BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 22-CF-116

MASON BINION, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2018-CF1-01370

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ISSUES PRESENTED

I. Whether the trial court plainly erred when finding appellant Mason Binion competent, where it had received an internally inconsistent report that did not apply the correct standard for competency, it permissibly undertook its own inquiry and engaged in a thorough colloquy tailored to meet the requirements for competency, and its inquiry comported with all statutory and constitutional requirements.

II. Whether the trial court erred in declining to give a self-defense instruction where the evidence showed that Binion and his co-conspirators executed Michael Taylor while Taylor was lying face-down in an alley.

III. Whether there was sufficient evidence to support the trial court's aiding-and-abetting and conspiracy instructions where, regardless of whether or not the evidence conclusively established that Binion pulled the trigger, it did conclusively establish that Binion was at the center of the conspiracy to kill Taylor and that he associated himself with the murder, participated in it as in something that he wanted to bring about, and sought by his actions to make it succeed.

COUNTERSTATEMENT OF THE CASE

On February 12, 2019, a superseding indictment charged Binion with one count of first-degree premediated murder while armed (D.C. Code §§ 22-2101, -4502) (Record on Appeal (R.) 18). A jury trial began before the Honorable Ronna L. Beck on January 28, 2020 (1/28/20 Tr. 24). On February 12, 2020, the jury found Binion guilty as charged (R. 70). On February 25, 2022, the Honorable Marisa J. Demeo sentenced Binion to 45 years' incarceration (R. 99). Binion timely appealed (R. 100).

The Trial

The Government's Evidence

On the afternoon of June 21, 2008, the victim, Michael Taylor, approached his acquaintance Calvin Tillman about facilitating a drug deal involving marijuana (1/28/20 Tr. 144-49, 180, 184-85). Taylor knew the buyers, including Binion (1/28/20 Tr. 79, 149; 1/29/20 Tr. 58). Tillman contacted the potential seller, who told Tillman to meet him at a hotel (1/28/20 Tr. 149-50). When Taylor and Tillman met with the buyers, the buyers asked about any need to bring guns, including "a nine" (*id.* at 151-53, 194). Although Tillman warned that it was not that type of transaction, he believed that the buyers were heavily armed (*id.* at 152-53, 212). The group traveled to the hotel area (1/28/20 Tr. 154-55). When they arrived, Taylor and

Tillman realized that the buyers had not provided enough money (*id.* at 160-61, 164). Because Tillman thought that the buyers were setting him and Taylor up, Tillman decided to take the money (*id.* at 164, 169). He and Taylor veered off from the rest of the group before they got to the hotel, went to a nearby bus stop, and split up (*id.* at 207-09).

Taylor's childhood friend, Kevaughn Jones, picked Taylor up (1/29/20 Tr. 49-50, 53-56). Taylor nervously told Jones that the drug deal had gone badly (*id.* at 56-58, 61, 118-19). Jones dropped Taylor off at the home of Taylor's friend Christian Hernandez (*id.* at 174, 178-79). While he was at Hernandez's home, Taylor asked for Hernandez's phone so he could call Binion (*id.* at 180). Hernandez saw Taylor speaking with someone on the phone, but Hernandez did not know who it was (*id.* at 180, 182-83). When Taylor finished the call, he told Hernandez he was going to try to find Binion (*id.* at 186).

Hernandez dropped Taylor off at the Coffield Recreation Center in Maryland, where Taylor met up with Jones again (1/29/20 Tr. 69-73, 192). Jones saw that Taylor had an unloaded .380-caliber Glock gun (*id.* at 62-64, 134-35). Taylor made some phone calls and told Jones that someone was going to pick him up (*id.* at 73-74). About 15 to 20 minutes later, a dark blue Mercedes truck pulled up (*id.* at 75-76). Taylor approached one of the windows and "jerk[ed] back" as he spoke to someone inside (*id.* at 80). He opened the rear passenger door and got in (*id.* at 81,

150; 1/28/20 Tr. 92). Binion was in the front passenger seat (1/29/20 Tr. 82; 1/28/20 Tr. 92). Besides Taylor and Binion, three other people were in the Mercedes (1/29/20 Tr. 82-83). The car sped off (*id.* at 85). Jones followed as the Mercedes made several U-turns, but he eventually stopped following it (*id.* at 85-86, 90-91).

The government's main witness to the murder itself was Joshua Massaquoi, who was one of the four men in the Mercedes when it picked up Taylor (2/3/20 Tr. 155-56). Massaquoi initially testified inconsistently with his grand-jury testimony at several points (2/3/20 Tr. 64-136). Among his claims were that he had committed the murder by himself; that he did not remember the events of June 21-22; that he had not gone with Binion to get a gun before the murder; and that he could not remember if Binion was with him and others when they picked up Taylor at the community center (*id.* at 64, 71, 96, 99, 110). In part by using Massaquoi's grand-jury testimony to impeach him, the government was able to establish the basic chain of events of that night (*id.* at 64-136). As explained by Massaquoi, after the drug deal went poorly, Binion was upset because "they [had] got[ten] played" (*id.* at 78, 93-94). Massaquoi went with Binion to get a. 22-caliber gun (*id.* at 99-101). Massaquoi, Binion, and two other men, Victor Carvajal and Derrick Williams, drove to Silver Spring, Maryland, in Binion's blue Mercedes truck (*id.* at 69, 103-06). Binion sat in the passenger seat (*id.* at 106). Massaquoi cleaned the gun because it had his fingerprints on it (*id.* at 107-08). Binion asked who wanted to kill Taylor (*id.*

at 108-09). The men picked up Taylor at the community center, entered Washington, D.C., and drove to an alley next to Emerson Street (*id.* at 113-18).

Massaquoi testified that Williams, Carvajal, and Taylor got out of the car (2/3/20 Tr. 119, 122-23). Taylor "got shot," but Massaquoi claimed at trial not to remember who had shot him (*id.* at 120). The government impeached Massaquoi with his grand-jury testimony, in which he testified that Carvajal hit Taylor from behind and then Binion shot Taylor (*id.* at 120-21). Massaquoi had seen Binion take the gun out of a backpack, and he saw sparks when the men were in the alley (*id.* at 126-27). Before Binion shot him, Taylor said, "No, Mason, don't" (*id.* at 125). The men drove away from the scene, and Massaquoi hid the murder weapon in the woods behind an apartment complex (*id.* at 130-31, 134-35).

Massaquoi clarified his trial testimony following a lunch recess, explaining that he had previously testified otherwise because he was scared but his lawyer had told him to tell the truth (2/3/20 Tr. 150, 158, 193). He confirmed that Binion and Williams were at Binion's apartment when he arrived at the beginning of the night (*id.* at 150-51). Binion told Massaquoi about the drug deal and left (*id.* at 151). When Binion returned, he asked Massaquoi to get a gun (*id.* at 151, 216). Binion and Massaquoi drove to Massaquoi's sister's house and got a long-nosed .22-caliber handgun (*id.* at 151, 220, 223; 2/4/20 Tr. 15-16). They returned to Binion's residence, where they were joined by Williams and Carvajal (2/3/20 Tr. 152). All

four men traveled to Silver Spring and stopped the car on a side street (*id.*). Massaquoi wiped the gun down and cleaned the bullets because he knew that his fingerprints were on them (*id.* at 153). He put the gun and ammunition back in a book bag and placed it between Binion's legs in the passenger-seat area (*id.* at 153-54; 2/4/20 Tr. 73). The gun had about 9 to 13 rounds in it (2/4/20 Tr. 17-19). Binion asked, "[W]ho's gonna do it?" (2/3/20 Tr. 155). They went to the community center, where Taylor got in the car; Binion was in the passenger seat (*id.* at 149, 155-56). They drove towards D.C., lost the car following them, entered the city, and drove to an alley near Emerson Street (*id.* at 156-57, 159-60). Williams, Carvajal, Binion, and Taylor got out of the car while Massaquoi stayed in the driver's seat (*id.* at 161-62). Massaquoi saw Taylor standing near the car and then could not see him any longer, as if Taylor was lying down on the ground (*id.* at 162). He heard Taylor say, "No, Mason," while Binion and Carvajal were standing over him (*id.* at 162-63). Massaquoi heard gunshots and saw sparks (*id.* at 163-64). He knew that Taylor had "[gotten] hit" (*id.* at 162). Massaquoi did not see who had shot Taylor and did not see Binion holding the gun during the shooting itself, but he thought that Binion had the gun because he had had it last (*id.* at 163-64).[1]

[1] A witness who lived in the 600 block of Farragut Street, N.W., testified that she heard a "pop" sound like a gunshot followed by a man loudly saying "ow" and then a "pop-pop" sound (1/29/20 Tr. 9, 12-13; 2/4/20 Tr. 150). The second "pop-pop" followed right after the "ow" (1/29/20 Tr. 13-14). About 10 to 15 seconds later, she (continued . . .)

