BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-196

RAKEEM WILLIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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II. Whether the trial court properly exercised its discretion in declining to excuse a sitting juror pursuant to Rule 24(c)?

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COUNTERSTATEMENT OF THE CASE

In January 2019, appellant, Rakeem Willis, conspired with two others (Jonathan Winston and Jeffrey Felder) to murder Sean Shuler and to conceal evidence of that crime by killing the two men with Mr. Shuler: Javon Abney and Tyrik Hagood. After Willis accomplished the conspiracy's goals by gunning down these three men, a D.C. Superior Court grand jury charged him and Winston with three counts of First-Degree (Premeditated) Murder, in violation of D.C. Code

§§ 22-2101, -4502 (Record on Appeal (R.) 154-61 (Indictment) (PDF)).[1] Following an eight-day trial in the Fall of 2022 before the Honorable J. Michael Ryan, a jury convicted Willis of first-degree murder and fleeing a law-enforcement officer (11/16/22:3-6).[2] On February 10, 2023, Judge Ryan sentenced Willis to 120 years' imprisonment (2/10/23:30-31). Willis timely appealed (R.289-90 (NOA) (PDF)).

The Trial

Weaving together cell site location information (CSLI), eyewitness testimony, and surveillance footage, the government demonstrated that Willis lured Mr. Shuler to a quiet, dead-end block in Southeast D.C. late on January 26, 2019, and – with his co-conspirator – unleashed a fusillade of gunfire, killing Mr. Shuler and his two companions (Mr. Abney and Mr. Hagood). Soon thereafter, Willis torched the black Lexus he had used to get to the murder scene and then ordered takeout food at a nearby IHOP restaurant.

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[1] The grand jury also charged Willis and Winston with: conspiracy, unlawful possession of a firearm, and three counts of possession of a firearm during a crime of violence (R.154-59 (PDF)). Further, it charged Willis with one count of fleeing a law-enforcement officer and Felder with three counts of accessory after the fact (premeditated murder) (R.160-61 (PDF)). Before the conspirators' trial, the court severed Felder's case due to his counsel's illness. At the end of Willis and Winston's subsequent trial, the court granted Winston's motions for judgment of acquittal, and the government later dismissed Felder's accessory charges (see 11/8/22:6).

[2] The government had previously dismissed the conspiracy count and the jury acquitted Willis of the firearms offenses (11/8/22:19-20; 11/16/22:3-6).

Beginning in the early afternoon of January 26, Willis exchanged 18 phone calls with his target, Mr. Shuler. Initially – from approximately 2 p.m. until around 5 p.m. – Willis and Shuler exchanged 10 calls using one of Willis's two phone numbers: 443-454-9090.[3] At 6:23 p.m., however, Willis switched to his second phone number, calling Shuler from 240-856-8168.[4] As the government explained, Willis thereafter used this 240-number "to draw Sean Shuler to the scene and kill him" (11/8/22:93 (gov't closing)).

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[3] The government established Willis's use of this "443" number through two pieces of evidence. First, less than two hours after the murders IHOP surveillance video captured Willis picking up the takeout food he had ordered using the 443-number (see pp. 8-9 infra). Second, soon after his mother's death on January 15, 2019, Willis provided the 443-number on his life-insurance claims form (Exh. 571; see 11/2/22:102-11;11/7/22:14).

[4] The government established Willis's use of this "240" phone number through numerous pieces of evidence. First, Willis stipulated that he provided this number to a "government official" to whom he had a "duty to provide a telephone number" and that government official thereafter reached Willis on this number in January 2019 (Exh. 620; see 11/7/22:93). Second, about halfway through their six-month relationship (which started sometime in 2018), Willis changed his number and contacted his girlfriend (Elaine Gaye) using the 240-number (11/2/22:85, 94-101). Third, on January 26, 2019 – i.e., soon after Willis's mother's death and on the same day Willis murdered Shuler – an inmate (Derrick Phillips) reached Willis using this number and declared he was "sorry to hear about your mother, man" (Exh. 570 (recorded BOP call); see 11/7/22:12-13, 93-94). Fourth, following the murders, Willis's co-conspirator (Jeffrey Felder) gave the iPhone that had been assigned this 240-number to his son (Avontae Felder) (10/27/22:38-41; 11/2/22:169). Finally, when Willis – using the alias "Mike Lloyd" – signed up for the 240-number on January 19, 2019, he verified it with his *other* number (443-454-9090) (10/31/22:35-37; see Exh. 552 (Yahoo business record linking loydmike87@yahoo.com to Willis's 443-number)).

Using wireless-carrier cell site records,[5] the government's evidence chronicled Willis's and Shuler's approximate movements from roughly 6:20 p.m. to the time of Shuler's murder, at 10:00 p.m. Specifically, at 6:23 p.m., Willis called Shuler using his 240-number (see Exh. 531). At that time, Willis was "out in the vicinity of Largo, Maryland," with his co-conspirator (11/8/22:45 (gov't closing); see Exh. 531).[6] After Willis and Shuler exchanged five more calls between 6:46 p.m. and 7:17 p.m., Willis called Shuler at 8:46 p.m., having "moved back into the District" (11/8/22:46 (gov't closing); Exh. 531). Around the same time (at approximately 9 p.m.), Shuler "picked up" Javon Abney from Shuler's girlfriend's house and the two "left" (10/19/22:19-20, 30).

Shuler and Willis then began to "converge" as they moved toward the 1500 block of Ft. Davis Place, with Shuler traveling in a grey Camry and Willis in a black

[5] Cell phones perform their functions "by connecting to a set of radio antennas called 'cell sites.'" *Carpenter v. United States*, 585 U.S. 296, 300 (2018). "Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site." *Id.* "Each time the phone connects to a cell site, it generates a time-stamped record known as . . . CSLI." *Id.* at 301. As explained in Part I.B.3 infra, the government introduced the CSLI for the target numbers through FBI Special Agent Billy Shaw's expert testimony and a Powerpoint slide presentation he had prepared (Exhibit 531).

[6] As the government detailed in its closing, the CSLI for Willis's two numbers and a third number associated with co-conspirator Winston (720-421-3650) indicated Willis had rendezvoused with Winston earlier on January 26 and the two were then likely together because "their devices [we]re connecting to the same [cell] tower" between 5:20 p.m. and 5:30 p.m. (11/8/22:44 (gov't closing); see Exh. 531).

Lexus (11/8/22:46 (gov't closing); see Exh. 531). Following his 8:46 p.m. call to Shuler, for example, the cell-site records showed Willis "moved South," i.e., "closer to the [D.C.] crime scene as he's communicating with Sean Shuler" (11/8/22:46 (gov't closing); see Exh. 531 (documenting 9:36 p.m. call from Willis to Shuler)). Further, when Shuler thereafter phoned Willis twice (at 9:44 and 9:45 p.m.), Willis's phone connected to the "same tower" each time, which was "near" the D.C.-Maryland border (11/8/22:46-47 (gov't closing); see Exh. 531).[7] Finally, when Shuler twice phoned Willis again (at 9:51 p.m. and 9:55 p.m.), Willis's phone was "pinging off of a tower" that was "consistent with him being at the crime scene," *viz.*, the 1500 block of Ft. Davis Place, SE (11/8/22:46-49 (gov't closing); see Exh. 531). Indeed, as Exhibit 505A – video captured by a front-porch camera at the corner of Ft. Davis Place and Q Street, SE – revealed, Willis's black Lexus had pulled into that block just seconds before Shuler's 9:51 p.m. call (Exh. 505A (9:50:04 p.m.)). Shuler's second call to Willis (at 9:55 p.m.) was the last between the two men because, as the government explained in its closing, Willis "ha[d] achieved what he was trying to do with those calls back and forth" – he had "gotten Sean Shuler and the other victims to meet up with him" on Ft. Davis Place, a quiet residential street

[7] Just one minute after the 9:45 p.m. call, a speed-enforcement camera captured a black Lexus "in an area consistent with the D.C. and Maryland border," i.e., "traveling northbound on Southern Avenue in the direction of the crime scene" (11/8/22:47 (gov't closing); see 10/26/22:146-53; Exhs. 503, 598).

that dead-ends into a recreation center's baseball field (10/25/22:63-64, 78, 95; see Exh. 581 (overhead photo)).[8]

When Shuler, Abney, and Hagood arrived in the 1500 block of Ft. Davis Place four minutes after Willis (i.e., at 9:55 p.m.) (see Exh. 505B (9:55:40)), they parked their Camry across from 1512 Ft. Davis Place, where Ernest Mason and Shantell Walker lived (10/26/22:23, 29; 10/27/22:46; see Exhs. 140, 581). Soon thereafter (at approximately 10 p.m.), Mr. Mason and Ms. Walker both heard gunshots from their second-floor bedroom (10/26/22:26; 10/27/22:46-47). For her part, when Ms. Walker looked out one of the couple's bedroom windows, she saw a "dark figure standing over a body," which wasn't moving (10/27/22:48-50). Ms. Walker stopped looking out the window when she heard "more shots" (10/27/22:50). For his part, after he heard two muffled shots, Mr. Mason looked out the couple's other bedroom window and saw two dark silhouettes, one of whom was shooting into a gray car from the sidewalk while the other was shooting into the gray car from the street (10/26/22:26-29, 52). Mr. Mason witnessed about 45 seconds of gunfire and then

[8] Video from a front-porch camera at 3915 Q Street, SE – i.e., a house on the cross-street at the end of the 1500 block of Ft. Davis Place – showed Willis's Lexus and Shuler's Camry driving into the 1500 block of Ft. Davis Place at approximately 9:50 p.m. and 9:55 p.m., respectively (see 10/25/22:115-22; Exhs. 505A-B, 505.1, .2, .3, .4). Shuler thereafter phoned his girlfriend at 9:57 p.m. (10/27/22:22). Because Shuler used his phone's Facetime app, his girlfriend noticed Shuler was in the backseat of a moving car and, further, heard Javon Abney's voice (10/27/22:23-24).

saw the two figures run to a dark-colored car – which was about eight-to-nine car lengths from the gray car – "where there was [a] body already" (10/26/22:29-30). The two figures got into the dark-colored car and began to pull away but, after travelling just a few feet, the car stopped and one of the figures got out (10/26/22:31). A man squatted down and touched Shuler's body with his hands (10/26/22:31, 33; see *id.* at 31 (man was "messing with" the body)). After the man re-entered the dark-colored car, it left the block.[9]

Once Willis and his co-conspirator fled the shooting scene, the cell-site records again documented their approximate movements. For example, soon after a

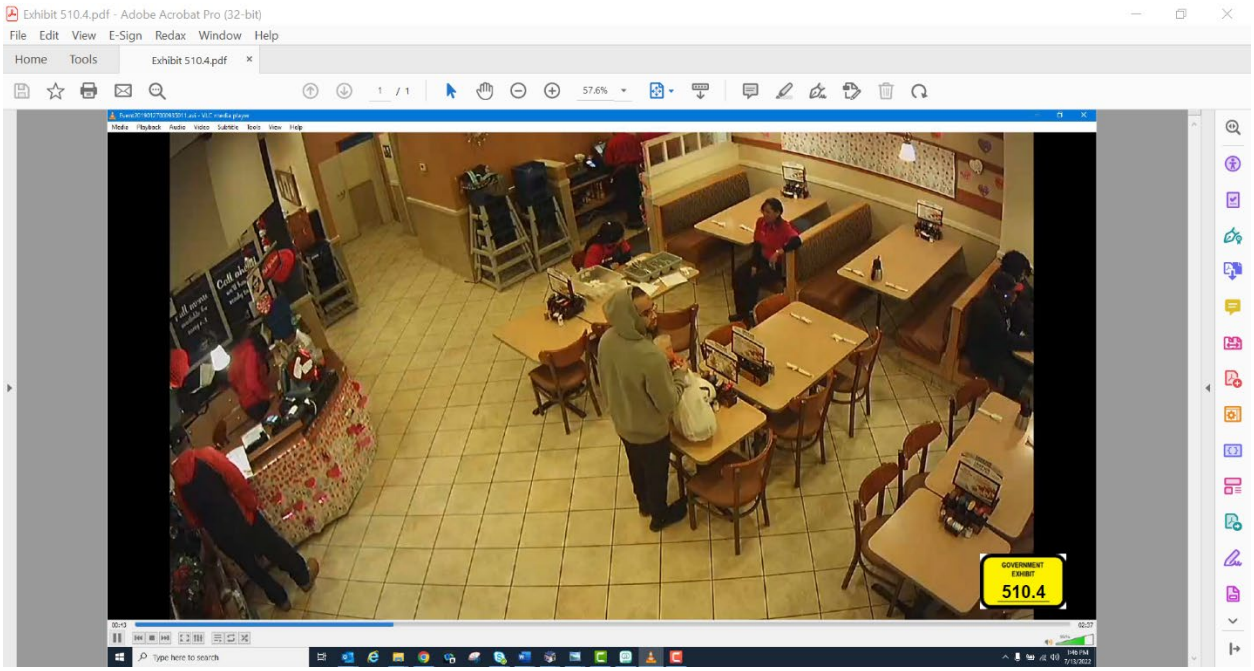
[9] Numerous items of physical evidence corroborated Mr. Mason's and Ms. Walker's account of the shooting. First, the Q Street front-porch camera recorded the black Lexus brake on Ft. Davis Place, "back up," and then exit the block at 10 p.m. (11/8/22:52 (gov't closing); see Exh. 505B (10:00:04-10:00:39)). Second, another camera located near the intersection of R and Ft. Davis Streets, SE – which is one block over from Ft. Davis Place – soon thereafter recorded a black sedan briefly stop and then the driver get out and seemingly "brush something off" himself (11/8/22:56 (gov't closing); Exhs. 506.1 (10:01:35-10:01:54), 582). Third, law enforcement recovered 24 cartridge casings near the gray Camry, including 12 clustered on the passenger side and 11 clustered on the driver's side (10/27/22:91-108; Exhs. 140, 150). Third, police found Mr. Abney's and Mr. Hagood's bullet-ridden bodies strewn across the Camry's front seat and Mr. Shuler's in the middle of the street, approximately three-to-four car lengths from the Camry (10/25/22:65, 87; e.g., Exhs. 103, 136, 620). Finally, consistent with Mr. Mason's suggestion that one of the fleeing men had bent down and touched Shuler's body and the government's suggestion that Willis had targeted Shuler, police did not find a phone on Shuler but did find over $200 in cash (see 10/27/22:131; 11/8/22:53 (gov't closing: "Whoever got out of the black car to mess with Sean Shuler's body wasn't interested in cash. They took his phone. Why? Because that device show[ed] those calls back and forth.")).

