] Appellants contend that Johnson's evidence could not have been known to them at the time of trial because there was nothing in the record to suggest that Johnson would have agreed to an interview with defense counsel or willingly divulged this information to them (Brief for Bishop at 9-10). If they had made such an effort and Johnson refused to speak with them, they would have stronger grounds to argue that they exercised reasonable diligence. Speculation that investigation would have been futile does not establish due diligence. Petitioners seeking relief based on new (continued . . .)

Second, as to Tyrone Jones, there was conflicting evidence in the record regarding whether his cousin Green had conveyed to Brown the information that Jones had allegedly told Green – i.e., that Jones was a witness to the Newton shooting and claimed that Brown and Bishop were not the shooters. Green initially told IPA investigators that he had relayed Jones's favorable information to Brown before Brown was arrested (10/25/22 Tr. 90-91, 97-98, 109-12). Yet just six weeks later, after being reinterviewed by IPA counsel, Green changed his story, stating that he had never conveyed this information to Brown or Bishop (10/25/22 Tr. 99, 111-16). Green did not testify at the IPA hearing to explain this about-face.[25] Without any explanation, the court could not reliably determine whether to credit Green's statements in his first interview (that he had conveyed Jones's information about the Newton murder to Brown) or Green's statements in his second interview (that he had not). The court certainly did not abuse its discretion in concluding that appellants

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evidence are held to "a high standard of diligence in discovering that evidence." *Richardson*, 8 A.3d at 1249. There was no diligence here.

[25] Vick testified that she thought Green's recollection during the second interview was more reliable (10/25/22 Tr. 109-114). Contrary to appellants' claims (see Brief for Bishop at 12-13), the trial court was free to disregard that aspect of Vick's testimony, because "'one witness may not express a view or an opinion on the ultimate credibility of another witness.'" *Allen v. United States*, 837 A.2d 917, 919 (D.C. 2003) (quoting *Carter v. United States*, 475 A.2d 1118, 1126 (D.C. 1984)). In short, Vick's own apparent view that Green was telling the truth during the second interview was not competent or relevant evidence.

had failed to meet their burden to establish due diligence (Brown RIV. 567 (Order p. 31)).[26]

C. The Trial Court Did Not Abuse Its Discretion in Finding the Defense Witnesses Unreliable.

First, the trial court did not abuse its discretion in discrediting the evidence of actual innocence provided by Keith Fogle, Robert Gaulden, Michael Wonson, and Rodney Gordon, each of whom claimed that Nixon had confessed to shooting Newton. As the court pointed out, these witnesses only came forward with this evidence over 20 years after Brown's and Bishop's trial (9/22/22 Tr. 67-68, 76-81, 94-95, 164, 200-01; 10/25/22 Tr. 43-46, 50-51, 61; Pet'rs IPA Mot., Exh. 14 at 1, 8-9). Some of these witnesses justified the delay in coming forward due to their desire to protect their friend Nixon (9/22/22 Tr. 63-65, 96-97, 162-64; 10/25/22 Tr. 32-33, 40-41, 54). Given that Nixon had died on May 10, 1996, less than two months after the conclusion of appellants' trial (Pet'rs IPA Mot. at 19 n.8), the trial court

[26] Appellants' reliance on *Commonwealth v. Mazza*, 142 N.E.3d 579 (Mass. 2020), is misplaced (see Brief for Bishop at 14-15). In *Mazza*, the issue was whether a witness's police statement had been disclosed to defense counsel before trial. There, the defendant was able to produce "several pieces of relevant, circumstantial evidence" suggesting that counsel did not have it. *Id*. at 588. Viewing the circumstantial evidence "as a whole," the appellate court found that the statement had not been disclosed to defense counsel before trial, and thus that the statement constituted newly discovered evidence. *Id*. Here, however, whether Jones's evidence qualified as new evidence under the IPA rested on a much shakier premise. Green did not testify at the hearing, and Vick's opinion that Green's second statement was more credible was irrelevant.