Massaquoi confirmed that he, Binion, Williams, and Carvajal drove away from the scene and back to Binion's house (2/3/20 Tr. 164-65). Carvajal moved Taylor's car, which had been parked nearby (*id.* at 165-66, 2/4/20 Tr. 132). When Massaquoi got the gun back, there were no bullets in it (2/4/20 Tr. 60). He stashed it behind an apartment complex and retrieved it the next morning (2/3/20 Tr. 167-68). He and Binion returned to Massaquoi's sister's house, where Massaquoi discarded the gun in the woods (*id.* at 168-69).

The next morning, police discovered Taylor's dead body in the alley (1/29/20 Tr. 217, 234-37). He was face down in a grassy area in front of a detached garage that ran along the rear of the 600 block of Emerson Street and the 600 block of Farragut Street, N.W. (2/4/20 Tr. 145).[2] Police recovered (1) two .22-caliber cartridge casings; (2) two unfired .22-caliber cartridges; (3) another unfired .22-caliber cartridge from the top of Taylor's body; and (4) a 9-millimeter cartridge casing (1/29/20 Tr. 217, 222-27). The .22-caliber cartridges and casings were found

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saw a car that was larger than a sedan but smaller than a large truck quickly drive past her garage (*id.* at 14-15, 19-21). She did not remember the exact color of the car but remembered that it was dark, but not black (*id.* at 21-22).

[2] A medical examiner determined that Taylor had suffered two gunshot wounds, one to the left side of the back of his head and one that grazed a finger on his left hand (1/30/20 Tr. 31). The gunshot to his head had killed him "pretty much immediately" (*id.* at 33, 47). The examiner did not see any burned or unburned gunpowder on Taylor's head, which was unsurprising because Taylor's hair was "very dark" and made any gunpower "very hard to see" (*id.* at 34-35). Thus, the examiner could not tell how far the shooter had been from Taylor (*id.* at 48).

next to Taylor's body (*id.* at 227-28). The 9-millimeter casing, however, was found a considerable distance from Taylor's body, further down the alley (Government Exhibit (Gov. Ex.) 301;[3] 1/29/20 Tr. 222-23). In addition, the 9-millimeter casing was rusty and appeared to be older than the .22-caliber ammunition, which was "shiny and metallic" (2/4/20 Tr. 147). Thus, "it appeared [that the 9-millimeter casing] had been sitting out there for a while" (*id.*). Taylor's right hand was holding a five-dollar bill and a hat (1/29/20 Tr. 230, 245).

An expert in firearms and toolmark examination testified that the two .22-caliber cartridge cases had consistent markings and that it could not be excluded that they were fired from the same firearm (1/30/20 Tr. 65-66, 70, 75; 2/3/20 Tr. 18). The 9-millimeter cartridge casing, meanwhile, could not have been fired from the same gun that had fired the .22-caliber casings (1/30/20 Tr. 76). Bullet fragments found in Taylor's cerebellum and body bag were consistent with a .22 rimfire cartridge (*id.* at 45-46, 77-78). The three unfired .22-caliber cartridges were all the same type of long-rifle Remington bullet (*id.* at 81, 84). When police later executed a search

[3] The government has moved to supplement the record with Government Exhibit 301.

warrant at Binion's residence, they discovered a .22-caliber round with a Remington stamp on it (2/3/20 Tr. 46, 51, 55, 57-59; 1/30/20 Tr. 79).[4]

SUMMARY OF ARGUMENT

The trial court did not plainly err when finding Binion competent to stand trial. After receiving an internally inconsistent report that did not apply the correct standard for competency, the trial court permissibly undertook its own inquiry and engaged in a thorough colloquy tailored to meet the requirements for competency. That process conformed with both statutory and constitutional requirements.

The trial court did not err in declining to give a self-defense instruction. There was no affirmative evidence that Binion acted in self-defense. Instead, the evidence showed that Binion and his co-conspirators executed Taylor while Taylor was lying face-down in an alley.

There was sufficient evidence to support the trial court's aiding-and-abetting and conspiracy instructions. The evidence did not conclusively establish that Binion pulled the trigger of the gun that killed Taylor, but it did conclusively establish that

[4] The defense put on a short case in which it recalled the crime scene officer to refresh him on the fact that some debris on scene, including a rock and what appeared to be a used condom, were not collected as evidence (2/4/20 Tr. 233-34). It also read into evidence stipulations that a now-deceased witness who lived near the crime scene had heard gunshots shortly after midnight on June 22 and had seen a small black car speeding past her house through an alley (2/5/20 Tr. 25).

Binion associated himself with the murder, participated in it as in something that he wanted to bring about, and sought by his actions to make it succeed. Similarly, the evidence showed that Binion was at the center of the conspiracy to kill Taylor.

ARGUMENT

I. The Trial Court Did Not Plainly Err Regarding Binion's Competency.

Binion first argues (at 16-28) that the trial court erred by finding him competent without conducting a competency hearing. This argument, raised for the first time on appeal, should be rejected. The court conducted the requisite hearing and permissibly found Binion competent.

A. Additional Background

At a pretrial show cause hearing on March 22, 2019, the government told the court that it had seen Binion "talk[ing] a lot out loud" either to himself or to the prosecutor while standing in the hallway (Appellant Appendix on Appeal (A) at 6). This observation followed a report from Binion's caseworker that Binion's mental health had declined (*id.* at 6-7). Binion acknowledged that he talked to himself but said that he did so "to get in my perspective" (*id.* at 7). The government asked that the court address the situation (*id.*). Binion did not believe that he had mental health issues but consented to an examination to allay any concerns (*id.* at 8-9). The trial

court observed that Binion "appear[ed] to be just a different kind of person than most," but the court did "not know what to make of with regard to it" (*id.* at 9-10).

The trial court ordered that Binion undergo a preliminary screening related to his competency (R. 25). A week later, Dr. Lia N. Rohlehr wrote a report opining that Binion was incompetent to proceed with his case (R. 26 at 4). Dr. Rohlehr recommended that Binion be scheduled for a full competency evaluation (*id.*). At a hearing on April 1, 2019, defense counsel had no objections to Dr. Rohlehr's report, but she relayed that Binion did not think that these inquiries were necessary (4/1/19 Tr. 3). The government deferred to the court as to whether Binion needed further treatment (*id.*). The trial court ordered a full competency examination (R. 27).

On May 6, 2019, Dr. Rohlehr issued a new report based on a 35-minute interview with Binion and a review of the affidavit in support of the arrest warrant, Binion's Pretrial Services Report, and her prior report (R. 29 at 1-2). Because Binion disliked Dr. Rohlehr, she decided to "terminate[ ]" the evaluation early and not ask "the formal line of competency-related questions" (*id.*). Dr. Rohlehr admitted that Binion "demonstrated a factual understanding of the court process and the proceedings against him" during the initial screening, and she assumed that he continued to possess that knowledge (*id.*). She opined that Binion had paranoid feelings towards his attorneys and the government (*id.* at 3-4). She also opined that Binion was incompetent to proceed even though she reiterated that Binion

"possesses a factual understanding of his case and the legal system" (*id.* at 4). She stated that "additional time is necessary to assess whether he is likely to attain competence in the foreseeable future" (*id.* at 4).

The trial court held a hearing the next day. Defense counsel expressed a desire to hire her own expert to challenge the report (5/7/19 Tr. 3). The government was "not sure we've made any progress here because, although [Dr. Rohlehr] has made a determination that he's not competent to proceed at this point, she hasn't asked any of the standard questions that are always asked" (*id.*). Thus, although the expert had opined that Binion was incompetent to proceed, it was "not your standard incompetent-to-proceed kind of opinion" (*id.*).

The trial court agreed that the language of the report did not seem to match its conclusions (5/7/19 Tr. 4). It noted that the report stated that Binion had "a factual understanding of the proceedings against him [and] the legal system in general," but the report also stated that "his rational understanding and his ability to consult with counsel are likely be affected by his current mental state" (*id.*). Nor had Dr. Rohlehr "done the standard competency examination" (*id.*).

The trial court accordingly doubted that the report "ma[de] out the strongest case that he's not competent" (5/7/19 Tr. 4). It noted the presumption that defendants are competent, and it stated that it did not "see much in here that shakes [the court] from that" (*id.*). The court further stated that "a lot of people who are exhibiting what

[Dr. Rohlehr] says are symptoms" and "what Mr. Binion says is his personality" were competent (*id.*). Indeed, "[v]irtually everyone who exhibits those symptoms is competent" (*id.*).

The government did not have any concerns about competence (5/7/19 Tr. 5). The trial court agreed with the government's statement that the report was "a little bit of a non sequitur" and did not "seem to address the standard" (*id.*). Defense counsel acknowledged that Binion "certainly" had "idiosyncrasies" and that he might have mental health concerns, but she again stressed that he did not believe that he had mental health issues (*id.*). Counsel therefore was "certainly" comfortable with challenging the report (*id.*).