red-light camera recorded a black Lexus merging onto I-295 North from Pennsylvania Avenue (see Exh. 507 (10:07 p.m.)), Willis's co-conspirator's phone twice "connected" (at 10:08 p.m. and 10:09 p.m.) to two towers "consistent with the device being on 295" and "traveling northbound" (11/8/22:57 (gov't closing); see Exh. 531). Further, a series of phone calls between Willis (now again using his 443-number) and Felder at approximately 10:30 p.m. showed Felder "converging" on Willis's location near the spot where law-enforcement personnel found a "still smoking" burned-out black Lexus just 30 minutes later, at approximately 11 p.m. (11/8/22:58 (gov't closing); 10/26/22:76, 89; see Exhs. 431, 194, 198).[10]

Finally, just before midnight on January 26, Willis – using his 443-number and from an area "just South" of the restaurant – phoned an IHOP in New Carrolton, Maryland, and ordered takeout (10/31/22:64-78; 11/8/22:60 (gov't closing); see Exh. 531). Soon thereafter, Willis arrived at the IHOP in a white Infiniti, which his girlfriend (Ms. Gaye) identified as the car Willis drove in January 2019 (11/2/22:133-34; see Exhs. 508-511 (IHOP surveillance videos)). Further, when Willis entered the IHOP to retrieve his takeout order, he left his Infiniti running and unlocked, which was consistent with at least one other person remaining inside the

[10] Inside the torched Lexus, police found the remains of a Glock handgun on the rear- passenger floorboard (10/26/22:105-112, 126-27; Exhs. 1-4, 11). A firearms examiner concluded that neither this gun nor another Glock found in Shuler's Camry had "fired any of the fired casings or bullets in this case" (11/7/22:70-71).

Infiniti, namely, "the other shooter" (11/8/22:62 (gov't closing); see Exh. 508A (IHOP parking-lot footage)). And, as the below IHOP-surveillance photo shows, Willis's face is plainly visible, which is why MPD Detective Joshua Branson could identify him from this footage (11/2/22:179-82):



Approximately five months after Willis and his co-conspirator murdered Shuler, Abney, and Hagood, law-enforcement officials issued a warrant for Willis's arrest (11/27/22:81; 10/31/22:62). When the police thereafter spotted Willis and signaled for him to stop his car, Willis led them on a high-speed chase that ended when he crashed his car and fled on foot (10/27/22:70-78). The police ultimately found Willis hiding under a porch and recovered a bag of $5920 in cash and two cell phones nearby (10/27/22:75-76, 143-48).

SUMMARY OF ARGUMENT

The motions court did not abuse its discretion in admitting Agent Shaw's expert testimony. Given, among other things, the judge's extensive experience with such historical cell site evidence, the judge had a sufficient foundational basis to exercise his Rule 702 gatekeeping authority and reasonably concluded that Agent Shaw's methodology was reliable, and that the agent had reliably applied it in Willis's case.

The trial court did not abuse its discretion in denying Willis's motion to disqualify Juror #2 and replace him with an alternate. Far from uncritically accepting Juror #2's denials that he had been sleeping during the trial, the court assiduously investigated the issue by twice questioning Juror #2, soliciting the parties' own observations of Juror #2, and paying close attention to Juror #2 as the eight-day trial progressed. Based on this expansive record, the court properly exercised its discretion and concluded there was an insufficient basis to exercise its narrow Rule 24(c) disqualification authority.

ARGUMENT

I. The Motions Court Properly Exercised Its Discretion in Admitting Agent Shaw as an Expert on Historical Cell Site Analysis.

Willis claims (at 24-46) the trial court erroneously admitted Agent Shaw's expert testimony about the cell sites that Willis's phone numbers connected to on the day of the triple homicide. He is mistaken.

A. Applicable Legal Principles and Standard of Review

Federal Rule of Evidence 702 – which this Court adopted in *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016) (en banc) – establishes these prerequisites to the admission of expert testimony: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."[11] Rule 702 places these "'gatekeeping' responsibilities on the trial courts 'at the outset' and thereafter during trial to ensure that expert testimony is sufficiently reliable to help,

[11] In addition, under Super. Ct. Crim. R. 16(a)(1)(G), "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use during its case-in-chief during trial. . . . . The summary provided . . . must describe the witness's opinion, the bases and reasons for those opinions, and the witness's qualifications."

as opposed to confuse and hinder, the jury." *United States v. (Henry) Williams*, 827 F.3d 1134, 1156 (D.C. Cir. 2016) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592, 597 (1993)). This Court reviews "a claim of error admitting expert testimony for abuse of discretion, affording the trial court 'a great degree of deference.'" *Faltz v. United States* 318 A.3d 338, 347 (D.C. 2024) (citation omitted). "That standard applies as much to the trial court's decisions about *how* to determine reliability as to its ultimate conclusion." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (emphasis added).

B. Relevant Procedural History

1. The Government's Disclosures

In September 2020, the government informed Willis it might call Special Agent Lynda Thomas of the FBI's Cellular Analysis Survey Team (CAST) to testify as an expert in the fields of cellular phone technology, cellular towers, and the "analysis of historical cellular phone records for the purpose of determining the approximate location from which a phone was used at the particular time or range of times" (A.95). Specifically, the government explained, Agent Thomas would testify about the following at Willis's trial:

> • ***cellular phone technology***: "cellular phones use radio frequencies to communicate"; unless a cellular phone is in "Airplane" mode, it "constantly scans its environment, evaluating and ranking which towers have the strongest signal"; as a cellular phone's radio signal "travels away from [a] tower, the strength diminishes";

> • ***cell towers***: sometimes referred to as cell sites, cell towers "come in a variety of shapes and sizes" and "can be located in a variety of places"; a "typical cell tower has three 120 degree sectors" and their "antennas are pointed at the Earth and are fine tuned to provide a specific area of coverage"; and
>
> • ***how cellular towers are used by a cellular phone to transmit or receive phone calls***: "cellular phones use particular towers based on various factors, including the signal strength, distance from cell sites, and obstructions"; "[w]hen a cellular phone places or receives a call, it will utilize the cellular tower and sector with the strongest signal," and the "tower with the strongest signal generally comes from the tower that is closest to the phone, or in its direct line of sight" (A.95).

In addition to testifying how "cell phones interact with cell towers," the government's expert notice declared that Agent Thomas had "conducted an analysis of the call detail records and associated cellular tower records in connection with this case," and thus would "explain which cell towers were used for the calls and/or text messages placed from th[e co-conspirators'] phone numbers during the relevant time period" (A.95).

Agent Thomas's draft reports – which analyzed the activity of those phone numbers associated with Willis, his co-conspirators, and one of the homicide victims (the "target phone[s]") – provided Willis further detail about the government's case and Agent Thomas's testimony (A.98-184).[12] Agent Thomas's drafts explained that

[12] The government had previously provided drafts of Agent Thomas's analysis to Willis and incorporated them by reference in its expert notice (see A.91, 98-184). Additionally, the government had previously posted the target phones' cell-site data and telephone records on its discovery portal (A.91-92).

the target phones were believed to be "associated with a triple homicide which occurred on 1/26/2019 at approximately 10:00 PM in the 1500 block of Fort Davis Place, SE" (e.g., A.165). Accordingly, the government had obtained the target phones' call-detail records along with a list of cell-site locations and Agent Thomas had performed an analysis of those records (A.165). Agent Thomas described her analytical "[m]ethodology" this way:

> **2. Methodology.** . . . The call detail records documented the network interaction to and from the target cell phone. Additionally, the records documented the cell tower and cell sector ("cell site") which served the cell phone during this activity. Used in conjunction, the call detail records and a list of cell site locations illustrate an approximate location of the target cell phone when it initiated contact with the network.
>
> **2.1 Cell Site Locations.** Cell sites in existence during the time of the incident were input into mapping software using latitude/longitude coordinates of the cell sites provided by the service provider. The cell sites associated with the target cell phone[s] were located using the mapping software and the plotted cell site data. (A.165.)

As for Agent Thomas's case-specific "[c]onclusions," her drafts explained that "the methods detailed in Sections 2 and 2.1 were used to produce the attached historical cell site analysis maps" (A.165). These maps, in turn, provided Willis a detailed visual depiction of Agent Thomas's opinions by showing the estimated locations of the target phones – including Willis's – at various points and times relevant to the triple homicide. In particular, "when displayed on [one of the] map[s], a sector illustration shows the general area of coverage as it relates to a specific

geographic area and indicates incoming or outgoing call activity" (A.169; see Part I.B.3 infra (reproducing three maps admitted at trial)).

2. The Rule 702 Litigation

In February 2022, Winston – but not Willis – moved to exclude the government's cell site expert's testimony pursuant to Superior Court Criminal Rule 16 and Federal Rule of Evidence Rule 702 (A.185-94). Winston asserted Agent Thomas's "methodology [wa]s not scientifically valid and not reliable" and should be "excluded" (A.187-92). Assuming Agent Thomas's draft reports were based on a "theory called '[g]ranulization,'" Winston – citing a single Rule 702 authority, *see United States v. Evans*, 892 F. Supp. 2d 949 (N.D. Ill. 2012) – argued that this "theory fail[ed] to meet the reliability standard under *Daubert*" (A.188-89). "Furthermore," focusing exclusively on cell site "coverage" areas, Winston argued that Agent Thomas's testimony did "not meet the four requirements defined in Rule 702" (A.189-92).[13]

In its opposition, the government explained that Agent Thomas had not relied on a granulization theory (A.201). The government thus distinguished *Evans*, where

[13] Additionally, Winston asserted, Agent Thomas's cell-site evidence "should be excluded under Rule 403" because it was irrelevant and unfairly prejudicial (A.192-93). In a single sentence, Winston also summarily asserted that the government's "notice and the accompanying report d[id] not 'describe the expert's opinions and fail[ed] to describe the basis for those opinions'" (A.185-86 (quoting *Murphey-Bey v. United States*, 982 A.2d 682, 688 (D.C. 2009)).

the expert had "relied on the 'wholly untested' theory of 'granulization' to estimate the range of certain cell sites based on one tower's location relative to other towers, and 'assumed that Evans's cell phone used the towers closest to it at the time of the calls'" (A.201). In contrast, the government emphasized, Agent Thomas did not "assume anything as to which towers defendant's cell phone connected to" (A.201). "Instead, [Agent Thomas] 'used historical data from the defendant's cell phone records to demonstrate the towers that [his] phone had actually activated'" (A.201 (citation omitted)). Moreover, the government made "explicitly clear," Agent Thomas "could only *approximate* locations – not determine the *exact* location or *exact* coverage area containing the location of an individual based on the historical cell-site data" (A.202). Thus, the "pie wedges" on Agent Thomas's maps "were meant to illustrate an *approximate* coverage area and not the *exact* coverage area of a particular cell tower being used" (A.202). The government also rebutted Winston's suggestion that the cell-site evidence was irrelevant and unfairly prejudicial (see note 13 supra) – "[t]he cell tower locations provide approximate locations of defendants Winston and Willis, coinciding with their going from Winston's home at The Wharf on Maine Avenue, SE, to the scene of the murder, fleeing northbound on I-295 to

where the dark colored Lexus was burned, later to the IHOP on Annapolis Road in New Carrolton before returning to The Wharf" (A.203).[14]

On June 17, the court addressed Winston's Rule 702 motion (see 6/17/22:10 (court: "Mr. Irving and Ms. [Scialpi] you have this motion on the cell data.")). The court asked the government to describe what its "cell data evidence look[ed] like" and what it "expect[ed] to prove by it" (*id.* at 11). As government counsel explained, other than the fact that Agent Shaw (who, by then, had replaced Agent Thomas) would be discussing "more cell sites than normal" due to the lengthy (12-hour) period of communications, his testimony would be what's "typically done here in Superior Court," namely, "pie shaped wedges that show the general area that the phone is in when it makes and receives calls" (*id.*). Moreover, government counsel confirmed, "the approach from the CAST agent is exactly the same thing [the court] see[s] every day" and there would thus be nothing "unusual" about Agent Shaw's testimony (*id.* at 12).

