BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-163

BARRY D. STRINGER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2005-FEL-4970

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ISSUE PRESENTED

Whether, on appeal after remand for further consideration of appellant Barry Stringer's motion under the Innocence Protection Act, D.C. Code §§ 4131-4135, the trial court clearly erred in finding Stringer's sole witness incredible based on the trial court's observations of the witness's demeanor while testifying at an evidentiary hearing and the inconsistencies in the witness's testimony compared to the trial evidence.

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OVERVIEW

This case centers around the June 3, 2003, shooting death of Tilford Johnson at close range in his car in a secluded alley behind 28th Street, SE. Appellant Barry Stringer and his nephew Roderick (Ricky) Charles—18 years younger than his uncle—were convicted of the murder after separate trials in 2006. Charles has given five statements in connection with the murder. In each case, he has lied (by his own admission) or been found incredible by Superior Court judges. Relying on Charles's word, Stringer asserts his actual innocence under the Innocence Protection Act (IPA), D.C. Code §§ 4131-4135. Now after remand for further consideration by the

trial court, the Honorable Julie H. Becker has discredited Charles's hearing testimony based on his demeanor and behavior on the stand as well as significant factual inaccuracies. Because Stringer did not meet his burden to establish actual innocence, this Court should affirm the denial of Stringer's IPA motion.

COUNTERSTATEMENT OF THE CASE

In August 2005, appellant Barry Stringer and his nephew Roderick (Ricky) Charles were indicted in connection with the June 3, 2003, shooting death of Tilford Johnson (Record on Appeal in No. 06-CF-1515 (R1.) 15 (Indictment)).[1] Their cases were severed, and after trials in August and July 2006, respectively, before the Honorable Rhonda Reid-Winston, both men were convicted of armed robbery, first-degree felony murder while armed, second-degree murder while armed (as a lesser-included offense of first-degree premeditated murder), and three counts of unlawful possession of a firearm during a crime of violence or dangerous offense (R1.124 (Verdict); Record on Appeal in 19-CO-76 (R2.) 161 (2019 Order)). After receiving an aggregate sentence of 432 months' imprisonment, Stringer appealed (No. 06-CF-1515), and this Court affirmed while remanding for resentencing on merged offenses. *Stringer v. United States*, No. 06-CF-1515, Memorandum Opinion and Judgment (D.C. July 20, 2009). In January 2021, Stringer was resentenced to 432

[1] All record cites are to the bates-stamped page number.

months' incarceration (Record on Appeal in No. 24-CO-163 (R3.) 42 (Docket)). The Court also affirmed Charles's convictions but remanded for resentencing on merged offenses; he was resentenced on October 24, 2014, and did not appeal (see R2.81 (Stringer IPA Motion); R2.106 (U.S. Opposition to Stringer IPA Motion)).

On December 15, 2014, Stringer filed an IPA motion, in which he proffered as newly discovered evidence an affidavit from Charles (R2.74 (Stringer IPA Motion); see also R2.99 (U.S. Opposition); R2.145 (Stringer Reply)).[2] At a June 8, 2018, hearing on Stringer's case, Judge Reid-Winston granted Stringer's oral motion that she recuse herself, and Stringer's case was transferred to Judge Becker (6-8-18 Tr. 4-6). After an evidentiary hearing on October 23, 2018, at which Charles testified, Judge Becker denied Stringer's motion without referring to Charles's demeanor or behavior on the stand (R2.161 (2019 Order)).

Stringer appealed (No. 19-CO-76) and argued that the trial court clearly erred in discrediting Charles. This Court remanded for further consideration. *Stringer v. United States*, 301 A.3d 1218, 1220 (D.C. 2023). On January 22, 2024, Judge Becker

[2] Charles filed a D.C. Code § 23-110 motion in his own case, 2004-FEL-4750, which was also pending before Judge Reid-Winston. Because Charles was a critical witness for Stringer's IPA motion, Judge Reid-Winston continued the evidentiary hearing on Stringer's IPA motion until Charles's § 23-110 motion was decided (R2:28-37 (Docket); R2.65, 70, 154 (Stringer motions to continue); R2.165-66 (2019 Order)). On May 26, 2017, after an evidentiary hearing in Charles's case at which Charles testified, Judge Reid-Winston denied Charles's § 23-110 motion; in doing so, the court discredited Charles's testimony (6-8-18 Tr. 3-4; R2.166 (2019 Order)).

denied Stringer's IPA motion again, discrediting Charles and relying in part on Charles's demeanor and behavior on the stand (R3.49, 57-58 (2024 Order)). On February 21, 2024, Stringer timely appealed (R3.60 (Notice of Appeal)).