Defense counsel did not object, however, to the trial court's suggestion that it "do[ ] a very limited competency voir dire" (5/7/19 Tr. 5-6). During that colloquy, Binion correctly told the court that the lead charge in his case was murder, and he recognized that he was facing a lengthy period of confinement if convicted[5] (*id.* at 6). He cogently explained the difference between pleading guilty and not guilty (*id.* at 6-7). He understood that if he continued to plead not guilty, there would be a trial, which he asserted he would "win" (*id.* at 7). Although at first he stated that he did

[5] Binion stated he was facing "ninety years in jail," which, although not necessarily correct, displayed an understanding that he was facing "an extensive period of jail" (5/7/19 Tr. 6).

not understand the prosecutor's role in the trial, he later told the trial court that the prosecutors had to prove that he was guilty beyond a reasonable doubt (*id.* at 8). He also understood his counsel's role, which was to "defend [him]" by doing, he hoped, "everything possible" (*id.*). He understood that the judge's role was to "proceed over everything" (*id.* at 9).

The trial court subsequently acknowledged that there "[m]ight be issues with the way [it was] asking questions about the conduct of the trial" and that "there are things that [Binion's counsel] can maybe educate Mr. Binion on," but the court could "see really no competency issue whatsoever at this point" (5/7/19 Tr. 9). The government agreed (*id.*). The court reminded defense counsel that she could raise Binion's competency again at any time, and counsel affirmed that she "absolutely" understood (*id.* at 11). The court found Binion competent to stand trial (*id.*).

No one appears to have raised Binion's competency again either before or during the trial. On April 2, 2020, after Binion was convicted, the presentence report stated that Binion denied any mental health diagnoses or illnesses (Supplemental Record (Supp. R.) #14 at 31 p. 18). Defense counsel did not have any corrections to that report at sentencing (2/25/22 Tr. 7). None of Binion's mother, Binion's counsel, or Binion himself brought up any mental health concerns at the sentencing hearing even though all three individuals addressed the court (2/5/22 Tr. 22-33, 35-36).

B. Standard of Review and Applicable Legal Principles

"In determining whether a defendant is competent to stand trial, the trial court must decide whether a defendant has 'a rational [and] factual understanding of the proceedings against him' and whether he 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" *Williams v. United States*, 268 A.3d 240, 246 (D.C. 2016) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

"[T]he trial court has wide discretion in determining competency to stand trial[.]" *Holmes v. United States*, 407 A.2d 705, 706 (D.C. 1979). Accordingly, "[a]ppellate review of a competency finding is deferential because the determination is primarily factual in nature." *Hargraves v. United States*, 62 A.3d 107, 111 (D.C. 2013) (internal quotation marks omitted). "A finding of competency will not be set aside upon review unless it is clearly arbitrary or erroneous." *Bennett v. United States*, 400 A.2d 322, 325 (D.C. 1979) (internal quotation marks omitted).

"In determining whether a competency hearing is warranted, factors such as a defendant's irrational behavior, demeanor at trial, prior medical opinions, evidence of mental illness, and representations by defense counsel are all relevant; courts must examine the totality of the circumstances: all evidence should be considered together, no single factor stands alone." *Gorbey v. United States*, 54 A.3d 668, 678 (D.C. 2012). "A court's decision whether to hold a competency hearing in the

absence of a request for one is . . . reviewed for abuse of discretion." *Phenis v. United States*, 909 A.2d 138, 152 (D.C. 2006).

Because Binion did not object to the trial court's colloquy, its competency evaluation, or its competence finding (5/7/19 Tr. 5-6, 11-12), this Court should review his claim for plain error. *See, e.g.*, *United States v. Utsick*, 45 F.4th 1325, 1338 (8th Cir. 2022); *cf. Hooker v. United States*, 70 A.3d 1197, 1201 n.4 (D.C. 2013) (declining to apply plain-error review to findings following retrospective competency evaluation agreed to by the parties, but implying that plain-error review would have been appropriate for unpreserved challenge to original competency finding). "Plain error is found only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." (*Steven*) *Anderson v. United States*, 857 A.2d 451, 459 (D.C. 2004) (quoting *Bates v. United States*, 834 A.2d 85, 92 (D.C. 2003)). "Under the test for plain error, appellant first must show (1) error, (2) that is plain, and (3) that affected appellant's substantial rights. Even if all three of these conditions are met, this court will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010).

C. Discussion

The trial court did not err, plainly or otherwise, while addressing Binion's competency. To the contrary, it followed the statutory requirements and thoroughly examined Binion's competency before permissibly finding that he was competent. D.C. Code § 24-531.04 sets out the procedures for competency hearings. That statute provides that the court shall hold "[a] hearing" to determine the defendant's competence no more than 45 days after the court orders the competency examination. D.C. Code § 24-531.04(a)(1)(B).[6] The trial court ordered the examination on April 1, 2019, and it held a hearing to address it on May 7, 2019 (R. 27; 5/7/19 Tr. 2). At that hearing, the "defendant is presumed to be competent," and the party asserting his incompetence must prove it by a preponderance of the evidence. D.C. Code § 24-531.04(b). No party attempted to prove Binion's incompetence because all parties believed him to be competent (5/7/19 Tr. 3, 5, 11). Nonetheless, the court addressed Dr. Rohlehr's report and examined the issue (*id.* at 4-6). When a court does so, it "*may* call its own witnesses and conduct its own inquiry." *See* D.C. Code § 24-531.04(b) (emphasis added).

The court chose from amongst these permissible options and decided to conduct its own inquiry (5/7/19 Tr. 5-9). The statute does not mandate any

[6] 45 days applies in this case, rather than 30 days, because Binion was released and ordered to participate in an outpatient examination (R. 27; R. 29).

procedures for that inquiry. But the court appropriately tailored the inquiry to the standard for competence—whether "a defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and has a rational, as well as a factual, understanding of the proceedings against him or her." D.C. Code § 24-531.01(1). Accordingly, the court asked Binion (1) what he was accused of; (2) the penalty for that crime; (3) whether he understood that he had pleaded not guilty; (4) the differences between a plea of not guilty and a plea of guilty; (5) the benefits of pleading guilty; (6) what happens when he pleads not guilty; (7) the role of the prosecutor, Binion's lawyer, and the court; and (8) what the government's burden would be at trial (5/7/19 Tr. 6-9).

Binion either provided a correct response to these questions when they called for a correct response, or a rational response when they allowed for a range of responses. He understood that he was charged with murder, that he would face a lengthy period of incarceration if convicted, that there were benefits to pleading guilty but "not [for him]" because he believed himself innocent, that his attorney was appointed to defend him, that the prosecutor had to prove the case against him beyond a reasonable doubt, and that the judge presided "over everything" (5/7/19 Tr. 6-9). These answers demonstrated that Binion both could effectively consult with his lawyer and that he understood the nature of the proceedings. *See* D.C. Code § 24-531.01(1). Indeed, Binion had clearly effectively consulted with his lawyer to

that point because he had told her that he did not have mental health problems, and she told the court that she was "certainly" comfortable challenging the report based on their discussions (5/7/19 Tr. 5). *See also (Mike) Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991) ("While the opinion of [defendant's] counsel certainly is not determinative, a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings."); *Blakeney v. United States*, 77 A.3d 328, 357 (D.C. 2013) (noting that "trial counsel's actual experience working closely with [the defendant] on his defense belied the conclusion that he was incompetent").[7]

Having concluded its inquiry, the trial court followed the statute's requirement to either "[f]ind that the defendant is competent; or [f]ind that the defendant is incompetent[.]" D.C. Code § 24-531.04(c)(1)(A)-(B). The court found Binion competent (5/7/19 Tr. 9). No party challenged this finding. Having found Binion competent, the trial court "resume[d] the criminal case[.]" D.C. Code § 24-531.04(c)(2). Nothing more was required.

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[7] Binion speculates (at 18 n.5) that his counsel might not have raised issues about Binion's competency because it would have put her in "a difficult ethical position." But there is no evidence in the record for this speculation, and as described in text supra, the existing record reflects that defense counsel genuinely and reasonably did not believe that a finding of incompetency was warranted. In any event, excusing a failure to object on the basis of speculation about counsel's motives would encourage precisely the kind of "sandbagging" that the plain-error rule was supposed to prevent, i.e., "remaining silent about [the defendant's] objection and belatedly raising the error only if the case does not conclude in his favor." *See Puckett v. United States*, 556 U.S. 129, 134 (2009).