[14] At a subsequent April 2022 status call, the trial court scheduled a June 17, 2022, hearing to address the parties' motions, including Winston's Rule 702 motion (4/7/22:20-21). In briefly discussing that motion, Judge Lee explained he had previously overseen several trials ("12, 15") where a CAST cell-site expert had testified, and he thus understood that such experts "don't try to testify that [a cell phone] is [in] a definitive spot" but simply "in a general area" (*id.* at 19; see also *id.* ("I don't believe that I have ever heard any of the analysts say that it definitely is in this spot")). Further, the court directed codefendants Willis and Felder, who had not yet then filed any pretrial motions, to file theirs – if any – by May 13 (*id.* at 7, 21).

In response, Judge Lee asked Winston's counsel, "[y]ou want me to exclude all of this or are you asking me to limit it in some way" (6/17/22:13). "[S]hort" of excluding "all" of it, Winston asked the court "to put a limitation on what the CAST team would say" (*id.*). Winston thus asked the court to ensure Agent Shaw did not stray from "talking about *general* areas, *general* locations" (*id.* (emphasis added)). Further, Winston requested, if Agent Shaw "suddenly changed [his] mind" and "start[ed] saying that [a phone] should have connected to [a] closer tower or typically or almost always" does, then Winston "want[ed] that sort of language limited" (*id.* at 13-14). Government counsel explained the agent would say that "typically the phone does connect to the closest tower" but it depends on several factors, including the "total number of calls being made on the network at a time" (*id.* at 14). Agent Shaw's testimony, government counsel noted, would be "carefully caveated" and he would not testify, for example, that "[']it must have been the closest tower[']" (*id.* at 14-15). In that regard, government counsel explained, Agent Shaw's testimony would be "exactly like every cell site expert who has ever testified in the Superior Court" (*id.* at 15).

Judge Lee agreed to admit Agent Shaw's testimony subject to these limitations:

> It can't be absolute because I think nobody can legitimately say that and I think I would be troubled if somebody came in to say that because I have never heard -- and I've heard them multiple times in trial, but I've never heard anybody say the science backs that up. So as long as that's

> the limitation, I think I'm okay with that piece, but I don't want the expert to run afoul of that[.] (6/17/22:15.)

So limited, Judge Lee ruled, Agent Shaw's proposed testimony satisfied Rule 702. It was based on sufficient facts or data – "Here the data relied upon by the Government is cell data kept by the phone companies that show the use of a particular cell number that is then recorded historically in these documents" (*id.* at 19; see Fed. R. Evid. 702(b)). Further, Agent Shaw's testimony met Rule 702(c)'s requirement that it be "based on reliable principles"; in 12 to15 trials involving such cell site testimony, Judge Lee "heard" the CAST agents describe their "methodology" – e.g., the "process that they use" – and the "[c]ourts have pretty routinely said [the methodology is] reliable" (6/17/22:19). Finally, Judge Lee determined, he hadn't "heard anything" suggesting Agent Shaw had failed to "reliably appl[y]" this methodology (*id.* at 17, 19; see Rule 702(d)). "[T]his type of information," Judge Lee explained, "is uniformly admitted into evidence" both in Superior Court and "the federal system as well," which is "a very powerful indicator of its general acceptance in court" (6/17/22:16).[15]

Moreover, correctly recognizing the Rule 702's Advisory Committee Notes admonition that "the trial court's role as gatekeeper is not intended to serve as a

[15] Indeed, as Winston's counsel had previously conceded, he was unaware of any Superior Court judge who had "rejected" such expert testimony (4/7/22:20-21).

replacement for the adversary system," Judge Lee would permit "pretty liberal" cross-examination; would let Winston's cell-site expert testify for the "same reasons" it was permitting Agent Shaw to testify; and would "give the instruction on experts" (6/17/22:18-20).[16] Thus, Judge Lee finally ruled, he would admit Agent Shaw's testimony "along with the use of a standard instruction for expert testimony and [ ] permit cross examination as well as the Defense evidence if they deem it appropriate" (*id.* at 24).[17]

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[16] Before the court's final ruling, Winston also objected to Exhibit 531's "actual displays," contending they were "subtl[y]" "misleading" based on "the way [the pie wedges] [we]re shaped" and the displays might thus "overpower[]" the court's "limitation" on Agent Shaw's testimony (6/17/22:20-21). As Judge Lee explained, however, in his experience, the CAST "experts say its usually like a pie shape and it's based on a kind of the direction of the tower and what I've heard and what I would expect to hear is that the pie shape is *kind of representative. It's not an absolute.*" (*Id.* at 21 (emphasis added).) Government counsel affirmed that Agent Shaw's testimony would be similar to that of the other CAST experts (*id.*). Moreover, Judge Lee noted, defense counsel could always cross-examine Agent Shaw about the visual displays (*id.* at 22-23). But when defense counsel protested – "why put the error in there in the first place?" – the court asked to review Exhibit 531 and counsel apparently emailed it to the court, a practice the defense elsewhere engaged in during the trial (*id.* at 23; see 11/3/22:68 (Willis's counsel referring to an "email" he "sent" to the court during trial testimony)). Ultimately, the court directed, if Winston still had concerns about any of Exhibit 531's visual displays, he should "see if the government w[ould] somehow acquiesce to maybe changing that slide or taking that slide out" (6/17/22:24). Neither Winston nor Willis thereafter objected to Exhibit 531's visual displays.

[17] Winston did not ultimately have to call his defense expert because the court granted his acquittal motion.

The trial court also declined Winston's request for a "standard *Daubert* hearing," where the court could "hear evidence about this and also actually hear" Agent Shaw's testimony "before" trial (6/17/22:16). Although Judge Lee understood he had the discretion to conduct such a hearing ("I could do it"), he'd "already heard it over and over and over again" in 12 to15 other trials with testimony from a CAST agent (*id.* at 17).[18]

3. Agent Shaw's Testimony

At trial, the court qualified Agent Shaw as an expert on "the topic of historical cellular record analysis" (11/3/22:31).[19] A cell phone, Agent Shaw explained, "is simply a radio" that "interacts with the network via cell towers,"[20] and that's how

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[18] At a subsequent hearing addressing the government's opposition to Winston's proposed cell-site expert, government counsel addressed Winston's Rule 16 claim (see note 13 supra), explaining that Agent Shaw's report provided the "detail and the specificity that allow[ed] the Defense to know" his opinions (7/28/22:15; *id.* at 21 (AUSA: "[I]t is a map. It shows towers, [and] the pie shapes")). Defense counsel disagreed, protesting: "[a]ll it is is a map visualization of the call detail records . . . all it does is it plot points" (*id.* at 16-17). But, as the court rightly noted, "that *is* the opinion" and thus concluded the government had satisfied Rule 16 (*id.* at 17 (emphasis added)).

[19] Agent Shaw had worked for the FBI for seven years and, as a CAST member, analyzed call-detail records, gave training on CAST methodologies, and provided expert testimony (11/3/22:27-28). Agent Shaw had received 248 hours' training in the analysis of historical cell site records, analyzed "[h]undreds" of call-detail records, and "provided instructions to several CAST basic classes" (*id.* at 28-31).

[20] "[T]ypically," a cell tower is "broken up into three sectors," each of which is "approximately 120 degrees" (11/3/22:37). However, towers that "are typically

(continued . . .)

one places and receives calls (*id*. at 32). A cell phone will "work from a tower with the strongest signal that the tower connects to when it either places or receives a phone call" (*id.*). But the "strongest and clearest signal does not necessarily mean the closest signal" (*id.* at 118; see also *id.* at 76 ("So when the phone call is placed, it's going to connect to the tower with the closest and strongest signal. Clearly that is going to be the closest tower unless there's some kind of physical structure or valley or mountain or something impeding that signal.")). Service providers – e.g., AT&T, Verizon, T-Mobile – keep call-detail records of all such calls "for billing purposes" (*id.* at 32-33). Agent Shaw "trust[s] these records" because they "are not maintained for law enforcement purposes" (*id.* at 86).

Agent Shaw's report in this case reflected his analysis of the target phones' historical cell site records (11/3/22:33; see Exh. 531).[21] "[T]o conduct this analysis,"

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located in very densely populated areas" – like The Wharf neighborhood – sometimes have one 360-degree sector (*id.* at 40). Providers install more cell sites in denser urban areas "to provide more coverage" (*id.*). In suburban and rural areas, fewer towers are "spread out further" (*id.*). "It's all about trying to provide the best coverage for the users of the cell phone" (*id.*). Each provider keeps a list of its cell towers and assigns each a "unique identifier" (*id.* at 32). These lists also contain "a specific latitude and longitude of every tower in the network" (*id.*).

[21] When Agent Shaw "inherited" Agent Thomas's preliminary report, he made certain corrections to the cell-tower identifiers because Agent Thomas had "transposed some numbers" (11/3/22:34). Agent Shaw then had another CAST agent peer review it "to check for any errors" (*id.*). "[T]o ensure [the report's] accura[cy]," the peer-review agent used a "different software" than the ESPA software used by Agent Shaw (*id.* at 116).

Agent Shaw used two records: the "call detail records" and "the tower list" (*id.* at 37, 82). A user's call detail records identify: who placed or received the call; the day and time the call was placed or received; and – via its "unique identifier" – the cell site and sector connecting the call (*id.* at 37-38; see also *id.* at 63 ("if a record is generated, that means a call was placed")). The tower list identifies the location of each cell tower via its "latitude and longitude" (*id.* at 38; see generally *id.* at 63, 78). When Agent Shaw put these two reports "together," he could "tell when someone made a call in an approximate area of where they were located of when they placed or received the call [sic]" (*id.* at 38). Of course, Agent Shaw conceded, he couldn't "tell who physically" had a particular phone because it could've been "possessed by anyone" (*id.* at 89).

Consistent with Judge Lee's pretrial rulings, Agent Shaw also detailed the limitations of Exhibit 531's maps, including the wedge-shaped sector illustrations. "[T]hese wedges," Agent Shaw explained, "indicate an approximate area of where the call happened as well as the sector of the tower that the call happened on" (11/3/22:38).[22] A cell site just "emit[s] radio signals" and "radio signals don't have hard and fast boundaries" (*id.* at 39; see also *id*. at 67-68 (same)). Agent Shaw

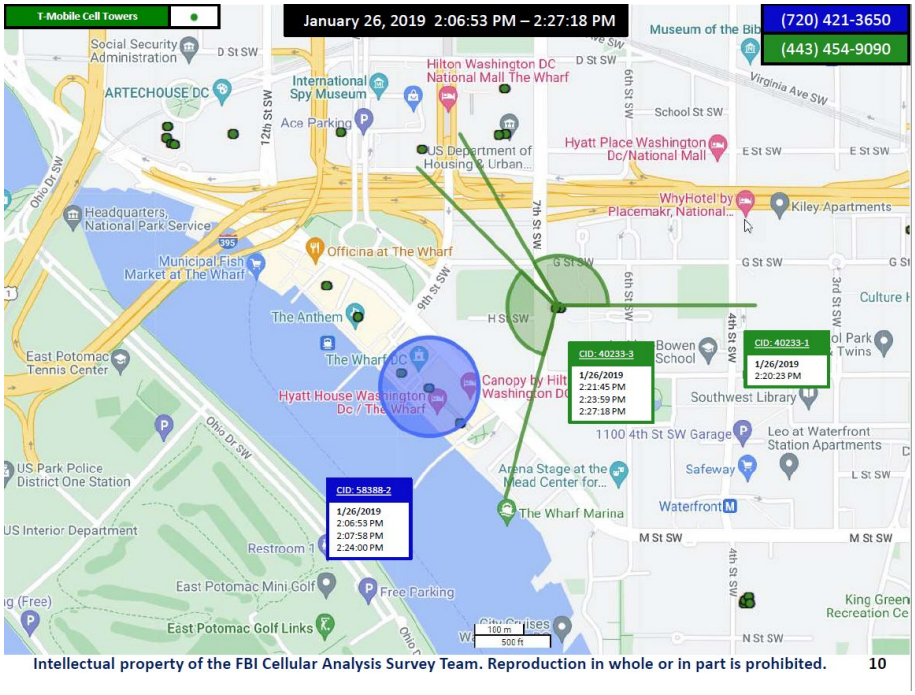
[22] Echoing this testimony, Exhibit 531 itself explains that, "[w]hen displayed on a map, a sector illustration shows the *general* area of coverage as it relates to a specific geographic area and indicates incoming or outgoing call activity" (A.66 (emphasis added)).

explained to the jurors that they had to "think of [Exhibit 531's wedge-shaped sector illustrations] as just approximations" (*id.* at 39; see also *id.* at 38-39 ("I keep saying [']approximate areas,[']because this is showing me the approximate coverage area of that tower")). In sum, Agent Shaw explained, he could not "pinpoint an exact location" for any cell phone (*id.* at 118). Rather, his maps reflected only "approximate location[s]" (*id.*).

Using Exhibit 531's Powerpoint slides, Agent Shaw also detailed his "analysis of the historical call detail records" in this case (11/3/22:40). For example, Slide No. 10 – reproduced below – showed "activation[s] for two phone numbers, both on the T-Mobile network" (*id.* at 41). (An "activation" can "be a call placed or received, a text sent or received or data" (*id.* at 51).) The "first number [wa]s 720-421-3650 and that [was] denoted by a blue circle in the wharf area,"[23] and then there were "activations in cell phone number 443-454-9090, and those [we]re denoted by two

[23] On cross, Agent Shaw reiterated that the blue circle around The Wharf site was "just an approximation" of the tower's actual coverage because he had not performed a "drive test" (11/3/22:65-66; see also *id.* at 80 ("[t]his is simply an approximation"); *id.* at 81 ("this is an approximation")). Thus, he agreed, that tower's coverage "could go out farther than the next tower" – "Possibly. But there's no way to tell that unless we do an actual drive test to measure that true coverage area." (*Id.* at 66-67.) *See also United States v. Morgan*, 45 F.4th 192, 197-98 (D.C. Cir. 2022) (though drive tests are "primarily" used by telephone companies to determine a wireless network's "health," law-enforcement personnel "also conduct drive tests, typically to determine the approximate coverage area of a particular tower to which a cell phone of interest connected during a relevant time period").