reasonably found that their excuse for the decades-long delay did not hold water. The trial court properly considered the length of the delay and lack of adequate justification for the delay in finding appellants' claims of actual innocence not credible. *See Ramsey v. United States*, 569 A.2d 142, 148-49 (D.C. 1990) (noting "trial court . . . may consider the length of the delay[,] . . . any excuse for that delay, and any resulting prejudice to the government as factors bearing on the credibility of appellant's claim"); *McCray v. Vasbinder*, 499 F.3d 568, 573-74 (6th Cir. 2007) (reversing trial court's determination that defense had made a colorable claim of actual innocence based on testimony of witnesses who "did not see the murder and have not provided a good explanation for why they took so long to come forward with evidence that their relation stands wrongly accused of murder").[27]

The varying accounts of Nixon's motive for the shooting, and the lack of consensus on something as basic as the target of the shooting, further undermined the credibility of these witnesses. Fogle, Gordon, and Gaulden claimed that Nixon intended to shoot Tolbert (all for different reasons) but ended up hitting Newton (9/22/22 Tr. 54-60; 10/25/22 Tr. 35-38, 52-57; Pet'rs IPA Mot., Exh. 14 at 2-7).

[27] Appellants criticize the trial court for relying on *Diamen v. United States*, 725 A.2d 501, 513 (D.C. 1999), for the proposition that "[p]utting the blame on people who are dead and who can no longer defend themselves is particularly suspect" (see Brief for Brown at 21-22). But there was nothing misplaced about the court's reliance on *Diamen* for this common-sense proposition.

Wonson, on the other hand, claimed that Nixon specifically targeted Newton because Newton and Nixon were fighting over Nixon's girlfriend (9/22/22 Tr. 159-60, 177, 180-81). But none of the other witnesses alleged that the motive for the shooting was a dispute over a woman. According to Fogle, Nixon wanted to shoot Tolbert because the two men had been shooting at each other (9/22/22 Tr. 55-56). Gaulden allegedly joined Nixon and Gordon in a conspiracy to kill Tolbert in retaliation for Tolbert's shooting of Gaulden's cousin, Michael Raymond (10/25/22 Tr. 31-35, 37, 57, 62, 68, 80). But Gordon's own affidavit contradicted the conspiracy motive for the shooting offered by Gaulden.[28] According to Gordon, Nixon wanted to shoot Tolbert because Nixon and Tolbert had gotten into a dispute over a craps game (Pet'rs IPA Mot., Exh. 14 at 2-3). Gordon's motive for the shooting was contradicted, in turn, by Johnson, who testified at the IPA hearing that Tolbert, who was his first cousin, never gambled (9/22/22 Tr. 129-30).

Appellants assert that the trial court erroneously focused on "minor" or "insignificant inconsistencies" in discrediting Fogle, Gaulden, Gordon, and Wonson

[28] As the trial court pointed out (Brown RIV. 556 (Order p. 20)), Gaulden's testimony was further undermined by inconsistencies in his written statement about when exactly Nixon realized that he had killed someone other than Tolbert (compare Pet'rs IPA Mot., Exh. 13 (day after Newton's murder) with 10/25/22 Tr. 35, 37 (two days after Newton's murder)). Moreover, Gaulden provided no explanation for how Nixon could have misidentified Newton for Tolbert when the evidence at trial undisputedly established that Newton was shot at point-blank range with the muzzle of the gun pressed against the front of Newton's neck (3/14/96 Tr. 525-26).

(Brief for Brown at 17-18, 26-27, 32-33). Although this Court has noted that a trial court may err if it affords too much weight to trivial inconsistencies, *see Caston*, 146 A.3d at 1097-98; *Stringer v. United States*, 301 A.3d 1218, 1229-31 (D.C. 2023), no such error occurred here. The wildly different accounts of the motive for the shooting – ranging from a dispute over a girl to a dispute over a craps game to a conspiracy to kill in retaliation for the murder of a specific individual to a general beef between two men – cannot be characterized as minor or trivial inconsistencies. Appellants' attempts to gloss over these inconsistencies by noting that all four witnesses generally claimed that Nixon was the shooter are unavailing (see Brief for Brown at 17-18). The trial court certainly did not abuse its discretion in considering these glaring inconsistencies – in conjunction with other factors such as the length of the delay, the lack of adequate justification for the delay, and blaming the murder on a dead man – to conclude that the evidence of innocence provided by these witnesses was unreliable and should not be credited. *See Williams*, 187 A.3d at 565 (distinguishing *Caston* on ground that "none of the contradictions or inconsistencies between [defense witness's IPA] testimony and the evidence at trial [we]re minor" or "pertain[ed] to inconsequential matters that may be explainable") (internal quotation marks and citation omitted).[29]

[29] Moreover, the trial court discredited Gaulden's testimony based on Gaulden's demeanor while testifying (Brown RIV. 558 (Order p. 22)). *See Williams*, 187 A.3d (continued . . .)