Binion's counterarguments lack merit. He first argues (at 18-21) that the court was required to hold a competency hearing. But the court *did* hold a hearing, pursuant to D.C. Code § 24-531.04 within the prescribed timeframe, to determine Binion's competency in light of Dr. Rohlehr's report (5/7/19 Tr. 2-3). Whether the court formally labeled the hearing as a "mental observation hearing" or a "competency hearing" makes no difference (*id.* at 2). *See, e.g.*, *State v. Johnson*, 551 N.W.2d 742, 752 (Neb. Ct. App. 1996) (noting that whether a separate "competency hearing" was held was largely irrelevant because "it is apparent from the record of the plea hearing that competency was considered by the court at that time"). All parties were aware that the purpose of the hearing was to determine Binion's competency in light of the report (5/7/19 Tr. 2-3). In arguing for the need for a hearing, Binion points (at 19) to concerns with his mental health and Dr. Rohlehr's statements regarding "grandiose delusions," but both of those considerations were already known to the trial court and to the parties at the hearing on May 7, 2019 (A at 6-9; R. 26 at 4; R. 29 at 3-4; 5/7/19 Tr. 2-5). Indeed, those concerns had precipitated the hearing in the first place. Binion also notes the trial court's comment at the hearing that Binion "didn't really have a firm grasp on . . . how the trial is going to work," but the court made that comment while encouraging Binion to further discuss the mechanics of the trial with his lawyer (5/7/19 Tr. 11). The trial court never indicated that Binion did not understand the nature of the proceedings

against him, *see* D.C. Code § 24-531.01(1), and such a finding would have been undermined by Binion's responses during the colloquy (5/7/19 Tr. 6-9). The trial court reiterated that it was "satisfied with [Binion's] competence" (*id.* at 11). Far from expressing doubt about Binion's competence, the trial court's statements demonstrated that the trial court believed that Binion had a "sufficient present ability to consult with his . . . lawyer[.]" *See* D.C. Code § 24-531.01(1).

To the extent that Binion is arguing that the court should have scheduled *another* competency hearing, he cites no statutory or constitutional requirement for such a step. Instead, the authorities that he cites (at 18, 20) only indicate that when there is a substantial doubt as to the defendant's competency, the court should schedule a hearing. The court scheduled that hearing, held on it on May 7, 2019, and resolved any such substantial doubt.

Binion's argument is more properly characterized as a claim that the court did not hold "a *full* competency hearing," *see* Appellant Brief (Br.) at 21 (emphasis added), which folds into his argument (at 22-27) that the hearing on May 7, 2019, was insufficient. But, as discussed further supra, the hearing was sufficient to determine Binion's competency. The trial court examined Dr. Rohlehr's report, heard from the parties, and examined Binion himself during a colloquy targeted to meet the legal standard for competency. Binion complains (at 23) that no witnesses were called, including Dr. Rohlehr. But the defense did not ask for witnesses, the

statute does not require the court to do so, and in fact its language indicates that that course is purely discretionary. *See* D.C. Code § 24-531.04(b) ("The court *may* call its own witnesses . . ." (emphasis added). The court may provide an "opportunity" for the parties to call a witness, *see Hansford v. United States*, 365 F.2d 920, 923 n.8 (D.C. Cir. 1966), but Binion declined that opportunity when the defense consented to the court's colloquy, agreed with the competency finding, and decided to continue with no further hearings (5/7/19 Tr. 5-6, 9-12). *See, e.g.*, *Higgenbottom v. United States*, 923 A.2d 891, 898 (D.C. 2007) ("The trial court fulfilled its obligation to inquire into appellant's competency, and any further advocacy on appellant's behalf at this point was the responsibility of appellant and his counsel.").[8]

Binion argues (at 23-26) that the trial court failed to give Dr. Rohler's report sufficient deference at the competency hearing. However, although this Court has noted that a psychiatrist's report may play an important role in *raising* competency in the first place, *see Blakeney*, 77 A.3d at 345-46, it has made clear that the trial court is under no obligation to credit a report that is inadequate or does not reflect

[8] Binion points (at 23) to "the requests from both parties to be given an opportunity to retain their own competency experts." First, the government never made such a request. It stated that "we may be in a position where we need to obtain our own expert as well but I don't think we're there yet" (5/7/19 Tr. 3). Second, the parties made their statements regarding experts *before* the trial court decided to conduct its colloquy (*id.*). Once the trial court decided to initiate its own colloquy, the parties agreed with that course and no longer raised any need to call their own experts (*id.* at 4-12). Certainly Binion never again mentioned wanting his own expert.

the correct legal standard. *See, e.g.*, *Blakeney*, 77 A.3d at 346 ("In exceptional cases, well-founded concerns about the basis and reliability of the opinion and compelling contrary evidence conceivably may dispel whatever force the expert's evaluation may possess."); *Hooker*, 70 A.3d at 1203 ("At no point was the court required or even permitted to rely exclusively on the 'incompetency' conclusion in [the psychiatrist's] preliminary screening report[.]"); *Wider v. United States*, 348 F.2d 358, 361 (D.C. Cir. 1965) ("The hospital report as to appellant's competency to stand trial was not binding on the court[.]"). These limits reflect "[t]he need for the court, not psychiatrists, to make the ultimate decision on competence to stand trial[.]" *(Perry) Holloway v. United States*, 343 F.2d 265, 267 n.4 (D.C. Cir. 1964).

Dr. Rohlehr's report fell well short of the standard needed for the trial court to rely on it. Binion may have had "grandiose" thoughts about his own ability and an animated personality, but, as the trial court noted, "a lot of people who are exhibiting what [Dr. Rohlehr] says are symptoms, what Mr. Binion says is his personality, are competent. Virtually everyone who exhibits those symptoms is competent." (R. 29 at 3-4; 5/7/19 Tr. 4). *See also Gorbey*, 54 A.3d at 680 ("Courts have held repeatedly that bizarre and irrational behavior cannot be equated with mental incompetence to stand trial." (internal quotation marks omitted)); *id.* at 678 ("Not every manifestation of mental illness demonstrates incompetence to stand trial." (cleaned up)). Meanwhile, Dr. Rohlehr's observations that Binion "was fully

oriented to person, place, and situation; and did not appear to be responding to internal stimuli" belied the finding of incompetency, and reinforced the fact that Binion had no reported mental health history (R. 29 at 2-4).

More importantly, Dr. Rohlehr admitted that she did not ask "the formal line of mental status questions" or "the formal line of competency-related questions" (R. 29 at 3). Instead, she ended the interview early (*id.*). *See Blakeney*, 77 A.3d at 347 (questioning whether defense counsel should have raised competency at all when the doctor "met with [the defendant] only once, for just a few hours, and it is less than clear what testing he actually performed"). Dr. Rohlehr noted, however, that Binion had "demonstrated a factual understanding of the court process and the proceedings against him" during the initial screening, and she "assumed that he continues to possess that factual knowledge" (R. 29 at 3). Although Dr. Rohlehr opined that Binion's "ability to consult with counsel [is] likely to be affected by his current mental state" (*id.* at 4), she did not explain what "mental state" she was referring to, nor did she tie her statement to the appropriate legal standard, i.e., a "*sufficient* present ability to consult with [the defendant's] . . . lawyer with a reasonable degree of rational understanding[,]" *see* D.C. Code § 24-531.01(1) (emphasis added), not merely whether a defendant's communication with counsel is "affected" by a psychological condition. Thus, as the trial court found, the factual

statements in Dr. Rohlehr's report did not match her legal conclusions (5/7/19 Tr. 4).

The record thus indicates that Dr. Rohlehr misunderstood the standard for competency (R. 29 at 4). Under those circumstances, the court permissibly minimized the importance of Dr. Rohlehr's report and undertook its own inquiry. Indeed, "given the court's expressed (and valid) concern about whether [the psychiatrist's] . . . findings . . . corresponded to the legal standard for competence and the court's own observations of [Binion] on the day of [the hearing], the court would likely have abused its discretion had it given Dr. [Rohlehr's] . . . report the great weight that [Binion] urges and failed to seek additional information." *See Hooker*, 70 A.3d at 1203 (internal citation omitted). At the very least, the report did not conclusively rebut the presumption of competence. *See* D.C. Code § 24-531.04(b).

Thus, contrary to Binion's claims (at 24-25), the trial court did not "arbitrarily disregard, disbelieve, or reject" Dr. Rohlehr's report. *See Hooker*, 70 A.3d at 1205 (alterations omitted). The court examined the report in detail, recognized its limited value, inquired of the parties' positions, and conducted a tailored colloquy that covered all of the topics needed to determine competency. *See Gorbey*, 54 A.3d at 679 (noting that this Court "accord[s] great deference to the trial court's inferences from its personal observations of, and conversations with, the defendant"). "Thus, the record reflects that rather than arbitrarily disregarding, disbelieving, or rejecting

[the psychiatrist's] opinion, the court carefully weighed her findings against its own observations of [Binion's] mental state on the day of [the hearing]." *Hooker*, 70 A.3d at 1204-05 (alterations and internal citation omitted).

Likewise, Binion's claim (at 24-25) that the hearing was not "fair and adequate" because it was too short is misplaced. Binion does not explain what substantive questions the trial court should have asked but did not, nor does he identify any insufficiency regarding the questions that were asked. He seems to assume that just because the colloquy was relatively brief, it was inadequate. But as discussed supra, and as all parties agreed, the trial court covered all the areas it needed to cover to assess Binion's competency (5/7/19 Tr. 6-12). *See also Hansford*, 365 F.2d at 923 n.8 ("The hearing, of course, need not be a lengthy and involved proceeding."). Binion again points (at 24-25) to certain statements that the trial court made during the hearing, but those statements either reflected the trial court's desire for Binion to speak further with his attorney about the trial's mechanics, or they signaled that the trial court was going to ask certain questions in a more specific way (*id.* at 8, 11). Those statements did not establish that Binion was somehow incompetent when the colloquy established Binion's knowledge of the proceedings, and the trial court made its competency finding clear (*id.* at 6-9, 11).[9]

[9] Binion also complains (at 25) that the trial court misunderstood *Dusky* (5/7/19 Tr. 4), but during that discussion the court merely reiterated the widely established (continued . . .)