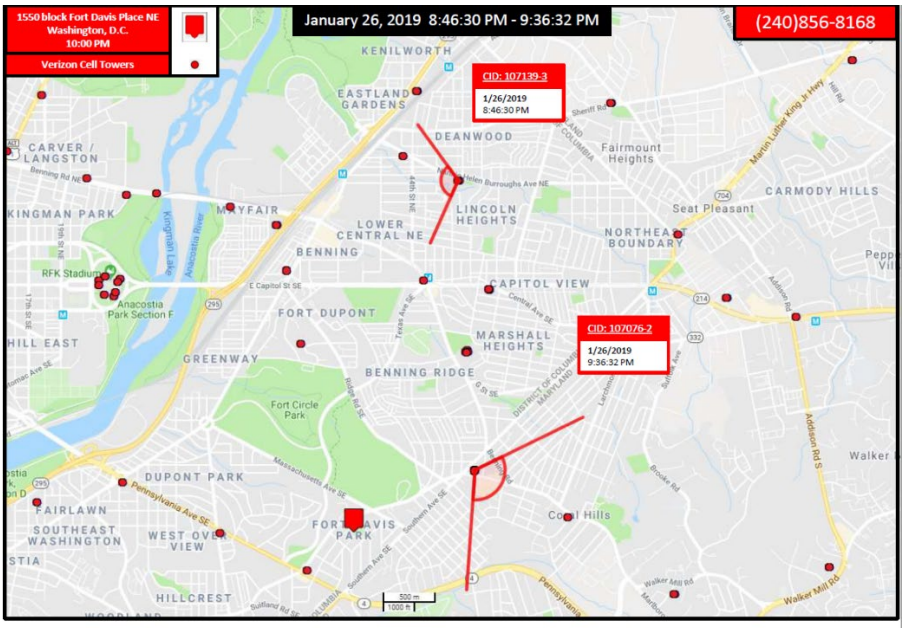
wedge-shaped arcs just northeast of the wharf area" (*id.*).[24] All those "activations occurred" on "January 26th, 2019, between 2:06 p.m. and 2:37 p.m. [sic: 2:27 p.m.]" (*id.*).



As another example, Slide No. 22 showed "activations for cell phone number 240-856-8168 which was on the Verizon network on January 26th, 2019, from 8:46 p.m. through 9:36 p.m." (11/3/22:47). Additionally, Slide No. 22 had a "red flag

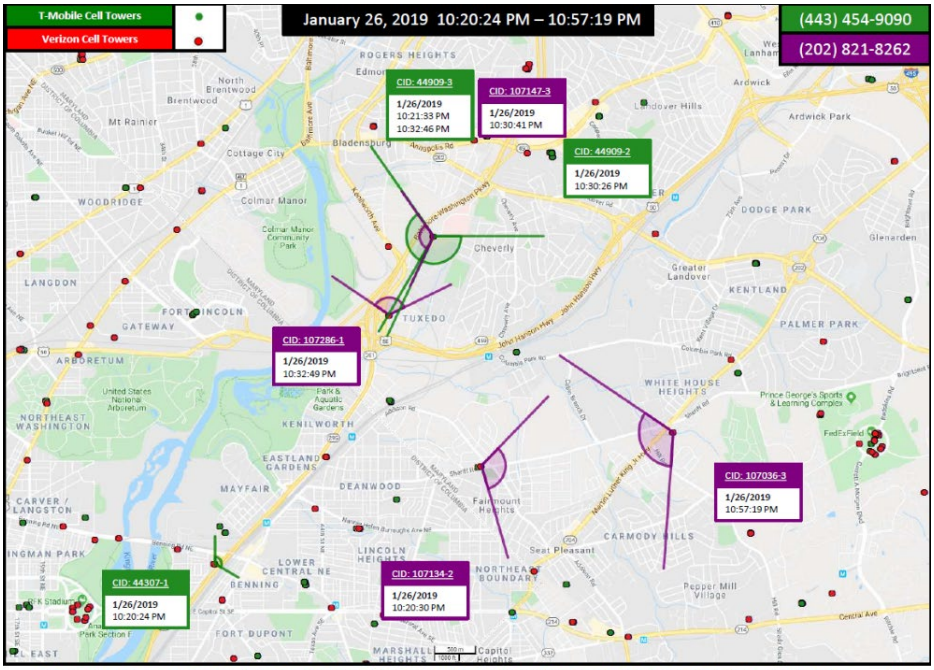
[24] On cross, Agent Shaw reiterated that the shaded areas and the "two lines coming out" from a tower on any of Exhibit 531's slides did not depict "the actual coverage of that particular tower" (11/3/22:67; see also *id.* at 74 (Agent Shaw agreeing "the arc itself, . . . doesn't denote where the phone is")). Further, the "lines also d[idn't] denote how far away the phone could be" (*id.* at 74-75). Instead, "[t]his [wa]s just an approximation of the coverage area" (*id.* at 67). Agent Shaw similarly agreed there "could be bleeding" between tower sectors such that it was "possible" an activation had come from a phone completely outside either the shaded area or the lines approximating a given sector (*id.* at 74-75).

denoting the location of the crime scene" (*id.*). Further, Agent Shaw agreed, the "data as shown on Slide 22" – e.g., the activation time-stamps and tower locations – was "consistent" with "the phone using phone number 240-856-8168, moving from the Deanwood/Lincoln Heights area of the City down in the direction of the crime scene" (*id.* at 47-48).



As a final example, Slide No. 25 showed "activations" ("denoted by two blue wedges") for "cell phone number 720-421-3650, which occurred on the T-Mobile network during the time period of January 26th, 2019, 10:08 p.m. through 10:09 p.m." (11/3/22:51). The first blue "wedge [wa]s on cell ID 46893 on the third sector" – which was "just northwest of the crime scene" – and the second blue wedge was "west of the crime scene facing northeast, and that's on cell ID 59297 on the first sector" (*id.*). Agent Shaw agreed that Slide No. 25's data was "consistent" with "the

phone moving in a northeast direction," "up 295 possibly or any road that is traveling in that same northeast direction" (*id.* at 51-52).[25]



[25] In addition to five generally illustrative slides (A.62-66) and one slide identifying the D.C. area's T-Mobile and Verizon cell sites (A.67), Exhibit 531 contained an additional 17 case-specific slides that mapped the target phones' activations. The remainder of Agent Shaw's testimony about those 17 slides (see 11/3/22:41-57) was similar to that described in the text, with the only variables being the time, location, and – in the case of Slides 27 and 28 – the date of the activations. See, e.g., *id.* at 40 (Slide No. 8 showed a "cell site activation" – via a tower "near the [W]harf" – for "cell phone number 720-421-3650 on the T-Mobile network on January 26, 2019, at 2:02 p.m."); *id.* at 41 (Slide No. 9 showed a "cell site activation for cell phone number 443-454-9090 that occurred on a T-Mobile network on January 26th, 2019, at 2:06 p.m." and "this activation happened on cell tower 44307," which "is located on [I-]295, just south of the Mayfair area"); *id.* at 41-42 (Slide No. 11 showed "an activation for cell phone number 202-821-8262, which occurred on the Verizon network"; this activation "occurred on January 26, 2019, at 2:[23] p.m." via a "sector facing southwest" on a tower at the intersection of Martin Luther King Highway and Sheriff Road in Maryland).

C. The Motions Court Properly Exercised Its Discretion in Admitting Agent Shaw's Testimony.

Willis raises two claims concerning the government's cell-site evidence. First, he alleges (at 22, 31-36), the court "erred in admitting Agent Shaw's testimony" "[b]ecause" – in contravention of Super. Ct. Crim. R. 16(a)(1)(G) – "the government failed to disclose [his] *actual* opinions and their bases and reasons prior to trial." Second, he contends (at 22-23, 36-46), Judge Lee "abused his discretion in admitting Agent Shaw's expert testimony under" Fed. R. Evid. 702. Neither claim has merit.

1. Willis Has Waived His Rule 16 Claim.

Pursuant to Rule 16(a)(1)(G)'s plain language, "*[a]t the defendant's request*, the government must give to the defendant a written summary of any testimony that the government intends to use" under Rule 702 (emphasis added). Subdivision (a)(1)(G) thus "requires the government to disclose information regarding its expert witnesses if the defendant first requests the information." Fed. R. Crim. P. 16 (Advisory Comm. Notes); *see Ferguson v. United States*, 866 A.2d 54, 63 (D.C. 2005) ("duty to disclose under Rule 16 is triggered by a proper request"); *see generally Weems v. United States*, 191 A.3d 296, 310 (D.C. 2018) (Super. Ct. Crim. R. 16 "derives from and mirrors" Federal Rule 16).

Here, Willis has not identified any Rule 16 request on his part and we have not found one. "Thus, [there is] no reason to think that his right to pretrial disclosure

of [Agent Shaw's] testimony was triggered." *United States v. Garza*, 566 F.3d 1194, 1200 (10th Cir. 2009); *cf. Miller v. United States*, 115 A.3d 564, 567 (D.C. 2015) ("Miller made such a request . . . ."). Because Willis had no right to *any* disclosure, he cannot challenge the adequacy of the government's disclosure to his co-defendant at this juncture. *See United States v. Clotaire*, 963 F.3d 1288, 1298 (11th Cir. 2020) ("Mikel objects that the government never filed notice of Broadhurst's expert testimony, but that makes no difference because the government only has an obligation to provide the defense advance notice of expert witnesses (along with a summary of their testimony) if the defendant makes a request. Mikel never did."); *United States v. Hudson*, 462 F. App'x 357, 360 (4th Cir. 2012) (same); *United States v. (Mary Jane) Johnson*, 228 F.3d 920, 924 (8th Cir. 2000) (same); *United States v. Salerno*, 108 F.3d 730, 743 (7th Cir. 1997) (same).[26]

2. The Government's Notice Complied with Rule 16(a)(1)(G).

In any event, as the trial court rightly concluded, the government complied with Rule 16 when it sent Willis's "counsel its discovery letter stating that it was

[26] Of course, if a defendant – such as Willis – does *not* request such a written summary or, at least, join in a co-defendant's request, he has no reciprocal discovery duty vis-à-vis his own expert, a strategic advantage that often explains a defendant's inaction. *See* Super. Ct. Crim. R. 16(b)(1)(C); *United States v. Palmer*, 884 F. Supp. 2d 22, 33 (W.D.N.Y. 2012) (defendants who joined in co-defendants' motions for expert disclosure obligated to provide reciprocal discovery).

going to present an expert" and that "letter stated the substance of the expert's testimony and the basis for the opinion that the expert would offer." *Reed v. United States*, 828 A.2d 159, 163 (D.C. 2003). Rule 16(a)(1)(G) "is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim. P. 16 (Advisory Comm. Notes). "This is particularly important if the expert is expected to testify on matters which touch on new or controversial techniques or opinions." *Id.*

As the trial court correctly recognized, there was nothing new or controversial about Agent Shaw's historical cell site analysis (see 6/17/22:16). It "enjoys widespread use by law enforcement" and "[c]ourts have generally found [it] to be reliable and admissible." *United States v. Morgan*, 45 F.4th 192, 202 (D.C. Cir. 2022). Indeed, nearly a decade ago, the Seventh Circuit declared that the "science and methods" upon which this evidence "is based are understood and well documented." *United States v. Hill*, 818 F.3d 289, 299 (7th Cir. 2016). And today there is "widespread, if not universal, acceptance of the general idea that because of the way cell phones communicate with towers, it is possible to make determinations about the general locations of phones at particular times." *State v. Gleaton*, 3 N.W.3d 334, 346 (Neb. 2024). "Across the nation, state and federal courts" have thus "accepted expert testimony about cell site analysis for the purpose of placing a cell

phone within a 'general area' at a particular time." *State v. Burney*, 298 A.3d 1080, 1092 (N.J. 2023); *see generally United States v. Bash*, 2025 WL 51210, *15 (E.D. Cal. Jan. 8, 2025) ("'[C]ell site data analysis is a widely used and respected methodology that has overwhelmingly been found admissible by federal courts.'") (citation omitted).

In adherence to Rule 16, the government's notice "describe[d]" Agent Shaw's "opinions." Rule 16(a)(1)(G). The government explained that Agent Shaw would testify "how cellular towers are used by a cellular phone," including that "cellular phones use radio frequencies to communicate" and, when a phone places or receives a call, it "utilize[s] the cellular tower and sector with the strongest signal" (A.95). Further, Agent Shaw would "testify that cellular phones use particular towers based on various factors, including the signal strength, distance from cell sites, and obstructions between the phone and tower" (A.95). Agent Shaw also would "interpret the call detail records he analyzed" and "explain which cell towers were used for the calls and/or text messages placed from those phone numbers during the relevant time period" (A.95).