Second, even assuming, arguendo, that Johnson's and Jones's testimony constituted new evidence, the trial court did not abuse its discretion in finding that their testimony did not support a claim of actual innocence. At the IPA hearing, Johnson made clear that he was not a witness to the shooting and that he had merely "assumed" that Nixon was involved in the shooting because of the ongoing disputes between Nixon and Tolbert (9/22/22 Tr. 107, 122-24, 130-31, 137, 145). The trial court did not clearly err in discrediting the assumptions or speculations of a witness. *See Rivas v. United States,* 783 A.2d 125, 134 (D.C. 2001) (en banc) (although a "[fact finder] is entitled to draw a vast range of reasonable inferences from evidence, [it] may not base a verdict on mere speculation") (internal quotation marks and citation omitted).

At the IPA hearing, Jones testified that he was a witness to the Newton shooting and claimed that Brown and Bishop were not the shooters (10/11/22 Tr. 24-30, 33-37, 57, 80). The trial court did not abuse its discretion in determining that

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at 564 ("[a]n appellate court will not redetermine the credibility of witnesses where, as here, the trial court had the opportunity to observe their demeanor and form a conclusion") (internal quotation marks omitted). The court also properly relied on Gaulden's extensive criminal history as a factor in concluding that his testimony was incredible (Brown RIV. 558 (Order p. 22)). *See Sherer v. United States*, 470 A.2d 732, 738 (D.C. 1983) ("The general credibility of a witness can be impeached by evidence that the witness has been convicted of a crime punishable by death or imprisonment in excess of a year, or of a crime involving dishonesty or false statement regardless of the punishment.") (citing D.C. Code § 14-305).

Jones's testimony was "entitled to little weight" and was "of little value" (Brown RIV. 567 (Order p. 31)). The IPA hearing was the first time Jones had testified about the shooting he had allegedly witnessed almost 30 years ago when he was around 12 years old (10/11/22 Tr. 24, 43, 97). Jones also had never reported what he had observed that evening to law enforcement (10/11/22 Tr. 37-38, 60-61, 92, 98-99).[30] The trial court could reasonably discount Jones's claims given Jones's lengthy delay in coming forward with this evidence. *See Valdez v. United States*, 320 A.3d 339, 363-66 & n.56 (D.C. 2024) (witness's three-year delay in reporting defendant's confession left "implication that her belated account of his murder confession might have been a fabrication"); *Bangura v. United States*, 248 A.3d 119, 125 (D.C. 2021) (Bangura's unexplained delay in asserting his ineffectiveness claim "substantially diminished its credibility").

Furthermore, the trial court correctly concluded that Jones's "identification" of Nixon was wholly unreliable, given that the identification procedure was conducted almost 30 years after the November 1994 murder. "[F]actors to be considered in determining the reliability of an identification include (1) the witness's

[30] In 2011, approximately 17 years after the murder, Jones provided a sworn statement to Brown's investigator, Ronetta Johnson (Pet'rs IPA Mot., Exh. 10; 10/11/22 Tr. 41-43, 86-91). It was the first time Jones had given a written account of his observations of the Newton murder (10/11/22 Tr. 86). In this affidavit, Jones did not provide a description of the shooter (10/11/22 Tr 86-87).

opportunity to observe the perpetrator at the time of the crime, (2) the degree of attention the witness paid to the perpetrator, (3) the accuracy of any prior descriptions of the perpetrator provided by the witness, (4) the level of certainty demonstrated by the witness at the time of the identification, and (5) the lapse in time between the crime and the identification procedure." *Long v. United States*, 156 A.3d 698, 707 (D.C. 2017) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). Here, even if Jones had ample opportunity to observe the shooter, the almost 30-year lapse in time between the murder and the identification procedure would render his identification of Nixon unreliable. *See Morales v. United States*, 248 A.3d 161, 177 (D.C. 2021) ("The longer the gap in time between the sighting and the identification procedure, the better the opportunity to observe must be to provide any assurance of reliability."); *Biggers*, 409 U.S. at 201 ("a lapse of seven months . . . would be a seriously negative factor in most cases").