Binion relies (at 26-27) on two cases for the proposition that reversal is required, but both are non-binding and readily distinguishable. In *Johnson*, neither the prosecutor nor the court challenged the psychiatrist's report opining that the defendant was incompetent, and no advance notice was given to the defendant that the report would be discussed at the hearing. 551 N.W.2d at 752-54. Nor did the trial court state why it was rejecting the expert's report. *Id.* at 754. Instead, at the plea hearing, the trial court engaged in an extremely short colloquy in which it essentially asked Johnson only if he thought he was competent. *Id.* at 747. Moreover, the *Johnson* court was particularly troubled by the subsequent evidence that Johnson was incompetent, including pre-sentence reports that he had serious psychiatric disorders and that he claimed to "have been two different people in the same body" and "out of contact with society" for over 20 years. *Id.* at 754-55. Johnson continued to make delusional statements at sentencing. *Id.* at 755-56.

Here, by contrast, both the prosecutor and the court challenged the report and made clear why they thought it was inadequate (5/7/19 Tr. 3-5). The defense knew that the report was the subject of the hearing and came prepared with its objection

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principle that "a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings." *See, e.g.*, *(Mike) Hernandez*, 930 F.2d at 718. In any event, the trial court only mentioned *Dusky* briefly and did not rely on it for its decision to initiate its own colloquy or when making its competency finding. The court's passing reference to *Dusky* therefore had no impact on the trial court's ruling.

to it (*id.* at 3, 5). The trial court engaged in a much more thorough colloquy with Binion than the trial court in *Johnson*, and that colloquy covered all the necessary ground to find Binion competent (*id.* at 6-9). And there has been no subsequent indication in the record that Binion suffers from any serious mental health condition.

Similarly, in *Hull v. Kyler*, 190 F.3d 88 (3d Cir. 1999), the psychiatrist was only asked two conclusory questions as to whether he believed that the defendant was competent, and the Third Circuit held that defense counsel was ineffective for not cross-examining further. *Id.* at 92, 108-112. Here, the trial court engaged in a much more thorough colloquy with Binion, making any further questioning unnecessary (5/7/19 Tr. 6-9).

Finally, even assuming that the trial court erred, the remedy would be to remand for a retrospective competency hearing. Binion admits (at 27) that the only alternative to such an action is to hold a new trial. But a new trial would require Binion to be competent. The trial court would therefore need to explore Binion's competency regardless. As an initial step—before simply discarding a lengthy and witness-intensive murder trial—it makes more sense to explore Binion's competency at trial in 2020 given the fulsome record on that issue. The trial court would have two reports from Dr. Rohlehr, the transcript of Judge Edelman's colloquy, and the many transcripts from the hearings and trial in this case in which Binion displayed few to no signs of incompetency. *See Blakeney*, 77 A.3d at 350

(retrospective finding of competency appropriate where the defendant "said little on the record at trial, but it is noteworthy that his behavior raised no apparent concern"); *see also Phenis*, 909 A.2d at 153 (no abuse of discretion in failing to order sua sponte competency evaluation where "it appear[ed] from the record that appellant was able to rationally consult with his attorney and understand the nature of the proceedings against him, notwithstanding some inappropriate behavior in the courtroom").

Binion posits (at 27) that too much time may have passed since Dr. Rohlehr's reports, but he does not explain why four years has crossed that threshold, nor does he cite any authority to that effect. Indeed, all authority is to the contrary. *See Blakeney*, 77 A.3d at 349-50 (retrospective competency hearing appropriate four years later); *Walker v. Att'y Gen. of Oklahoma*, 167 F.3d 1339, 1347 & n.4 (10th Cir. 1999) (same). And given that all the relevant materials are in writing and there is no indication that Dr. Rohlehr or Binion's trial counsel would be unavailable, "the time that ha[s] passed since [Binion's] trial [is] not so long as to call into question the feasibility of a retrospective examination." *Hooker*, 70 A.3d at 1203; *see also Blakeney*, 77 A.3d at 349 (availability of prior competency determinations and relevant witnesses both relevant factors in holding retrospective competency hearing). Otherwise, the trial court would merely be ordering a new trial based on an uncertain competency report from four years ago, an outcome that this Court has expressly disfavored. *See Hooker*, 70 A.3d at 1203.

II. There Was Insufficient Evidence to Warrant a Self-Defense Instruction.

Binion also argues (at 28-34) that the trial court erred when it did not give a self-defense instruction. Because there was insufficient evidence to warrant such an instruction, this argument should be rejected.

A. Additional Background

Near the close of trial, Binion requested a self-defense instruction, but the government objected because there was "no evidence in the record to support one" (R. 67). Binion's counsel argued, among other things, that Taylor had a firearm earlier in the day and at the community center (2/5/20 Tr. 4). She also pointed to the different calibers of cartridges on scene and the testimony from the earwitness, who had testified to someone saying "ow" between gunshots (*id.* at 4-5, 9-10). The government responded that Massaquoi's testimony did not suggest that Taylor ever took out a firearm, and the crime scene and the nature of Taylor's injuries were "consistent with someone standing over [Taylor] and shooting him" (*id.*). Regarding the two different calibers of cartridges, the government noted that the 9-millimeter casing was found "three or four garages down" from Taylor's body and was "sort of rusty and tarnished" (*id.* at 35; see also Gov. Ex. 301).

The trial court declined to instruct on self-defense, finding that "at most" the evidence showed that Taylor "was armed," not that "there was any display of a

weapon at any time" (2/5/20 Tr. 5). It also noted that although the different calibers suggested "a possibility that there was more than one firearm," there was "no affirmative evidence of there being more than one firearm" (*id.*). The court observed that Taylor was shot in the head from behind and that there was no affirmative evidence that Taylor could have used the .380-caliber firearm to fire the .22-caliber ammunition, which was "all the relevant ammunition" (2/5/20 Tr. 57-58). The .9-millimeter ammunition was "at a different location from where this happened" and "rusty" (*id.*). Further, the court did not believe that a reasonable juror could look at the photographs introduced through the firearms expert and conclude that the .22-caliber ammunition was fired from two different firearms (*id.*). Nor had the expert provided testimony that would have supported that proposition (*id.* at 58-59).

B. Standard of Review and Applicable Legal Principles

A defendant is typically entitled to have the court instruct the jury on any cognizable defense to his charges, so long as sufficient evidence—viewed in the light most favorable to the defendant—tends to support the requested instruction. *(Katrina) Holloway v. United States*, 25 A.3d 898, 902 & n.6 (D.C. 2011); *Mack v. United States*, 6 A.3d 1224, 1227 n.3, 1229 (D.C. 2010).[10] Conversely, "[a]

[10] As this Court noted in *McCrae v. United States*, 980 A.2d 1082 (D.C. 2009), "[i]t is not correct that any evidence, however weak, entitles the defendant to an instruction; rather, there must exist evidence sufficient to find in the defendant's (continued . . .)

requested instruction is not appropriate if, as a matter of law, the defendant would not be entitled to the defense." *Mack*, 6 A.3d at 1229 (citation and internal quotation marks omitted). This Court reviews review for abuse of discretion a trial court's assessment of whether a jury instruction was supported by the evidence, *see (Edward) Brown v. United States*, 139 A.3d 870, 875 (D.C. 2016), but reviews any legal issues surrounding the denial of a requested jury instruction de novo. *Mack*, 6 A.3d at 1228.

"[T]he law of self-defense is a law of necessity; the right of self-defense arises only when the necessity begins, and equally ends with the necessity." *Rorie v. United States*, 882 A.2d 763, 771 (D.C. 2005) (citations and internal quotation marks omitted). Accordingly, to be entitled to a self-defense instruction, the evidence must show that:

> (1) there was an actual or apparent threat [to the defendant]; (2) the threat was unlawful and immediate; (3) the defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm; and (4) the defendant's response was necessary to save himself from danger.

Id. (citation omitted). "[T]he trial court [is] in the best position from which to reflect upon the evidence and assess whether a fair inference of self-defense was raised."

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favor." *Id.* at 1087 n.4 (citations omitted). In so ruling, this Court clarified that the "however weak" formulation in *Frost v. United States*, 618 A.2d 653, 662 n.18 (D.C. 1992), was incorrect. *McCrae*, 980 A.2d at 1087 n.4; see Appellant Br. at 28 (articulating the *Frost* "however weak" standard).

(Robert) Brown v. United States, 619 A.2d 1180, 1182 (D.C. 1992) (citation and internal quotation marks omitted).