The Trial

The Government's Evidence

On June 3, 2003, shortly after 6:30 a.m., police found the body of Tilford Johnson slumped in the driver's seat of a black two-door Acura behind 3208 28th Street, SE (8-14-06 Tr. 205-14; 8-16-06 a.m. Tr. 593; Government Exhibit (GX.) 3-11, 13).[3] Johnson had been shot once in the head at close range, with the bullet entering his head above his right ear, and exiting the left side (8-15-06 Tr. 467-72).

There was a "vast amount" of blood on the rear seat and floorboard of the car (8-15-06 Tr. 434-35), and a blood trail led from the car to a nearby apartment building—3209 Buena Vista Terrace, SE (8-14-06 Tr. 213, 217). The blood in the car, and on the blood trail, matched that of Johnson (8-16-06 a.m. Tr. 594). The car doors were locked, the windows were up, the keys were in the ignition, and the

[3] Metropolitan Police Department Officer Deidre Fisher testified that GX.3-8 showed the car as she found it (8-14-06 Tr. 206, 211-12).

parking brake was engaged (8-14-06 Tr. 207; 8-15-06 Tr. 436). The front-passenger

Figure 1: GX 5 (top) & 7 (below)

seat of the two-door car was pushed forward (GX.5, 7). The window behind the driver's seat was shattered (8-14-06 Tr. 207). There was no money in Johnson's wallet (8-15-06 Tr. 434-35). The police found one expended shell casing on the floorboard behind the driver's seat (*id*. at 438, 442-43).[4]

Johnson lived in Frederick, Maryland, with his close friend, Anthony Collins (8-15-06 Tr. 412-413). Both were friends with Charles (*id*. at 413). Sometime during the evening of June 2, 2003, Johnson asked Collins to drive with him to Boston; Johnson wanted to visit a girl he had recently met (*id*. at 415-416).[5] Collins did not

[4] The prosecutor told the jury that there were two persons in the car besides Johnson, one in the front-passenger seat and one in the back seat (8-16-2006 p.m. Tr. 22-23). Pointing to GX.7, the prosecutor stated that there was "[h]ardly any blood on the passenger seat" because "[t]he blood that must have popped right out of his head should been on that seat. But somebody was there and it covered them instead." (*Id*.) Still pointing to GX.7, the prosecutor noted the way the passenger seat was found folded forward, consistent with a person getting out of the back of a two-door vehicle by pushing the seat forward and then forgetting to "push the seat back in its normal reclining position" (*id*. at 23).

Contrary to Stringer's claim (at 9), the government did not tell the jury that the front-seat passenger was the shooter (see 8-16-2006 p.m. Tr. 22-23). Also, contrary to Stringer's repeated claim (at 4, 44), there was no testimony that the back seat was "covered" in blood. In fact, GX.7 shows the rear-passenger-seat floorboard, which has blood on it, but it is by no means "covered" in blood. No photograph of the rear-passenger seat itself was received at trial.

[5] A duffel bag packed with clothing was recovered from the trunk of Johnson's Acura (8-15-06 Tr. 444).

want to go because he was too tired (*id*. at 416).[6] The following day, Collins learned from his girlfriend that Johnson had been murdered in D.C. (*id*. at 417).

Collins was surprised that Johnson had gone to D.C. "because [Johnson] really didn't know anybody in D.C. except for . . . a female and [Charles]" (8-15-06 Tr. 417). Collins called Charles, who told Collins that Johnson had called him and said something about going to Boston (*id*.). Charles also told Collins that he had planned to travel to Boston with Johnson, and that Johnson had called from the Baltimore-Washington Parkway and asked for directions; Charles said that was the last he heard from Johnson (*id*. at 417-418). When Collins tried to call Charles again later that day, Collins learned that Charles's cell phone was disconnected (*id*. at 418).