Moreover, far from simply detailing the "'subject areas'" of Agent Shaw's testimony, as Willis asserts (at 31), the government provided Willis with several drafts – in the form of Powerpoint presentations – of the agent's historical cell site analysis. "As for the opinions that [Agent Shaw] w[ould] testify to, the Powerpoint

presentation[s] contain[ed] his conclusions, which [we]re visual estimations of where the cell phones associated with [Willis and his co-conspirators] were during the times relevant to this case." *United States v. Ramsey*, 2023 WL 2523193, *17 (E.D.N.Y. March 15, 2023) (rejecting Rule 16(a)(1)(G) challenge). Specifically, the drafts denoted: the phone numbers Agent Shaw considered; the cell sites (and, indeed, site sectors) with which those numbers communicated at the relevant times; and the locations of those cell sites. Thus, contrary to Willis's contention (at 32) that the government "never provided case-specific details," the "maps themselves depict[ed] SA [Shaw's] conclusions, which [we]re visual in nature and show[ed] the estimated locations of the Defendants' cell phones at various points relevant to the case." *United States v. Clanton*, 2024 WL 1072050, *25 (E.D.N.Y. March 12, 2024) (rejecting Rule 16(a)(1)(G) challenge).[27]

Similarly, the government also provided adequate notice of the "bases and reasons" for Agent Shaw's opinions. Rule 16(a)(1)(G). Specifically, the government

[27] *See also United States v. Belloisi*, 2023 WL 2716551, *1 (E.D.N.Y. March 30, 2023) (rejecting Rule 16(a)(1)(G) challenge where, *inter alia*, "an exhibit to the disclosure indicates the approximate locations where the cell devices were at particular times"); *United States v. Ray*, 2022 WL 101911, *4 (S.D.N.Y. Jan. 11, 2022) (rejecting Rule 16(a)(1)(G) challenge where, *inter alia*, "[f]rom the maps, the defense ha[d] notice of whether wireless devices were in geographic proximity to one another"); *United States v. Cervantes*, 2015 WL 5569276, *2 (N.D. Cal. Sept. 22, 2015) (rejecting Rule 16(a)(1)(G) challenge where, *inter alia*, "slides depict[ed] the purported map locations of 'pertinent' cell phones (including [one defendant's]) around the time of the alleged Oakland double murder").

provided Willis the target phones' call-detail records. Those records, the government's notice explained, "documented the network interaction to and from the target cell phones" (A.99). They also documented the "cell tower and cell sector ('cell site') which served the cell phones during this activity" (A.99). And, when "[u]sed in conjunction, the call detail records and a list of cell site locations illustrate[d] an approximate location of the target cell phone[s] when they initiated contact with the network" (A.99). Finally, the government explained, the cell sites in existence at the time of the January 26 murders were input into a mapping software using their "latitude/longitude coordinates" and the "cell sites associated with the target cell phone[s]" (including Willis's) were thereafter "located utilizing the software and the plotted cell site data" (A.99). These methods produced the draft historical cell site analyses that the government provided to Willis well in advance of trial.[28]

Thus, even if Willis has not waived his Rule 16 claim, the government's expert notice complied with subdivision (a)(1)(G). "Specifically, the government explained that [Agent Shaw] obtained the cell phone records for [Willis's] telephone, and those records documented the cell towers and cell sectors that serviced that phone." *United States v. Hahn*, 2019 WL 1246185, *2 (D. Haw. March 18, 2019).

[28] Willis does not contend that the government's notice failed to detail Agent Shaw's "qualifications." Rule 16(a)(1)(G).

The government also explained that Agent Shaw used "mapping software" to locate the "cell sites associated with the target cell phone[s]," which resulted in "'an approximate location of the target cell phone[s]'" when they initiated contact. *Id.* (citation omitted) "No further disclosure was required." *Id.*[29]

Despite the breadth of the government's Rule 16 disclosure, Willis recites (at 32-33) several omissions, including "what software was used," "what level of confidence or precision [Agent Shaw] would express," and "how the pie-shaped

[29] *See also Clanton*, 2024 WL 1072050, at *25 (Rule 16(a)(1)(G) disclosure "adequately identif[ied] bases and reasons" for expert's opinions where, *inter alia*, "PowerPoint explain[ed] that the records on which [expert] relied to create maps depicting the approximate location of [defendants' phones] 'document[s] the network interaction to and from the target' phones" and "further show[ed] 'which cell towers and which cell sectors the [defendants' phones] connected to at various times . . . and the locations of other cell towers, to which the defendant's phones did not connect during the relevant time periods"); *Ray*, 2022 WL 101911, at * 5 (Rule 16(a)(1)(G) disclosure of "basis" for cell-site expert's opinion "sufficient" where, *inter alia*, government explained its expert would testify that the "cell tower that provides the strongest and clearest available signal is ordinarily the nearest cell site" and – based on his "study" of target's "cellphone records" – expert could "locate the likely cellphone towers that would likely provide the strongest and clearest signal," which he then mapped); *United States v. Martinez*, 2015 WL 428314, *1 (N.D. Cal. Jan. 30, 2015) (Rule 16(a)(1)(G) disclosure "sufficient" where government provided "the underlying data regarding [expert's] testimony" – which included "data showing the location of pertinent cell phones during the events in question" – and explained "(1) how cellular telephones and cellular networks operate; (2) the information contained in cellular telephone records, also known as call detail records; and (3) that it is possible to approximate to a fair degree of accuracy the location of a cellular telephone based on information contained in call detail records, based on the cell site location accessed for a particular call, along with any attendant cell sector information").

'sector illustration[s]' were constructed." But Rule 16 only requires a "summary" of expert testimony, not a "recitation of the chapter and verse of the experts' opinions, bases, and reasons.'" *United States v. Nelson*, 533 F. Supp. 3d 779, 789 (N.D. Cal. 2021) (citation omitted); *see also United States v. Spotted Horse*, 914 F.3d 596, 601 (8th Cir. 2021). Because the government's summary ensured Willis was not surprised by the expert testimony and certainly provided the defense with an adequate opportunity to test Agent Shaw's opinions through focused cross-examination, the government's notice satisfied Rule 16. Indeed, as to the latter, the defendants' cross of Agent Shaw consumed 50 transcript pages, while the government's direct spanned only 30 pages (see 11/3/22:58-106, 117-18 (cross)).

3. The Motions Court Properly Admitted Agent Shaw's Expert Testimony Pursuant to Rule 702.

Rule 702 assigns to the judge "the task of ensuring that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. "The inquiry envisioned by Rule 702 is . . . a flexible one," *id.* at 594, and the judge "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable," *Kumho Tire*, 526 U.S. at 152. "'Notwithstanding its critical gatekeeping function' to prevent the jury from hearing expert testimony that does not have proper indicia of reliability," however, the court "'is just that – a gatekeeper – and Rule 702 is a

screening procedure, not an opportunity to substitute the trial court's judgment for that of a jury.'" *United States v. Ware*, 69 F.4th 830, 847 (11th Cir. 2023) (citation omitted), *cert. denied*, 144 S. Ct. 1395 (2024). Indeed, the "'general approach'" of the Rule is a "'relaxing [of] the traditional barriers to "opinion" testimony.'" *Daubert*, 509 U.S. at 588 (citation omitted).

As the record amply demonstrates, Judge Lee understood the scope and purpose of Rule 702,[30] and properly exercised his discretion in admitting Agent Shaw's testimony. Rule 702, Judge Lee correctly explained, now "allows more expert testimony in than what existed before" and, following *Daubert*, "'the rejection of expert testimony is the exception rather than the rule'" (6/17/22:18 (quoting Advisory Comm. Notes)). Judge Lee also noted that "'cross-examination, presentation of contrary evidence [ ], [and] careful instruction on the burden of proof are the traditional means of attacking shaky but admissible' expert testimony" (*id.* at 19 (quoting Advisory Comm. Notes)). Accordingly, Judge Lee accurately concluded, "if there are reliable principles reliably applied and the individual is qualified to so render an opinion," Rule 702 is "satisf[ied]" (4/17/22:20; see also 6/17/22:17 (same)).

[30] Though Winston challenged Agent Shaw's testimony in the trial court pursuant to Rule 403, Willis does not now contest its relevance or suggest its prejudicial effect outweighed its probative value (see Br. at 36-42).

Moreover, Judge Lee understood (see 6/17/22:16-17), "[w]hile the gatekeeping function require[d] [him] to ascertain the reliability of [Shaw's] methodology, it d[id] not necessarily require that a separate hearing be held in order to do so." *United States v. (Elijah) Williams*, 506 F.3d 151, 161 (2d Cir. 2007). "[S]ome expert testimony will be so clearly admissible that a district court need not conduct a *Daubert* hearing." *Ware*, 69 F.4th at 846. In such circumstances, the relevant question is only "whether there was a sufficient foundational basis in the record to support the trial court's decision to admit" the expert's testimony. *(Elijah) Williams*, 506 F.3d at 161; *see also* E. Chang, *Applying Daubert: Preliminary Considerations Regarding the Management of Expert Testimony*, 1 Mod. Sci. Evidence § 1.8 (2024-2025 ed.) ("when no *Daubert* hearing is held, the district court must create a sufficient record"). Relying on the government's disclosures, the parties' pleadings, the governing authorities, and his own significant experience with historical cell site evidence – e.g., he had presided over 12 to15 trials where such testimony had been elicited – Judge Lee developed a more-than-sufficient record to support his decision to admit Agent Shaw as an expert.

The state and federal courts have overwhelmingly concluded that "[h]istorical cell-site analysis can show with sufficient reliability that a phone was in a *general*

area, especially in a well-populated one." *Hill*, 818 F.3d at 298 (emphasis added).[31]

"At the same time, courts have cautioned that an antenna-mapping technique might

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[31] *See*, *e.g.*, *United States v. Pembrook*, 876 F.3d 812, 825 (6th Cir. 2017) ("Pembrook's argument that Hess's expert testimony was improper because cell-site analysis is unproven and unreliable under *Daubert* and FRE 702(c) unravels before it begins because the particular form of cell-site analysis and corresponding testimony used here was reliable"), *vacated on other grds by Calhoun v. United States*, 139 S. Ct. 137 (2018); *United States v. Lewisby*, 843 F.3d 653, 659 (7th Cir. 2016) ("[u]sing call records and cell towers to determine the general location of a phone at specific times is a well-accepted, reliable methodology" (citing, *inter alia*, 2014 NIST article)); *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 n.5 (4th Cir. 2015) ("We also reject Jackson's contention that evidence regarding the use of historical cell phone data to identify the geographic area in which a cell phone was located at a given time is inherently unreliable. Federal courts have regularly admitted expert testimony regarding this type of evidence."); *Nelson*, 533 F. Supp. 3d at 792 ("as the Government represents[,] . . . no court has ever excluded CAST agent testimony on the ground that historical cellular analysis is inherently unreliable under Rule 702"); *United States v. Jones*, 918 F. Supp. 2d 1, 5 (D.D.C. 2013) ("use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts" (citing authorities)); *State v. Washington*, 2025 WL 466417 at *27 (La. Ct. App. Feb. 12, 2025) ("[h]istorical cell site analysis and its methodologies are routine law enforcement tools that this court has consistently found admissible when challenged" (citing authorities)); *Wells v. State*, 675 S.W.3d 814, 829 (Tex. Ct. App. 2023) ("this Court and many others have already concluded that maps based solely on cell-site location data . . . are sufficiently reliable to be admissible at trial" (citing authorities)), *petition for discretionary review granted* (Jan. 24, 2024); *Walker v. State*, 308 So. 3d 193, 198 (Fla. Ct. App. 2020) ("[n]umerous other courts have determined that testimony based on cell phone data mapping programs is admissible" (citing authorities)); *State v. Warner*, 842 S.E.2d 361, 367 (S.C. Ct. App. 2020) (court "join[s] the many other jurisdictions that have deemed CSLI reliable enough to pass the Rule 702 gate" (citing authorities)), *aff'd in part and remanded*, 872 S.E.2d 638 (S.C. 2022); *State v. Parham*, 121 N.E.3d 412, 424 (Ohio 2019) ("we join the multiple other courts that have concluded that historical cell-site analysis is accurate enough and well accepted enough to allow admissibility" (citing authorities)); *People v. Shanks*, 467 P.3d

(continued . . .)

raise *Daubert* concerns if the expert 'overpromises on the technique's precision' by misleadingly suggesting that the data pinpointed a defendant to a *precise* location – like GPS." *United States v. Reynolds*, 86 F.4th 332, 347 (6th Cir. 2023) (quoting *Hill*, 818 F.3d at 299). Similarly, the courts have also "criticized techniques" that "wrongly assume a phone always connects to the closest antenna." *Id.* (citing, *inter alia*, *Evans*, 892 F. Supp. 2d at 956-57). Based on his accumulated knowledge of the parameters of reliable cell-site evidence, Judge Lee appropriately ruled that Agent Shaw's testimony was admissible so long as he did not transgress these boundaries.

Cell site "data," Judge Lee correctly noted, cannot reliably "tell[] you anything more than that it connects to this tower and this tower is in this kind of usually pie-shape range" (4/7/22:19). Judge Lee emphasized that he had never heard a CAST expert (such as Agent Shaw) testify that a cell phone "definitely is in this spot" (*id.*). To the contrary, the CAST experts only testify that a phone was "in a general area" (*id.*). Relatedly, Judge Lee understood, the CAST experts could only reliably testify that it was "generally true" cell phones "connect to the strongest, closest, most available tower," not that it was "absolutely true" (*id.* at 20). As Judge Lee knew from his prior trials ("based on evidence I've heard"), certain "variables" – such as "the strength of the tower" and "[h]ow busy the activity is on the tower"

1228, 1239 (Colo. Ct. App. 2019) ("we hold that the use of historical cell site data to determine the general location of a cell phone is widely accepted as reliable").