C. Discussion

The trial court did not abuse its discretion when denying Binion's request for a self-defense instruction, because insufficient evidence had been presented that would entitle Binion to that defense. The evidence showed that, after Binion had been cheated in a drug deal, Binion and Massaquoi retrieved a gun (1/28/20 Tr. 164, 169; 2/3/20 Tr. 93-94, 151, 220, 223; 2/4/20 Tr. 15-16). They got in a car with Williams and Carvajal, spoke with Taylor to find his location, and drove there (1/29/20 Tr. 73-76, 82, 180, 182-83, 186; 1/28/20 Tr. 92; 2/3/20 Tr. 152, 155-56). On the way, Massaquoi took out the gun and bullets and cleaned them so that they would not leave fingerprints (2/3/20 Tr. 152-53). Binion asked "who's gonna do it" (*id.* at 155).

After the men picked up Taylor, they eluded a car that was following them, drove to an alley in D.C., and got out (1/29/20 Tr. 85-86, 90-91; 2/3/20 Tr. 156-62). Taylor was standing near the car with the other men (2/3/20 Tr. 162-63). He got on the ground so that Binion and Carvajal were standing over him (*id.*). Taylor told Binion, "No, Mason" (*id.*). Massaquoi heard gunshots and saw sparks (*id.* at 163-64). Massaquoi knew that Taylor had "[gotten] hit" (*id.* at 162). The other men returned to the car and sped away (*id.* at 164-65; 1/29/20 Tr. 14-15, 19-21). Taylor

died from a gunshot wound to the back of the head, and he had an unfired cartridge on his back when police discovered him, both of which were consistent with Massaquoi's testimony that Binion or one of his co-conspirators killed Taylor while he was lying on the ground (1/29/20 Tr. 224-27; 1/30/20 Tr. 31; 2/3/20 Tr. 162-64; 2/4/20 Tr. 145). The evidence therefore showed that Taylor was shot, execution-style in an alley shortly after pleading for his life. Binion was not entitled to a self-defense instruction under those circumstances.

Binion's counterarguments lack merit. He first argues (at 29) that the instruction was appropriate because someone saw Taylor with a gun earlier that day, and Jones saw Taylor with a gun shortly before Binion and others picked him up from the community center. The incident earlier in the day was unrelated to the murder, and there is no evidence that it concerned Binion or his co-conspirators or even that they were aware of it (1/28/20 Tr. 144-46, 178-79).[11] It occurred several hours before the murder. In the interim, Taylor set up a drug deal at a different location, failed to complete that drug deal, and drove to a friend's house and community center before being picked up by Binion (1/28/20 Tr. 147-49, 164, 169, 180, 185; 1/29/20 Tr. 69-73, 174, 178-79, 192). *See Edwards v. United States*, 721

[11] In that incident, Tillman saw Taylor fire his gun into the air because someone else was getting into a fight (1/28/20 Tr. 144-46, 178-79). Taylor was not involved in the altercation (*id.* at 146).

A.2d 938, 942 (D.C. 1998) (self-defense instruction unwarranted even though defendant saw the victim with a knife earlier that day in an unrelated altercation).

Jones's observation that Taylor had a gun before Binion picked him up, meanwhile, established at most that Taylor was armed—an insufficient basis on which to ground a self-defense instruction. It did not establish that Taylor ever took out the gun in the alley where he died, much less that he did so in such a way that would cause Binion or anyone else to fear for their lives. *See, e.g.*, *Henry v. United States*, 94 A.3d 752, 759 (D.C. 2014) (defendant was not entitled to self-defense instruction because "no evidence was presented that gave the jury a basis for finding that appellant *reasonably* believed that [the decedent] was about to start shooting him" (internal quotation marks omitted)).

Indeed, Massaquoi never testified that Taylor took out his gun during the entire drive to the alley, nor that Taylor did so upon exiting the car and lying on the ground (2/3/20 Tr. 155-164). *See Henry*, 94 A.3d at 759 (self-defense instruction unwarranted where there "was no evidence that either [a witness] or appellant perceived that [the decedent] was armed"). In fact, the evidence at the scene suggested that Taylor did not take out a firearm. When police discovered his body, his right hand was holding a hat and a five-dollar bill (1/29/20 Tr. 230, 245). And in any event, Taylor's gun was unloaded (1/29/20 Tr. 62-64, 134-35). It had no clip in it and no cartridge in the chamber (*id.*). Binion does not explain how "there was an

actual or apparent threat" to him, why he would "honestly and reasonably believe[] that he was in imminent danger of death or serious bodily harm" as a result, or why shooting Taylor to death while Taylor was on the ground was "necessary to save himself from danger" under those circumstances. *See Rorie*, 882 A.2d at 771.

Binion also points (at 29-30) to testimony from the earwitness, but that testimony falls far short of establishing any recognizable self-defense claim. That witness testified that she heard a "pop" sound like a gunshot followed by a man saying "ow" and then a "pop-pop" sound (1/29/20 Tr. 12-13; 2/4/20 Tr. 150). She clarified that the first pop, the "ow" and the second "pop-pop" came right after one another in quick succession (1/29/20 Tr. 13-14). About 10 to 15 seconds later, she saw a car that resembled Binion's car quickly drive past her garage (*id.* at 14-15, 19-22, 75-76; 2/3/20 Tr. 105-06). She did not see the shooting itself, the crime scene, or any of the participants. In short, it was sheer speculation to attribute one of the gunshots to Taylor. And in any event, Taylor could not have contributed one of the "pops" from an unloaded gun (1/29/20 Tr. 62-64, 134-35).

Binion's ballistic arguments (at 30-32) are similarly misplaced. First, Binion ignores the crucial fact that Taylor's gun was unloaded (1/29/20 Tr. 62-64, 134-35).[12] That alone dispels any notion that Taylor fired a weapon and Binion reacted

[12] In fact, Binion incorrectly asserts in his brief that Taylor's gun was loaded. See Appellant Br. at 31.

in self-defense. Second, Binion greatly exaggerates the importance of the 9-millimeter casing. It was found a significant distance away from Taylor's body, was rusty, "no longer ha[d] a shiny finish to it," and appeared to be older than the .22-caliber ammunition, which was "shiny and metallic" (2/4/20 Tr. 147; Gov. Ex. 301). Thus, "it appeared [that the 9-millimeter casing] had been sitting out there for a while" (2/4/20 Tr. 147). All of the evidence, therefore, pointed to the conclusion that the 9-millimeter cartridge had not been fired during the murder.[13] Binion's speculation does not override the evidence in the record.[14] Rather, the record reflects that the shooter used Massaquoi's .22-caliber gun to fire two .22-caliber bullets, consistent with Taylor suffering two injuries (2/3/20 Tr. 99-101; 1/29/20 Tr. 226-28; 1/30/20 Tr. 31; see 1/30/20 Tr. 75 (firearms expert confirming that "[a]s a general matter, . . . a 22[-]caliber gun would be firing 22[-]caliber ammunition")). And although Binion attempts to point (at 30-31) to what he calls "slight differences" in

[13] Indeed, to the extent that there was any evidence as to a 9-millimeter on the day of the murder, the evidence was that Binion or one of his compatriots on the buyer's side of the drug transaction would have been carrying it. See 1/29/20 Tr. 192-94 (Tillman testifies that one of the buyers "was talking about a nine").

[14] Binion also speculates (at 30) that a .380-caliber firearm could fire a 9-millimeter cartridge, but the testimony that he cites does not establish that fact. Binion assumes that a .380-caliber gun could fire a 9-millimeter because a 9-millimeter equates to approximately .357 inches in diameter (1/30/20 Tr. 76). But the firearms expert did not testify that a .380-caliber firearm could fire a 9-millimeter cartridge, much less that a .380-caliber firearm could have fired the 9-millimeter cartridge in this case. Accordingly, Binion's speculation is outside of the record.

the two .22 cartridge casings,[15] the expert testified that the marks on each were consistent with each other, that it could not be excluded that they were fired from the same firearm, and that there was no "significant difference" between the markings (1/30/20 Tr. 75, 102). Put simply, all evidence pointed to the conclusion that Binion or one of his-conspirators had taken out and fired a gun, but Taylor had not.

Binion relies (at 32-33) on *Reid v. United States*, 581 A.2d 359 (D.C. 1990), but that case is readily distinguishable. In *Reid,* officers responded to a radio run for people fighting with knives. 581 A.2d at 361. When they arrived, they encountered an "ambiguous street scene" where Reid was facing several individuals with a knife "with a look like he was arguing with them." 581 A.2d at 361, 367. Those circumstances "indicated that Reid was outnumbered and was in the process of warding off an attack by the group." *Id.* at 367.