D. The Trial Court Properly Weighed the Weaknesses of the Government's Trial Evidence Against the Defense Evidence of Innocence.

Appellants assert that the trial court erred in failing to critically weigh the defense evidence of innocence against the weaknesses in the government's trial evidence (Brief for Brown at 37-39, 44-48). The record belies appellants' claim.

The trial court explicitly stated in its 51-page order that it had considered both the evidence presented by the defense at the IPA hearing "as a whole" and the

"weaknesses in the government's trial evidence highlighted both at trial and during these IPA proceedings" (Brown RIV. 585, 587 (Order p. 49, 51)). Only after doing so did the court conclude that the defense evidence of innocence was outweighed by the government's compelling trial evidence, in particular the testimony of the three independent eyewitnesses (Keith Williams, Carol Jeffries, and James Jones) who knew Brown and Bishop and implicated them in Newton's murder (Brown RIV. 585-87 (Order pp. 49-51)). Moreover, the trial court specifically discussed the weaknesses in the testimony of these three trial eyewitnesses (Brown RIV. 541-42, 544-45, 585-86 (Order pp. 5-6, 8-9, 36, 49-50)), as well as the IPA evidence (Brown RIV. 551-85 (Order pp. 15-49)).

Given the record here, appellants' reliance on *Caston* and *Faltz v. United States*, 318 A.3d 338 (D.C. 2024), is misplaced. In *Caston*, the trial court did not discuss the weaknesses in the government's trial evidence at all in evaluating the strength of the defendant's IPA motion. *See Caston*, 146 A.3d at 1099-1100 ("[I]t was incumbent on the court to at least consider the potential weaknesses in the government's case that appellant cited in his IPA papers."). Likewise, in *Faltz*, the trial court did not "fully grapple" with the other ample evidence of innocence that the defendant had presented beyond his own testimony, and thus this Court remanded the case for "further analysis of the totality of the evidence that [the defendant had] presented in his IPA claim." *Faltz*, 318 A.3d at 349-50.

Although Brown and Bishop may disagree on how much weight the trial court placed on the weaknesses in the government's trial evidence in relation to the defense IPA evidence of innocence, it is ultimately the "fact finder's prerogative to weigh the evidence." *Simms v. United States*, 244 A.3d 213, 217 (D.C. 2021); *accord Parker v. United States*, 254 A.3d 1138, 1150 (D.C. 2021) ("Where, as here, a trial judge presided over [a] factfinding hearing and was able to observe and assess the demeanor of the witnesses, we take care to avoid usurp[ing] the prerogative of the judge, as the trier of fact, to determine credibility and weigh the evidence.") (internal quotation marks and citation omitted). This Court should therefore accord "due deference" to the trial judge's weighing of the evidence. *Simms*, 254 A.3d at 1150.

II. The Trial Court Properly Denied Appellants' Joint Motion for Discovery Under the IPA.

Brown and Bishop contend that the trial court erred in denying their discovery request for Detective Rice's disciplinary file (Brief for Bishop at 17-22). They are mistaken.

A. Standard of Review and Applicable Legal Principles

The IPA permits defendants to request post-trial discovery only "to the extent that, the judge, in the exercise of the judge's discretion and for good cause shown, grants leave to do so, but not otherwise." D.C. Code § 22-4135(e)(4).

"This [C]ourt reviews denials of post-trial discovery motions under an abuse of discretion standard." *(Kevin) Smith v. United States*, 686 A.2d 537, 551 (D.C. 1996) (citing *Gibson v. United States*, 566 A.2d 473, 478 (D.C. 1989)). "In exercising its discretion in ruling on a discovery request, the trial court must not act arbitrarily or willfully but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Gibson*, 566 A.2d at 478 (internal quotation marks and citations omitted). "Courts may use suitable discovery procedures, civil or criminal, to aid in disposing of post-trial motions for discovery." *(Kevin) Smith*, 686 A.2d at 551.