– sometimes mean that a phone "connect[s] to the *next* closest tower" (6/17/22:14-15 (emphasis added)). Finally, based on his prior experience ("what I've typically heard"), Judge Lee also understood that the wedges depicted on the CAST experts' Powerpoint exhibits did not purport to identify "exactly where the cell tower reaches out" (*id.* at 21). Thus, an expert could not "say," for example, that "Mr. Winston or Mr. Willis was in X spot[, j]ust somewhere within the general area" (*id.*).

Consistent with these articulated reliability parameters, Judge Lee "barr[ed] [Agent Shaw] from couching his testimony in terms that would suggest that he could pinpoint the exact location of [the target] phones." *Lewisby*, 843 F.3d at 659-60. Judge Lee thus ruled that Agent Shaw would not be permitted to testify that any phone was located at "a definitive spot," that cell phones invariably connect to the nearest tower, or that an exhibit's pie-shaped wedge was anything but an approximate "representati[on]" of a tower's coverage area (4/7/22:19; 6/17/22:14-15, 21-22). Simply put, Judge Lee decreed, Agent Shaw could not speak in "absolute[s]" (6/17/22:15). And, defense counsel emphasized in his closing argument, Agent Shaw did not. Instead, counsel noted, Agent Shaw had conceded he couldn't "pinpoint [an] exact location" of any phone and cell phones "connect to the strongest signal, but not necessarily the closest one" (11/8/22:82-83).

Because Judge Lee (i) had a proper understanding of the limitations of reliable historical cell site testimony, (ii) insisted that the government's expert adhere to

these limitations, and (iii) concluded these limitations were consistent with "the type of information that the Government ha[d] put in their notice," Judge Lee properly exercised his discretion in admitting Agent Shaw's testimony (6/17/22:17; see *id.* at 24). Indeed, near the end of the Rule 702 hearing, Winston's counsel – who was the *only* defense counsel who participated in the Rule 702 litigation – agreed that these "limitations" on Agent Shaw's testimony addressed the defense's "concern[s]":

> THE COURT: So with those limitations, Mr. Irving, what's your thought that the expert is only going to say ["I]t's a representation. It's not an absolute. It's not even fixed, right, and that different areas are kind of different sizes but in my opinion based on the data that I've looked at, the phone connected to this cell tower and the general sense is the person is somewhere within this pie shape.["] Tell me why that is something that is concerning for you.
>
> MR. IRVING: Again if that's the limitation of the expert testimony, that's fine[.] (6/17/22:22.)[32]

Though Judge Lee exercised his gatekeeping authority consistent with the permissible contours of reliable cell-site evidence and the defense agreed with his ruling ("that's fine"), Willis now attacks it. Willis asserts (at 37) the judge "lacked a

[32] All that defense counsel thereafter focused on was "[E]xhibit [531] itself." As explained at note 16 supra, counsel asked the court to ensure that Agent Shaw's Powerpoint slides did not somehow "subconsciously" inflate the impact of the agent's testimony because, for example, of "the way things are shaped" on the maps or how the "different size angle shapes" are depicted (6/17/22:22-23). The court agreed to "deal[]" with any such objections to Agent Shaw's "slides" before trial if the parties could not themselves "resolve" the issue (*id.* at 24). Neither Winston nor Willis thereafter raised any objection.

firm factual foundation for assessing reliability" because the "government never disclosed case-specific details about Agent Shaw's opinions and their bases." As demonstrated in Part I.B.1 supra, however, the government's disclosure incorporated draft Powerpoints depicting Agent Shaw's methodology and his case-specific opinions. Judge Lee did not have to "'rely[ ] on descriptions of cell-site methodology in other cases,'" as Willis maintains (at 37). Agent Shaw's methodology was detailed in both the government's original disclosure (which the court expressly referenced (see 6/17/22:17)) and the draft Powerpoint (which Willis's counsel apparently provided the court before its final ruling (see 6/17/22:23-24)). Judge Lee thus correctly identified both the data supporting Agent Shaw's proposed testimony (it's "cell data kept by the cell phone companies that show the use of a particular cell number") and his methodology ("the [CAST] experts come in and they look at the cell site data and they kind of plot where they think the area where the phone might be connecting to towers") (6/17/22:19; 4/7/22:19).

Willis nonetheless maintains (at 37-38) that Judge Lee "incorrectly presumed that all CAST agents use the same principles and methods to reach their conclusions, and that all CAST agents give the same testimony in every case." But Judge Lee did not have to presume anything. As explained, Judge Lee understood Agent Shaw's cell-site methodology. Further, Judge Lee had presided over at least 12 trials where other CAST agents had testified about their historical cell site analyses and,

undoubtedly, detailed their methodologies. In assessing the reliability of Agent Shaw's methodology pursuant to Rule 702, Judge Lee could thus compare and – if necessary – contrast Agent Shaw's methodology to the methods used by other CAST agents. In this way, Judge Lee could independently evaluate whether, as government counsel asserted, "the approach from the CAST agent [e.g., Agent Shaw] is exactly the same thing the [court] see[s] every day" (6/17/22:12).

Willis also contends (at 38) that, "[a]lthough Judge Lee identified Rule 702 as the governing standard, he failed to actually apply it." Specifically, Willis asserts (at 39), Judge Lee "refused to conduct his own reliability inquiry" and instead "simply presumed that CAST agent testimony is always admissible because 'there is kind of general acceptance in the Superior Court of the testimony'" (quoting 6/17/22:20)). But Judge Lee plainly applied Rule 702 to the facts of Willis's case. As explained at pp. 36-42 supra, based on his deep reservoir of knowledge amassed over 12 to15 trials, Judge Lee understood the parameters of admissible – and reliable – cell-site testimony. And, relying on this knowledge, Judge Lee exercised his gatekeeping authority by ensuring Agent Shaw would not stray from these parameters. Judge Lee extracted from the government numerous assurances about the scope of Agent Shaw's testimony, including that he would not suggest his analysis could place Willis "at a particular spot" or precisely identify a tower's coverage area (4/7/22:20; 6/17/22:22-23). At most Agent Shaw could testify "[']in

my opinion based on the data that I've looked at, the phone connected to this cell tower and the general sense is the person is somewhere within this pie shape[']" (6/17/22:22), which is consistent with the judicial consensus (see note 31 supra) that "historical cell-site analysis can show with sufficient reliability that a phone was in a general area," *Hill*, 818 F.3d at 295; *see also United States v. Baker*, 58 F.4th 1109, 1125 (9th Cir. 2023) ("Because the jury was adequately informed of the limitations of CSLI, the district court's decision to admit [the agent's] testimony was not erroneous under any standard."); *Nelson*, 533 F. Supp. 3d at 792 (the "Government also cites a lengthy series of authorities standing for the proposition that such testimony *is* reliable for *Daubert* purposes so long as it only described the *general* area in which a phone was located, and does not exaggerate the precision provided by [CSLI]").[33]

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[33] Willis understandably does not suggest Agent Shaw contravened the court's Rule 702 limitations. As detailed in Part I.B.3 supra, Agent Shaw left no doubt in the jurors' minds that CSLI cannot be used to "pinpoint" a phone's "exact location" (11/3/22:118 (Agent Shaw: "I cannot pinpoint an exact location. This is just an approximation.")). Thus, Agent Shaw repeatedly emphasized, Exhibit 531's sector illustrations were just "approximations" of a tower's coverage area (*id.* at 38, 38-39, 65-67, 74, 80, 81) and neither a map's shaded areas nor its lines depicted the "actual coverage" of a tower (*id.* at 67; see also *id.* at 74-75). Further, Agent Shaw carefully explained, a cell phone will work from the tower with the "strongest signal," but the "strongest and clearest signal does not necessarily mean the closest signal" because of obstructions that might "imped[e] that signal" (*id.* at 76, 118). At most, Willis asserts in his Rule 16 argument (at 35), Agent Shaw's cross-examination testimony conflicted with the government's pretrial assurances that he would not "'estimate the range of certain cell sites'" nor opine about a phone's "'distance' from [a] tower"

(continued . . .)

Finally, Willis's case is nothing like the *only* authority he cites that has held historical cell site evidence inadmissible. In *United States v. Machado-Erazo*, 47 F.4th 721 (D.C. Cir. 2018), the defendant "conceded" he had no "concern" with "the general methodology of collecting and interpreting cell-site data" but claimed the "specific location testimony offered at trial exceeded the Government's proffer and [the agent's] expertise." *Id.* at 731 n.3. Consistent with *Hill*, *Reynolds*, *Baker*, *Nelson*, and the myriad authorities cited in note 31 supra, the D.C. Circuit agreed, concluding the district court had erroneously admitted the expert's testimony where, although the government had represented pretrial that the expert "would discuss only the 'general range of cell towers,' not the specific location of a person," the government at trial repeatedly "elicited testimony from [the expert] about precise locations of the cell phones he analyzed." *Id.* at 732 (citing four instances). Here, in contrast, Judge Lee understood the limitations of Agent Shaw's historical cell site analysis and ensured the agent did not exceed those limitations. In literally his final

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(quoting A.201; 7/28/22:17-18 & citing 11/3/22:65-66, 88-89). But Willis's own citations to Agent Shaw's trial testimony confirm – rather than refute – the agent's obedience to the government's representations and the motions court's rulings. In discussing the blue "circle" around The Wharf's cell site, Agent Shaw explained that that was "just an approximation" of its coverage area and even conceded coverage "could go out further than the next tower" (11/3/22:65-67). Further, given the density of cell sites in urban areas, Agent Shaw simply disagreed with defense counsel's suggestion that The Wharf's site could provide coverage to people "miles" away (*id.* at 88-89).

words on the stand, Agent Shaw correctly explained that he could not "pinpoint an exact location" of a phone and confirmed "the strongest and clearest signal does not necessarily mean the closest signal" (11/3/22:118; see also note 33 supra).

In sum, far from "abdicat[ing] his gatekeeping role" and simply relying on the fact that CAST testimony is "routinely admitted," as Willis asserts (at 37, 39), Judge Lee applied the proper Rule 702 standard to the facts and insisted upon precisely those testimonial guardrails that the courts have overwhelmingly approved in this context. Indeed, the defense agreed that – subject to the court's articulated limitations – Agent Shaw's "expert testimony" would be "fine" (6/17/22:22). And "[w]hile the [motions court] did not conduct a *Daubert* hearing, it was not required to do so." *Ware*, 69 F.4th at 848. Judge Lee built a sufficient record to support his decision to admit Agent Shaw as an expert.[34]

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[34] Willis also claims (at 38-39) Judge Lee erroneously "failed to consider" any factors relevant to the reliability of Agent Shaw's methodology "under Rule 702," including whether it has been subjected to peer review or tested, and its error rate (citing *Daubert*, 509 U.S. at 593-94). But as "*Daubert* itself" made "clear," its "list of factors was meant to be helpful, not definitive." *Kumho Tire*, 526 U.S. at 151; *see also Reynolds*, 86 F.4th at 346 (*Daubert* factors "do not create general requirements that an expert's opinion must meet in every case"). "[W]hether *Daubert*'s factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Kumho Tire*, 526 U.S. at 153. Here, Judge Lee properly relied on, among other things, his first-hand knowledge – accumulated (no doubt) through hours of similar CAST agent testimony in 12 to15 previous trials – about the permissible parameters of reliable cell site evidence. *See United States v. Rodriguez*, 591 F. App'x 897, 899-900 (11th Cir. 2015) (in properly admitted cell site evidence, district court "in large

(continued . . .)

II. The Trial Court Properly Exercised Its Discretion in Declining to Replace Juror No. 2 with an Alternate.

Willis next asserts (at 47-67) that the trial court "erred in refusing to replace a juror who repeatedly slept throughout the trial." Again, he is mistaken.

A. Applicable Legal Principles

"'Rule 24 is carefully designed . . . to provide defendants and the United States with a meaningful, if limited, say in the composition of the jury.'" *Hinton v. United States*, 979 A.2d 663, 683 (D.C. 2009) (en banc) (quoting *United States v. Donato*, 99 F.3d 426, 430 (D.C. Cir. 1996)). "The Rule gives parties a say in the selection of the jury through questioning of prospective jurors and the exercise of peremptory challenges, and respects their choice by 'limit[ing] the use of alternate jurors to situations where regular jurors become or are found to be unable . . . to perform their duties.'" *Id.*; *see* Super. Ct. Crim. R. 24(c) (court may empanel alternates "to replace any jurors who are unable to perform or who are disqualified from performing their duties"). Rule 24(c) thus "operates as a narrow grant of authority to the trial court, and when its conditions are not met, the court is without authority to replace an empaneled juror with an alternate." *Hinton*, 979 A.2d at 671. As Judge Ryan

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part declined to hold a [*Daubert*] hearing because it had available to it the testimony of the same witness, on the near identical issue, from a case before a different judge in the same court").

correctly determined based on, among other things, his two individual voir dires of Juror #2, he "d[idn't] have a basis for disqualifying" that juror (11/8/22:140).