Here, by contrast, there was no evidence that Taylor entered into any type of altercation with Binion or his co-conspirators. No witness saw any fight, there was

[15] The trial judge, who viewed the evidence in person, doubted even this characterization of the evidence. *See* 2/5/20 Tr. 58 ("I don't believe that a reasonable juror could look at these photos and . . . conclude that those were fired from two different firearms."). Indeed, Binion attempts to establish these "slight differences" based on photographs, which the expert testified was inappropriate because one must examine the marks by microscope (2/3/20 Tr. 23, 42-43). But even if "slight differences" existed, the expert confirmed that "you might expect slightly different firing pin impressions" on two cartridges even fired from the same gun (*id.* at 26).

no report or circumstantial evidence of any fight, and there was no affirmative evidence that anyone except Binion or one of his co-conspirators took out a gun. Indeed, as discussed supra, all evidence was to the contrary. Massaquoi's testimony established that Taylor rode to the alley with his future murderers, got out of the car, pleaded for his life, got on the ground, and was killed (2/3/20 Tr. 156-64).[16]

In sum, Binion's theory "would require the jury to rely on purely speculative inferences or to engage in bizarre reconstructions of the evidence." *Henry*, 94 A.3d at 757 (internal quotation marks omitted). His self-defense theory relies on Taylor somehow firing an unloaded gun, or one with mismatched ammunition, while lying down on the ground, holding two other objects in his hand, and pleading for his life. Given the lack of evidence supporting any self-defense claim, and the powerful evidence in contradiction of that claim, the trial court did not abuse its discretion in declining to give the instruction.[17]

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[16] Binion points (at 32) to this Court's subsequent description of the self-defense evidence in *Reid* as "weak," *see (Napoleon) Hernandez v. United States*, 853 A.2d 202, 206 (D.C. 2004), but, if anything, that characterization supports the trial court's decision in this case. If the evidence of self-defense was "weak" in *Reid*, then the dramatically weaker evidence of self-defense in this case was insufficient to warrant the instruction. To the extent that Binion tries to use *(Napoleon) Hernandez* to advance a "however weak" standard, this Court has made clear that that standard is inaccurate. *See* supra footnote 10.

[17] For the same reasons, Binion errs when he argues (at 33) that "the *existence* of even a modicum of evidence" supporting a self-defense instruction means that a trial court must give one. First, the evidence here fell well below that "modicum of

(continued . . .)

III. The Evidence Was Sufficient to Support the Trial Court's Aiding-and-Abetting and Conspiracy Instructions.

Finally, Binion argues (at 34-39) that the evidence was insufficient to support the trial court's aiding-and-abetting and conspiracy instructions. This argument is without merit. There was sufficient evidence that Binion acted as both an aider-and-abettor and as a co-conspirator.

A. Additional Background

When the trial court sent proposed jury instructions to the parties on January 30, 2020, in the middle of trial, the government asked for a *Pinkerton*[18] instruction (R. 65 at 1). Counsel for Binion objected to that instruction and the aiding-and-abetting instruction on the basis that she did not believe the evidence at trial supported those instructions (*id.* at 6). At beginning of the day on February 3, 2020, the court told the parties that it would "wait" on ruling on the issue (2/3/20 Tr. 15).

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evidence," even if one were to accept that standard. Binion puts forward no actual evidence that he had to act in self-defense and instead bases his argument around speculation and mistaken assumptions. Second, this Court has made clear that the question is not whether there is a "modicum of evidence" supporting an instruction. Rather, the question is whether Binion was "entitled to an instruction as to any *recognized* defense for which there exists evidence *sufficient* for a reasonable jury to find in his favor." *Mack*, 6 A.3d at 1229 (second emphasis added) (internal quotation marks omitted). Because the evidence upon which Binion relies—even if it did exist—was *insufficient* for the instruction, he was not entitled to it.

[18] *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946) (holding that any crime in furtherance of a conspiracy that is reasonably foreseeable may lead to criminal liability for any member of the conspiracy).

After trial concluded, the trial court decided to give both the aiding-and-abetting and the *Pinkerton* instructions because "based on the evidence the jury could believe that Mr. Binion aided and abetted or conspired but didn't fire the gun" (R. 65 at 58; R. 66 at 15-19; R. 67; 2/5/20 Tr. 65, 67). It further noted that based on Massaquoi's testimony, the jury "could believe that Mr. Binion was very much involved with this incident but that someone else ultimately was the one who fired the gun" (2/5/20 Tr. 14).

During its closing argument, the government emphasized that Binion had not killed Taylor "alone" (2/5/20 Tr. 75). Rather, he had done it with Carvajal, Massaquoi, and Williams (*id.*). Regarding the conspiracy, the government noted that Binion, among other things, told Massaquoi to get a gun, went with him to get it, sat next to Massaquoi while he unloaded the bullets and started cleaning them, asked who wanted to kill Taylor, and spoke with Taylor to arrange the meeting at the recreation center (*id.* at 88-90, 102). Moreover, Binion went with Massaquoi to hide the gun in the woods the next day (*id.* at 102).

Although the government argued that Binion had shot Taylor, it allowed for the possibility that Massaquoi, Carvajal, or Williams had done it (2/5/20 Tr. 104). Even if one of those three men had been the shooter, however, Binion would still be guilty because "he's part of an agreement" to "kill Michael Taylor" (*id.*).

Regarding aiding and abetting, the government noted that Binion would not have had "to commit every single one of the acts that constitute the murders" (2/5/20 Tr. 105). Instead, he would have had to just "intentionally participate in some of the acts with the intent to make the crime succeed" (*id.*). The government also discussed premeditation and deliberation in the context of aiding-and-abetting, and it outlined the evidence that Binion had acted with that premeditation and deliberation (*id.* at 105-107). Much of that evidence overlapped with the evidence of conspiracy.

During its deliberations on February 10, the jury sent Judge Beck a note asking, "Do we need to determine that Mason Binion fired the gun in order to determine that the defendant caused the death of Michael Taylor[?]" (R. 68). Judge Beck referred the jury back to her aiding-and-abetting and co-conspiracy-liability instructions (R. 69). She added that if the jury found "beyond a reasonable doubt that Mason Binion was an aider and abettor, as I have defined that concept, to someone else who fired the gun that caused the death of Michael Taylor, then you would not need to determine that Mason Binion fired the gun in order to determine that Mr. Binion caused the death of Michael Taylor" (*id.*).

B. Standard of Review and Applicable Legal Principles

As noted supra, this Court reviews "the trial court's decision to give a requested jury instruction for abuse of discretion, viewing the instructions as a whole, and considering the record in the light most favorable to the requesting

party." *Dickens v. United States*, 163 A.3d 804, 810 (D.C. 2017) (internal quotation marks and alteration omitted). "The central question for this court is whether the instruction is an adequate statement of the law, and whether it is supported by evidence in the case." *Id.* (alterations and quotation marks omitted).[19]

"The elements of aiding and abetting are that (1) a crime was committed by someone, (2) the accused assisted or participated in its commission, and (3) his participation was with guilty knowledge." *Dickens*, 163 A.3d at 810 (internal quotation marks and alteration omitted). "To aid or abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Id.* (alternation and quotation marks omitted).

"To prove conspiracy, the government must establish that an agreement existed between two or more people to commit a criminal offense; that the defendant[s] knowingly and voluntarily participated in the agreement, intending to commit a criminal objective; and that, in furtherance of and during the conspiracy, a co-conspirator committed at least one overt act." *Tann v. United States*, 127 A.3d 400, 424 (D.C. 2015) (quoting *Hairston v. United States*, 905 A.2d 765, 784 (D.C.

[19] Binion does not argue that the trial court misstated the law regarding aiding-and-abetting or conspiracy. He only argues (at 34-37) that the evidence did not support giving either instruction.

2006)). "A conspiratorial agreement may be inferred from circumstances that include the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties and the interests of the alleged conspirators." *Id.* (quoting *Castillo-Campos v. United States*, 987 A.2d 476, 483 (D.C. 2010)).