B. Discussion

Appellants requested the disciplinary file of MPD Detective Rice to determine whether "he ha[d] a history of misconduct" related to witness coercion that would support the defense theory that Keith Williams and Marcus Johnson[31]

[31] Although appellants claimed in their joint discovery motion that Detective Rice coerced Johnson into identifying them as the shooters, the record belies their assertions. In both his December 1, 1994, statement to the police, and his testimony at the IPA hearing, Johnson made clear that Detective Rice and the other detectives had treated him fairly and that no one had promised him anything in exchange for his statement (Brown RIV. 167-69 (Gov't Post-Hearing Br., Gov't Exh. 3); 9/22/22 Tr. 139-41). Indeed, appellants do not develop any legal argument on appeal as to the relevance of Detective Rice's personnel record with respect to Johnson's testimony, and have abandoned that claim. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993) (where "[a]ppellants provide no supporting argument in their brief for [a] general assertion . . . we consider [it] to be abandoned").

were coerced into identifying Brown and Bishop as the shooters (Brown RI. 328-29 (Joint Mot. for Discovery at 3-4)). With the agreement of the parties (Brown RI. 329 (Joint Mot. for Discovery at 4); Brown RI. 365 (Gov't Response at 5)), Judge Park conducted an in camera review of the MPD personnel and disciplinary files of Detective Rice, but found nothing that related to witness intimidation or coercion (9/30/22 Tr. 18-19; 10/11/22 Tr. 6, 116; 10/25/22 Tr. 13-14).

Judge Park initially ruled that Detective Rice's misuse of a grand-jury subpoena would be relevant for purposes of cross-examining Detective Rice under a corruption-bias theory (10/25/22 Tr. 13-14). *See (Shawn) Smith v. United States*, 180 A.3d 45, 53 (D.C. 2018) (defining "corruption bias"). Subsequently, however, the defense declined to call Keith Williams to the stand and stated that it would "no longer [be] relying on [ ] Williams'[s] statement," in which Williams recanted his trial testimony and claimed that police coerced him to identify Brown and Bishop (10/25/22 Tr. 10, 17-18; Pet'rs IPA Mot. at 27-28, Exh. 7 at 3-4, 6-10). In light of the defense representations, the government decided that it would not call Detective Rice as a witness to rebut Williams's allegations that Detective Rice had corrupted the judicial process in obtaining his statement (10/25/22 Tr. 10, 17-18). Given "this change of circumstance" (10/25/22 Tr. 18), the trial court did not abuse its discretion in ultimately denying the defense request for production of Detective Rice's disciplinary file. Because Williams and Detective Rice would not testify at the

hearing, Detective Rice's credibility was no longer relevant. *See Matter of M.W.G.,* 427 A.2d 440, 443-44 (D.C. 1981) (no abuse in granting government's motion to quash juvenile's subpoena duces tecum where, even if it existed, material sought would not be admissible); *United States v. Akers*, 374 A.2d 874, 877 (D.C. 1977) (abuse of discretion to grant defendant's request for discovery of police officer's personnel file regarding use of force where officer's prior acts of violence would not have been admissible).

Appellants contend, as they did below (see 10/25/22 Tr. 15-16), that Detective Rice's disciplinary file remained relevant to the IPA proceedings because Detective Rice's credibility (or lack thereof) would help the trial court to evaluate the credibility of Williams's trial testimony (Brief for Bishop at 20-22). However, at trial, Williams expressly denied that Detective Rice had said anything intimidating or threatening to him, and further denied that he had identified Brown and Bishop because he feared Detective Rice (3/11/1996 Tr. 151, 153-56). The first time Williams alleged that Detective Rice had coerced him into falsely identifying Brown and Bishop was in his July 19, 2011, statement recanting his trial testimony (Pet'rs IPA Mot., Exh. 7 at 3-4, 6-10). But appellants withdrew this statement and did not rely on it in arguing their IPA motion (10/25/22 Tr. 17-18). Thus, there was no basis

to interject into the IPA proceedings information from Detective Rice's disciplinary file that he had misused a grand-jury subpoena for an unrelated personal reason.[32]

[32] Appellants contend that even if no single error was sufficient to require reversal, the cumulative effect of the errors requires reversal (Brief for Bishop at 22-23). As we argue supra, however, the trial court did not err at all.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant Brown, Margaret Abernethy, Esq., Thomas Carter, Esq., and Thomas Heslep, Esq., and counsel for appellant Bishop, Peter H. Meyers, Esq., on this 6th day of May, 2025.

/s/
ANNE Y. PARK
Assistant United States Attorney