B. Relevant Procedural History

Following jury selection on Monday afternoon (October 24), Judge Ryan assured the jurors he would "always take a break" if any juror needed one (10/24/22:186-87). The next morning – after opening statements and the court's preliminary instructions – Willis's counsel alerted the court that Juror #2 "appeared to be sleeping" during "parts" of those proceedings; counsel explained that Juror #2's eyes "were definitely closed" (10/25/22:43). Counsel suggested the court again instruct the jurors that, if they needed to take a break at any time, they should "raise their hands" (*id.* at 44). The court did so, subsequently telling the jurors to "always put your hand up" if "anybody's feeling drowsy or anything like that" (*id.* at 103).

At the end of the trial's first week (on Thursday, October 27), the court commended the jurors before excusing them for the weekend, noting, "you guys are doing a great job paying attention and being punctual" (10/27/22:188).

On the trial's fifth day of testimony (Wednesday, November 2),[35] Willis's counsel asked to approach the bench during the government's redirect of the medical examiner and declared that Juror #2 "has been asleep" (11/2/22:29). Judge Ryan

[35] The court did not sit on Tuesday, November 1.

acknowledged he had not been "paying attention to that particular aspect" and thus couldn't "confirm or deny that [he] saw anything" (*id.* at 29-30). Winston's counsel moved to replace Juror #2 with an alternate, explaining that he and co-counsel had "been watching Juror #2 all of last week" and had noticed he "was falling asleep through major portions of testimony" (*id.* at 30-31). Government counsel said Juror #2 had "appeared attentive" and indicated that neither of the prosecutors had "noticed" the "instances that the Defense ha[d] mentioned" (*id.* at 31-32). Government counsel thus recommended a voir dire inquiry, explaining that "[s]ome people . . . may listen carefully with their eyes closed and they appear to be inattentive" (*id.* at 31). With defense counsel's consent, Judge Ryan agreed to voir dire Juror #2, noting "[i]t's a very difficult issue to penetrate" and "get to the bottom of" (*id.* at 31-32).[36]

The court began by telling Juror #2 "there's been a concern that you might have been falling asleep in the trial" (11/2/22:54). The court then directly asked Juror #2 if he had "been falling asleep"; Juror #2 said he had not: "No, sir" (*id.*). When the court followed-up ("No?"), Juror #2 reiterated he had not been falling asleep ("No,

[36] As the court explained, in its experience there are "facts" that "can support more than one conclusion," e.g., the court had "seen the type of behavior which has been described, which is either looking down or eyes closed with head straightforward" and the court didn't "know whether that conclusion that the person [wa]s sleeping [wa]s accurate or not" (11/2/22:32).

sir") (*id.*). Taking a different approach, the court asked Juror #2 if he had been "having difficulty staying awake"; Juror #2 denied he had been having any such difficulty (*id.*). Finally, the court took yet a third approach to the issue, asking, "[h]ave you missed any aspects of the testimony" (*id.*). Juror #2 said he hadn't (*id.*).

The court also allowed counsel to question Juror #2. When Winston's counsel asked if Juror #2 had "been able to see all of the exhibits as they've been displayed," Juror #2 affirmed he had (11/2/22:54-55). Further, though Juror #2 agreed with counsel's suggestion that his "eyes appeared to be closed during numerous portions of the trial," Juror #2 explained he was not, in fact, "falling asleep" but, rather, "paying attention" (*id.* at 55). Indeed, Juror #2 agreed that he had been able to "carry on the same amount of attention when [his] eyes [we]re closed as when they [we]re open" (*id.* at 56). Finally, Juror #2 affirmed that he'd had no "problem" "hearing anything" (*id.*). Before excusing Juror #2, the court again reminded him to let the court know if he "need[ed] breaks" going forward (*id.*).

Following Juror #2's departure, Winston's counsel noted he had "watched" Juror #2 since "day one" and "[e]very day [Juror #2] ha[d] had instances" where his eyes "stay closed" when exhibits were "being shown on the screen" (11/2/22:57). Counsel thus renewed his request that Juror #2 be replaced with an alternate (*id.* at 58). The court declined, noting that, although Juror #2 "acknowledged" his eyes had "been shut numerous times," Juror #2 also denied sleeping and the court "d[idn't]

have a basis at this time for disqualifying him" (*id.*). But, the court added, "we've got a long trial" and the "facts may continue to develop" (*id.*).

After lunch that same day (Wednesday, November 2), the court reminded the jurors that, "if anybody needs a break, don't hesitate to put your hand up at any time, and we'll take a break" (11/2/22:123).

The next morning, during his co-counsel's cross-examination of the government's cell-site expert, Willis's counsel asked to approach (11/3/22:68). At the bench, counsel explained he was following up on an 11:57 a.m. email "alert[ing]" the court that Juror #2 "appeared to be asleep" because "his eyes [we]re closed" and his head "hanging" (*id.*). Counsel thus "renew[ed]" his motion, explaining that Juror #2's "slumped" head and "closed" eyes supported the inference he wasn't "paying attention" (*id.* at 69-70). Government counsel disagreed: "Well, I've not seen it. I've seen some looking down and eye-resting behavior. But I haven't seen anything that would suggest sleeping." (*Id.* at 71.)[37] For its part, the court had seen "the posture" that Willis's counsel described but couldn't "comment as to whether the juror [wa]s sleeping" (*id.*). Recognizing it "ha[d] the discretion to determine" whether Juror #2

[37] See also 11/3/22:71 (AUSA Spence: "I've been looking over to Juror #2 from time to time. He's been with his eyes, especially, he's been looking and alert looking around. He's certainly alert right now."); *id.* at 108 (AUSA Dean: "[O]n direct examination of [government's cell-site expert] I was paying attention and able to pay a little bit more attention to Juror #2. And all the times that I saw him he seemed engaged. I haven't observed quite as much on cross.").

should be replaced, the court denied Willis's motion (*id.* at 72-73). But, the court reiterated, it was "certainly involved in an ongoing assessment of the facts as they change [o]r if they remain the same" (*id.* at 73).

After the court later excused the jury for lunch, Willis's counsel explained that to "build [his] record" he was "not[ing] again our sleeping juror," whom counsel had seen in the interim with the "same posture of head down, slumped," for a "duration of minutes" (11/3/22:106-08). Government counsel made similar "observations" – e.g., "[o]ccasionally [Juror #2's] head does nod and his eyes close" – but "ha[dn't] seen any sort of sudden startling or sort of dropping of notebooks or anything like that that would actually suggest he's actually asleep" (*id.* at 107-08). As for Judge Ryan, he "was watching [Juror #2] at 12:37 and he had his eyes closed and his head went down a little bit, then it went down a little farther, then it went down a little farther," but when the court "looked back" at 12:40 "his eyes were opened and he was paying attention to everything that was going on" (*id.* at 107).

Following a three-day weekend and at the conclusion of the government's ballistics-expert's testimony on Monday, November 7, Willis's counsel renewed his disqualification motion, explaining he "thought" Juror #2 had "had his eyes closed and slumped . . . many times" during the government's one-hour-and-45-minutes direct examination (11/7/22:89). Further, counsel "saw [Juror #2] slumped for a great portion" of his co-counsel's "very brief" – "maybe two minutes" – cross-

examination (*id.*). Counsel "concede[d]" he could not "say [Juror #2] was asleep" but again suggested that was a "reasonable inference" given his "closed" eyes and "slumped" head (*id.* at 90). When Judge Ryan asked if the defense wanted the court to "interview" Juror #2 again, counsel said they would confer (*id.* at 91).

Immediately following closing arguments and final instructions the next morning (Tuesday, November 8), the parties "discuss[ed] Juror #2" (11/8/22:133). Government counsel explained that he had "been watching [Juror #2] the last several days and he seem[ed] to be generally attentive, although he does from time to time close his eyes" (*id.* at 133-34). Further, government counsel noted, Juror #2 "appeared to be attentive throughout the defense closing" and the government's rebuttal (*id.* at 133). And, although Juror #2 "did close his eyes" during the government's initial closing, he "then immediately open[ed]" them (*id.*). During the jury instructions, Judge Ryan declared that Juror #2 was "[t]otally" "attentive the whole time" (*id.*). Willis's counsel conceded he had not "observed as much" seemingly inattentive behavior on Juror #2's part that day but estimated he had seen Juror #2's eyes closed and head slumped "at least 15 times" – for a "duration of more than 20 seconds" each – over the trial's eight days (*id.* at 134-35).[38]

[38] See 11/8/22:134-35 (Willis's counsel: "I do think that there is a difference when one certainly can be thinking and sometimes when you are thinking even one-tenth, you can raise your head up and close your eyes. I think that is an example of someone who is really digesting something and may be more focused. I think [Juror #2] was
(continued . . .)

In sum, Willis's counsel argued, "by the number of times that I have brought [the issue] to the Court's attention, I think that w[ould] disqualify" Juror #2, adding the juror didn't "have the requisite knowledge to be competent" (11/8/22:136). Government counsel disagreed, noting he had not "seen this slumped over posture" and only "occasionally" seen Juror #2's "eyes closed" (*id.*). Indeed, government counsel noted, "every time" he had "looked at [Juror #2], he has been generally attentive" (*id.*). Thus, government counsel concluded, he did not believe there was "an adequate record under the rules and the case law to disqualify" Juror #2 (*id.*). Given these conflicting positions, the court suggested an additional voir dire of Juror #2, which defense counsel agreed was appropriate (*id.* at 137).

The court began its second inquiry by reminding Juror #2 of the court's prior questions "about whether you had been having difficulties sleeping or paying attention in this case" (11/8/22:138). Once again, Juror #2 denied that he'd had such difficulties (*id.* at 138-39). Rather, Juror #2 affirmed that he "fe[lt] like [he'd] been able to pay attention throughout this time" (*id.* at 139). Moreover, though the court

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what – he's taken – here, he was with the eyes closed, and the head slumped. I think the reasonable inference there is that you're not paying attention and that you're not attentive at that moment . . . . I'm not going to sit here today and say specifically representative times like [AUSA] Spence says -- when that happens, 10 seconds [sic]. I think there have been, by my estimation, at least 15 times that there's been a duration of more than 20 seconds.").

told Juror #2 that it had "noticed" he had "closed [his] eyes here and there," Juror #2 denied that he had been "falling asleep at all" (*id.*).

After both the government and defense declined the court's invitation to pose follow-up questions, the court excused Juror #2 (11/8/22:139). The court then commented, "it's just a very difficult issue to tease out," which Willis's counsel "agree[d]" was true (*id.*). Ultimately, the court concluded, it "d[idn't] have a basis for disqualifying" Juror #2 (*id.* at 140).

C. The Trial Court Correctly Concluded It Had an Insufficient Basis To Disqualify Juror #2 Pursuant to Rule 24(c).

In assessing a trial court's exercise of its Rule 24(c) discretionary authority, it is not this Court's function "to second-guess a reasonable judgment of the trial court." *Hinton*, 979 A.2d at 683. This Court will find an abuse of that discretion only if the court relied on "an improper or legally insufficient reason, if its ruling lacked 'a firm factual foundation,' or if the trial court otherwise failed to 'exercise its judgment in a rational and informed manner.'" *Id.* (quoting *(James) Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979)). Judge Ryan's decision suffers from none of these maladies.

First, the court plainly understood the parameters of its lawful discretionary authority. A "trial court may replace a juror *only* if that juror 'becomes or is found to be unable or disqualified to perform juror duties.'" *Hinton*, 979 A.2d at 671

(quoting Rule 24(c)). Judge Ryan correctly recognized his "discretion[ary]" authority under Rule 24(c) "to determine whether a [juror] is qualified or not" (11/3/22:72; see also 11/2/22:58 ("I have to find that he's not qualified to sit as a juror as opposed to that he should be an alternate")). Further, as his careful questioning of Juror #2 revealed, Judge Ryan also understood that a legitimate ground for disqualification would have been Juror #2's "[p]rolonged" "inattentiveness," *Samad v. United States*, 812 A.2d 226, 230 (D.C. 2002), that is, Juror #2's actual "sleeping" as opposed to him simply "looking down" or sitting with his "eyes closed" but his "head straightforward" (11/2/22:32). *Cf. State v. Reevey*, 387 A.2d 381, 383 (N.J. Ct. App. 1978) (though defense counsel asked that an alternate replace a sleeping juror, court responded it lacked "authority to do so").

Second, Judge Ryan meticulously investigated Juror #2's attentiveness and built a firm foundation for his Rule 24(c) ruling. "When a trial court receives a report of a sleeping juror, it has 'considerable discretion' in deciding how to respond." *Samad*, 812 A.2d at 230 (quoting *Golsun v. United States*, 592 A.2d 1054, 1057 (D.C. 1991)). "However, '[i]f . . . the court notices, or is [reliably] informed, that a juror is asleep during trial, the court has a responsibility to inquire and to take further action if necessary to rectify the situation.'" *Id.* "Typically, the next step is to conduct a voir dire of the potentially inattentive juror, in an attempt to investigate whether that juror 'remains capable of fulfilling his or her obligation to render a verdict based

on all of the evidence.'" *Commonwealth v. Villalobos*, 84 N.E.3d 841, 843 (Mass. 2017) (citation omitted); *see also State v. Mohammed*, 141 A.3d 243, 245 (N.J. 2016) ("[i]f the judge did not observe the juror's attentiveness, the judge must conduct individual voir dire of the juror"); *People v. Valerio*, 529 N.Y.S.2d 350, 351 (N.Y. App. Div. 1988) ("It is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified.").