Even if an instruction is given in error, this Court will not reverse a conviction where it can say "with fair assurance . . . that the judgment was not substantially swayed by the error." *Headspeth v. United States*, 86 A.3d 559, 565 (D.C. 2014) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

C. Discussion

Binion challenges (at 35) both instructions on the basis that "the prosecution failed to introduce any evidence suggesting that someone other than Mr. Binion shot and killed Mr. Taylor." This is incorrect. Massaquoi's testimony established that one of Binion, Carvajal, and Williams killed Taylor, but Massaquoi did not directly observe which one pulled the trigger. In the grand jury, Massaquoi testified that Binion shot Taylor, but he did not explain why he thought so (2/3/20 Tr. 120-21). At trial, Massaquoi clarified that he did not actually see Binion pull the trigger (*id.* at 163). Massaquoi testified that when the group arrived at the alley, Williams, Carvajal, Binion, and Taylor all got out of the car (*id.* at 161-62). Massaquoi stayed in the driver's seat (*id.* at 161). He could see that Taylor was standing near the middle

of the car, and then he could not see him any longer (*id.* at 162). Massaquoi assumed he was lying on the ground (*id.*). Massaquoi heard Taylor say, "No, Mason" (*id.* at 162-63). He saw Binion and Carvajal standing over top of Taylor, and he was unsure of Williams' exact position (*id.* at 163). Massaquoi heard gunshots and saw sparks (*id.* at 163-64). He testified that he did not see Binion holding the gun when the shots were fired (*id.* at 163). He assumed that Binion had been holding the gun because he was the last one to possess it when Massaquoi had finished cleaning the bullets (*id.* at 163-64).[20]

The evidence therefore showed Binion at the scene and participating in the crime, but it allowed for the possibility that either Binion, Carvajal, or Williams ultimately pulled the trigger. Carvajal in particular was a possible alternative triggerman because he was also standing over Taylor (2/3/20 Tr. 163). And on the way to the recreation center, Binion had asked "who [was] gonna do it" (2/3/20 Tr. 155). Given the ambiguity as to who had actually shot Taylor, it was proper for the trial court to instruct the jury on aiding-and-abetting liability. *See, e.g.*, *Dickens*, 163 A.3d at 811-12 (aiding-and-abetting instruction appropriate where the defendant had

[20] Further, on cross-examination, Massaquoi at first seemed to agree that he saw Binion pointing the gun in front of him at one point (as opposed to at the ground), but he then clarified that he could not see who was holding the gun when it was fired (2/4/20 Tr. 71-73).

clearly assisted or participated in the murder, but it was unclear whether he or his co-defendant had pulled the trigger).[21]

Binion cites (at 35-36) government arguments that Binion shot Taylor, but he ignores the government's arguments that Binion acted as an aider-and-abettor. During its closing argument, the government emphasized that Binion had not killed Taylor "alone" (2/5/20 Tr. 75). Thus, although the government argued that Binion had shot Taylor, it allowed for the possibility that Massaquoi, Carvajal, or Williams had done it. *See* 2/5/20 Tr. 104 ("But what if someone else had actually done it? What if—and all the evidence shows that it was Mason Binion who shot him, but what if it was Joshua Massaquoi? What if it was Victor Carvajal? What if it was Derrick Williams who actually pulled the trigger and delivered the fatal shot? Would Mason Binion still be guilty? The answer, ladies and gentlemen, is yes."). Indeed,

[21] Binion does not argue that his conduct otherwise fails to satisfy the elements of aiding-and-abetting. Indeed, (1) the crime was clearly committed by someone because Taylor was killed; (2) Binion assisted or participated in its commission by going with Massaquoi to get the gun, apparently speaking with Taylor in order to find his location before picking him up, exiting the car with Carvajal and Williams, and ignoring Taylor's pleas; and (3) Binion acted with guilty knowledge because he knew that the group would murder Taylor, as evidenced by his question of "who [was] gonna do it" (2/3/20 Tr. 151, 155, 161-64, 220, 223; 2/4/20 Tr. 15-16; 1/29/20 Tr. 73-74, 82, 180, 182-83, 186; 1/28/20 Tr. 92). *See Dickens*, 163 A.3d at 810 (laying out elements). Thus, Binion "associate[d] himself with the venture, . . . participate[d] in it as in something that he wishes to bring about, . . . [and sought] by his action to make it succeed." *Id.* at 811.

the government dedicated an entire section of its closing argument to why Binion would still be guilty as an aider and abettor (*id.* at 105-107).

For similar reasons, Binion errs when he argues (at 36-37) that the trial court's analysis was flawed. First, the trial court did not give the aiding-and-abetting instruction simply because defense counsel "challenged . . . Mr. Massaquoi's credibility[.]" See Appellant Br. at 36. It gave the instruction because, as described supra, the evidence showed that someone other than Binion could have fired the weapon (R. 67 at 4). The jury heard that evidence on Massaquoi's direct examination, before defense counsel ever cross-examined him (2/3/20 Tr. 161-64). Indeed, the trial court included the aiding-and-abetting instruction in its original proposed jury instructions on January 30, 2023, before Massaquoi even took the stand, "based on . . . the evidence that [the court] expect[s] we're going to hear" (R. 65 at 6; 2/3/20 Tr. 15-16). Nonetheless, the court decided to wait until Massaquoi testified on February 3 and 4 (2/3/20 Tr. 15-16). On the evening of February 4, after Massaquoi had testified, it told the parties over email that it "believe[d] aiding and abetting and *Pinkerton* instructions are appropriate because based on the evidence the jury could believe that Mr. Binion aided and abetted or conspired but didn't fire the gun" (R. 67 at 4). *See also* 2/5/20 Tr. 13 ("And I explained in the email, which will be part of the record, . . . why I think an aiding and abetting and a *Pinkerton* instruction is appropriate.").

Second, the trial court's decision made sense based on the evidence. As discussed supra, Massaquoi's testimony established that one of Binion, Carvajal, and Williams shot Taylor, but Massaquoi did not see which one had done it.[22] The jury would not need to create "an irrational or bizarre reconstruction of the facts of the case," *see (David) Anderson v. United States*, 490 A.2d 1127, 1130 (D.C. 1985), to conclude that Binion was present on scene and had facilitated the murder, but that one of his co-conspirators had pulled the trigger. Indeed, the jury apparently found that scenario plausible because it asked if it "need[ed] to determine that Mason Binion fired the gun in order to determine that the defendant caused the death of Michael Taylor" (R. 68).

Although Binion does not develop a separate argument regarding conspiracy, a similar analysis applies. After being cheated in a drug deal, Binion told Massaquoi to get a gun, went with him to get it, drove with the three other men to Silver Spring, and sat next to Massaquoi while Massaquoi unloaded the bullets and started cleaning them (2/3/20 Tr. 93-94, 149-55, 216, 220, 223; 2/4/20 Tr. 15-16). Binion asked "who's gonna do it" (2/3/20 Tr. 155). The evidence indicated that he spoke with Taylor so that he could meet him at the recreation center (1/29/20 Tr. 73-76, 82, 180-

[22] Binion's argument (at 36) that the jury would have to "*disbelieve* Mr. Massaquoi's testimony that Mr. Binion committed the shooting" is therefore based on a mistaken premise.

83, 186; 1/28/20 Tr. 92). He and his co-conspirators chose a murder scene that Binion knew would be largely blocked from view because Binion's stepmother lived across the street (1/29/20 Tr. 156-61; 2/4/20 Tr. 145-46, 148-49; 2/5/20 Tr. 96). After the murder was complete, the co-conspirators talked over the phone while one of them drove Taylor's car to a different location so that it would not be found (2/3/20 Tr. 165-66; 2/4/20 Tr. 132, 221). Binion went with Massaquoi to hide the murder weapon in the woods the next day (2/3/20 Tr. 168-69). In sum, as the government argued, Binion was "at the center of this conspiracy" (2/5/20 Tr. 102). Thus, even if Carvajal or Williams shot Taylor, Binion would still be guilty because "he's part of an agreement" to "kill Michael Taylor" (*id.* at 104).

Finally, even if the trial court did err in giving the aiding-and-abetting or the conspiracy instruction, Binion's conviction should be upheld under *Griffin v. United States*, 502 U.S. 46 (1991), and *Inyamah v. United States*, 956 A.2d 58 (D.C. 2008). In *Griffin*, the Supreme Court held that although the trial court could, in its discretion, give an instruction "eliminating . . . an alternative basis of liability that does not have adequate evidentiary support," its "refusal to do so . . . does not provide an independent basis for reversing an otherwise valid conviction." 502 U.S. at 60; *see also Dickens*, 163 A.3d at 811. In *Inyamah*, which applied *Griffin* in the aiding-and-abetting context, this Court noted that "when parallel theories are submitted to a criminal jury antecedent to a general verdict of guilty, the verdict

should be upheld as long as there is sufficient evidence to validate either of the theories presented." 956 A.2d at 62 (quoting *Leftwich v. Maloney*, 532 F.3d 20, 24 (1st Cir. 2008) (citing *Griffin*)). Even if there was insufficient evidence that Binion acted as an aider-and-abettor or conspirator, there was sufficient evidence that he acted as a principal given his presence on scene, his motive to kill Taylor, his central role in planning the murder, and Massaquoi's testimony that he was the last person that Massaquoi saw with the firearm (2/3/20 Tr. 93-94, 151, 155, 163-64, 216). For the same reasons, any error would be harmless. *See Headspeth*, 86 A.3d at 565 (quoting *Kotteakos*, 328 U.S. at 765). Accordingly, the jury's verdict should stand even assuming error regarding the aiding-and-abetting and conspiracy instructions.

CONCLUSION

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

Respectfully submitted,

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District of Columbia
Court of Appeals

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

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

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

(1) An individual's social-security number
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(6) Financial account numbers

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(a) the acronym "SS#" where the individual's social-security number would have been included;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and (g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

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

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

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

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

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/s/	22-CF-116
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Kevin Birney	12/6/2023
Name	Date

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Email Address

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, Jonathan I. Kravis, Esq., Jonathan.kravis@mto.com, and Xiaonan April Hu, Esq., April.hu@mto.com, on this 6th day of December, 2023.

/s/
KEVIN BIRNEY
Assistant United States Attorney