In strict adherence to these authorities, Judge Ryan conducted a voir dire of Juror #2 after acknowledging he hadn't been "paying attention" to Juror #2 when Willis's counsel suggested the juror had "been asleep" during the medical examiner's testimony (11/2/22:29-30; see *id.* at 53-55). Judge Ryan also permitted both defense counsel to question Juror #2. Though Juror #2 acknowledged his eyes had been closed on numerous occasions, he denied he'd been sleeping. Indeed, Juror #2 declared, he'd been "paying attention" (*id.* at 54-55). Further, at the end of this voir dire, Judge Ryan instructed Juror #2 to let him know if he needed a break moving forward. Though Juror #2 did not thereafter indicate he needed such a break, when – on the trial's second-to-last day – Willis's counsel asserted he had seen Juror #2's "eyes closed and head slumped" during the ballistics-expert's testimony, the court conducted a second voir dire (11/7/22:90-91). Juror #2 again affirmed that he'd not been sleeping "at all" but rather "pay[ing] attention throughout" (11/8/22:139). Through these two face-to-face inquiries, Judge Ryan undoubtedly "obtain[ed] the

information necessary to a proper exercise of discretion." *Commonwealth v. Braun*, 905 N.E.2d 124, 127 (Mass. Ct. App. 2009). *See also Commonwealth v. Gonzalez*, 15 N.E.3d 774, 776 (Mass. Ct. App. 2014) ("part of the reason a voir dire is necessary in circumstances" where there is "reliable information that a juror was asleep" is that '[u]ncertainty that a juror is asleep is not the equivalent of a finding that the juror is awake'") (citation omitted).[39]

Though the results of Judge Ryan's two inquiries alone support his Rule 24(c) decision, abundant – additional – information corroborated Juror #2's representations. Both government counsel – who, along with the court and defense counsel, had a "duty" to be "certain" that Willis's trial was "heard by an alert and attentive jury," *Mohammed*, 141 A.3d at 253 – repeatedly explained that, while they had occasionally seen Juror #2's eyes closed, they had not seen evidence he was sleeping.[40] And, as AUSA Dean correctly posited, "[s]ome people" may "listen

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[39] In *Braun*, because "[c]ontemporanous observations from three separate sources – a court officer, defense counsel, and the judge himself – alerted the judge to the very real likelihood that the juror was sleeping through the trial," the trial court had a "compelling reason to conduct a voir dire of the inattentive juror." 905 N.E.2d at 127. Failing to do so was thus error because "the judge prevented himself from obtaining the information necessary to a proper exercise of discretion." *Id.* The opposite is true here. Keenly attuned to the danger of an inattentive juror, Judge Ryan *twice* personally questioned Juror #2 and gathered the requisite information.

[40] See 11/2/22:31 (AUSA Dean: "we haven't noticed certainly all of the instances that the Defense has mentioned"); *id.* at 32 (AUSA Dean: "we've been in trial now for almost two weeks and at least Mr. Spence and I have looked over at Juror Number

(continued . . .)

carefully with their eyes closed" and thus only "appear to be inattentive" (11/2/22:31); *see Braun*, 905 N.E.2d at 126 ("[m]editation may be mistaken for somnolence"). Indeed, this was what AUSA Spence observed on both the trial's sixth and eighth days. AUSA Spence explained that "*every time* I've looked at [Juror #2], he has been generally attentive[]" (11/8/22:136 (emphasis added); see also 11/3/22:108 ("*all the times* that I saw him he seemed engaged" (emphasis added)).

Similarly, although Judge Ryan acknowledged he had "seen times" on the trial's fifth and sixth days when Juror #2's "head was down and his eyes were shut," (11/2/22:57; see 11/3/22:71), Judge Ryan promised to undertake "an ongoing assessment of the facts" (11/3/22:73). And, true to his word, when Judge Ryan noticed later on the sixth day Juror #2's "eyes closed" and his head going "down," Judge Ryan "looked back" just three minutes later and noticed Juror #2's "eyes were

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2 as appeared attentive [sic]"); *id.* at 56-57 (AUSA Spence: "he tends, especially when the husher is on, when there's not much activity [in the courtroom,] as opposed to chatting with his neighbors, he tends to have his head down with his eyes closed" but when "activity resumes within the courtroom, he looks up with his eyes open"); 11/3/22:71 (AUSA Spence: "I've been looking over to Juror #2 from time to time. He's been with his eyes, especially, he's been looking and alert looking around."); *id.* (AUSA Spence: "I've not seen it. I've seen some looking down and eye[-]resting behavior. But I haven't seen anything that would suggest sleeping."); *id.* at 107-08 (AUSA Spence: "I haven't seen any sort of sudden startling or sort of dropping of notebooks or anything like that that would actually suggest he's actually asleep."); 11/8/22:133-34 (AUSA Spence: "I've been watching the last several days and he seems to be generally attentive, although he does from time to time close his eyes. Every time I look at him, he reopens them.").

opened and he was paying attention to everything that was going on" (11/3/22:107). Further, on the trial's last day, Judge Ryan observed that Juror #2 "[t]otally was attentive the whole time [he] was instructing" the jury (11/8/22:133).[41]

Also corroborating Juror #2's repeated declarations of attentiveness is the absence of any contrary reports from his fellow jurors or the court personnel. If, as Willis maintains (at 1), the record firmly established that Juror #2 "repeatedly slept during the most important parts of the trial," presumably at least one of the other 15 jurors (there were four alternates) would have alerted the court. *Cf. Commonwealth v. McGhee*, 25 N.E.3d 251, 255 (Mass. 2015) (juror reported that another one had fallen "'sound asleep'"); *Gonzalez*, 15 N.E.3d at 775 (jurors reported that "'one juror fell asleep during the presentation of evidence'"). This is particularly true given Judge Ryan's repeated instruction that the jurors alert him if they ever needed a break (see 10/24/22:186-87; 10/25/22:103; 11/2/22:123). Similarly, no court employee apparently reported that Juror #2 was sleeping during the trial. *Cf. Braun*, 905 N.E.2d

[41] Thus, contrary to Willis's oft-repeated claim (at 27, 47, 57) that Juror #2 "repeatedly" and "pervasive[ly]" *slept*, government counsels' and the court's observations were different. Though Juror #2's eyes may have occasionally been "closed," this did not "mean that he [wa]s asleep." *People v. Degondea*, 769 N.Y.S.2d 490, 502 (Ct. App. 2003) ("that a person's eyes are closed does not necessarily mean that he or she is asleep"). Moreover, Willis understandably does not contend that Juror #2's closed eyes justified disqualification. Although Willis highlights (at 57-58) the cell-site expert's "CSLI slide deck," Juror #2 affirmed that he'd had no problem hearing the expert's testimony and the court provided all the exhibits to the jury so they could "examine any or all of them" (11/8/22:129).

at 126 (among others, "court officer" alerted judge to possibility that "juror was sleeping through the trial").

Further, as this Court has "'repeatedly said,'" jurors "'are presumed to follow instructions.'" *Blocker v. United States,* 239 A.3d 578, 592 (D.C. 2020) (citation omitted). In its preliminary instructions, the court generally instructed the jurors to "give this case its fullest and most serious attention" (10/25/22:20). And later that same day, the court instructed the jurors to alert it "if anybody's feeling drowsy or anything like that" (*id.* at 103). The court repeated this instruction directly to Juror #2 at the end of its first voir dire. Juror #2, however, never indicated he was feeling drowsy or couldn't give the case his full attention. *Cf. United States v. Barrett*, 703 F.2d 1076, 1082 (9th Cir. 1983) (juror himself asked to be excused because he admitted sleeping during trial).

In sum, with a full understanding of the governing Rule 24(c) standard, Judge Ryan assiduously developed a factual record sufficient to address Willis's disqualification motion and thereafter exercised his judgment in a rational manner. Nonetheless, Willis suggests (at 58-59), in "repeatedly" acknowledging the "'difficult[y]'" of "discerning whether a juror is sleeping," Judge Ryan "abdicated his responsibility to evaluate the totality of the evidence, make appropriate findings, and rule accordingly." Far from reflecting the court's abdication of its "responsibility to inquire and to take further action if necessary," *Golsun*, 592 A.2d at 1057,

however, the record establishes the court's careful attention to this sensitive issue. When defense counsel first noted Juror #2's potential inattentiveness, Judge Ryan took counsel's advice and instructed the jurors to notify him if they needed a break. And, when defense counsel next raised the issue four trial days later, Judge Ryan took the precise action endorsed by numerous courts as the best investigative practice, *viz.*, he conducted a voir dire of Juror #2. The court also: permitted both defense counsel to question Juror #2; solicited the government's observations of Juror #2; and carefully weighed the parties' post-inquiry arguments. Further, although the court concluded it did not have a "basis *at th[at] time*" to disqualify Juror #2 (11/2/22:58 (emphasis added)), the court promised it was "involved in an ongoing assessment" of the facts (11/3/22:73). And, indeed, when defense counsel renewed his dismissal motion, the court conducted another voir dire of Juror #2. Contrary to Willis's "abdicat[ion]" suggestion, the judge's treatment of this issue was a model of discretion soundly exercised.[42]

[42] Willis relatedly – and repeatedly (at 23, 51, 57, 58, 59, 63) – asserts that Judge Ryan "uncritically accepted" Juror #2's "cursory denials" and "treated as decisive the juror's failure to admit sleeping or not paying attention." The extensive record developed by Judge Ryan over numerous trial days belies this claim. In concluding he did not have a sufficient basis to exercise his narrow Rule 24(c) authority, Judge Ryan gave careful attention to all aspects of the record, including the parties' observations, his own observations, *and* Juror #2's repeated denials.

Moreover, even Willis's counsel concurred with Judge Ryan's suggestion that the question of a juror's attentiveness is a "very difficult issue to penetrate" and "get to the bottom of" (11/2/22:32). Following Judge Ryan's second voir dire of Juror #2, counsel immediately "agree[d]" when the judge noted "it's just a very difficult issue to tease out" (11/8/22:139). And, while Willis's counsel repeatedly *argued* it was reasonable to "infer[ ]" Juror #2 had been sleeping because his eyes had been closed and his head down, even counsel "concede[d]" he couldn't "say [Juror #2] was asleep" (11/7/22:90; *see also* 11/3/22:72 (counsel: "we can't know for sure . . . [but] I think we can make a reasonable inference").

Additionally, Judge Ryan did not – as Willis maintains (at 59-60) – "impos[e] an unduly stringent standard for replacement." The Rule 24(c) standard is a "demanding" one because, once jurors "'start hearing and considering the evidence,'" they may not be "'viewed as fungible.'" *Hobbs v. United States*, 18 A.3d 796, 800-01 (D.C. 2011) (quoting *Hinton*, 979 A.2d at 689). Moreover, Rule 24 is "'carefully designed'" to provide "'defendants *and* the United States with a meaningful, if limited say in the composition of the jury'" and subsection (c) "respects their choice by 'limit[ing] the use of alternate jurors to situations where regular jurors become or are found to be unable . . . to perform their duties.'" *Hinton*, 979 A.2d at 682 (emphasis added; citation omitted). After a trial has begun, there is thus a "far more limited scope for the trial court's exercise of discretion." *Hobbs*, 18

A.3d at 800. Accordingly, Judge Ryan appropriately exercised his discretion in applying a strict disqualification standard.

Finally, although Willis repeatedly describes (at 23, 57, 64) the evidence of Juror #2's inattentiveness as "overwhelming," simply saying it does not make it so. Of the six different sets of potential witnesses in the courtroom – e.g., defense counsel, government counsel, the court, other jurors, court personnel, and Juror #2 himself – only defense counsel asserted Juror #2 had slept during the trial. In contrast, under direct and probing questioning from the court and defense counsel, Juror #2 repeatedly denied he had been "falling asleep," having "difficulty staying awake," or "missed" any testimony (11/2/22:54). Rather, as Juror #2 affirmed on the trial's last day, he'd "been able to pay attention throughout this time" (11/8/22:139). Given government counsel's repeated declarations that Juror #2 appeared attentive, the absence of any contrary reports from disinterested parties, and Judge Ryan's own observations, the judge properly concluded he lacked an adequate basis to disqualify Juror #2 in the face of the juror's credible declarations that he had been attentive during the trial. In so ruling, Judge Ryan strictly adhered to *Hinton*'s admonition that a court's Rule 24(c) authority is "narrow" and, unless the Rule's conditions are

"met," a court lacks the authority to replace an empaneled juror with an alternate. 979 A.2d at 671.[43]

CONCLUSION

WHEREFORE, the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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[43] Willis's primary authority (at 60-61) is distinguishable. In *Dimas-Martinez v. State*, 385 S.W.3d 238 (Ark. 2011), the court itself "noticed the juror sleeping" and, indeed, "'sent him a cup of water'" to keep him awake during a crime-lab witness's testimony. *Id.* at 243, 245. Further, defense counsel reported, a fellow juror had similarly noticed the juror sleeping and "'nudg[ed] him there at the end to keep him awake.'" *Id.* at 243. Finally, and most critically, during court questioning the juror conceded that he "'might have been'" a "'little drowsy'" and, further, that a fellow juror had had to awaken him. *Id.* In contrast, as detailed supra, Juror #2 repeatedly denied he'd been sleeping, apparently no other juror noticed Juror #2 sleeping, and the court only saw Juror #2's eyes closed.

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, Stefanie Schneider, Esq., sschneider@pdsdc.org, on this 25th day of March, 2025.

/s/
DAVID B. GOODHAND
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