Robert Lyles, Stringer's brother (and Charles's uncle), heard from a friend about a shooting in the alley, but did not know any of the details (8-14-06 Tr. 260-63). Lyles spoke to Charles a few days after the murder "down at the bottom of Buena Vista [Terrace]" (*id*. at 263). Lyles asked Charles where Lyles could get some marijuana; Charles told Lyles that he had some marijuana, but that someone else was selling it for him (*id*. at 264). Charles then told Lyles that Charles had called someone

[6] Johnson had his cell phone and money when he left the house in Frederick (8-15-06 Tr. 416 ("I know he had money on him."); *id*. at 423 ("Q: As far as money, are you sure he had money? A: I am sure he did. He couldn't go all the way up to Boston, broke.")). Neither the cell phone nor the money were found on Johnson's body or in his car (*id*. at 432-63).

he knew from Hagerstown [presumably Johnson] because Charles wanted to get some marijuana, and he knew that the person from Hagerstown had some marijuana (*id*.). Charles told Lyles that after he met the person at a pay phone near the 7th District police station, they got into the person's car and drove to the alley (*id*. at 265). Charles further told Lyles that he brought the person into the alley "so they could rob him" (*id*.). Charles said that Stringer joined them in the car, and that "both of them robbed [the person], and [Charles] said that [Stringer] shot him" (*id*.). Then, Charles and Stringer "left the alley, and . . . [g]ot into a car with someone parked down the street" (*id*. at 266). Charles told Lyles that he and Stringer robbed the person of marijuana and money (*id*.).

A few days later, Stringer asked Lyles if Lyles had heard about what had happened in the alley (8-14-06 Tr. 266-67). When Lyles responded that he had heard about it, Stringer stated, "That was me" (*id*. at 267).[7]

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[7] Lyles had been arrested on June 18, 2003; on September 23, 2003, he pleaded guilty to one count of distribution of cocaine, and he agreed to cooperate with the government (8-14-06 Tr. 268-69). Lyles agreed in September 2003 to make undercover drug purchases and was released to do so (8-14-06 Tr. 277-81, 310). Lyles, who had prior convictions for Attempted Possession of PCP and Possession of PCP, testified pursuant to his plea agreement with the government in this new case (8-14-06 Tr. 268-71).

Lyles was first interviewed about the Johnson murder in April 2004 after lead Detective Scott Gutherie learned that a federal cooperator had been arrested in the area where the homicide occurred (8-14-06 Tr. 271-72; 8-15-06 Tr. 447-48). In that first meeting, Lyles told Detective Gutherie about Charles's statement to him

(continued . . .)

The government presented evidence of cell phone use to link Stringer and Charles to the Johnson murder and corroborate aspects of Lyles's testimony. Sprint telephone records for Charles's phone (202-276-9025) (GX.14, 14A; 8-14-06 Tr. 225; 8-15-06 Tr. 399, 401) indicated that Johnson (301-693-9155) called Charles 12 times between 11:38 p.m. on June 2, 2003, and 2:58 a.m. on June 3, 2003 (see generally 8-14-06 Tr. 221-243; GX.14). This was the last call on Johnson's phone (8-16-06 a.m. Tr. 594-95).

The government alleged that, immediately after this last call, Charles called Stringer. The Sprint telephone records indicated from 11:00 p.m. to 3:00 a.m., Stringer and Charles called each other approximately 14 times (GX.14). There were several more calls between Stringer and Charles from approximately 3:00 a.m. to

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implicating Charles and Stringer, but Lyles denied speaking to Stringer directly about the murder (8-14-06 Tr. 288, 311). The following week, on April 28, 2004, Lyles was interviewed for a second time before testifying in the grand jury; he twice denied speaking with Stringer before admitting he had done so (*id*. at 288-89, 311). On cross-examination at trial, Lyles agreed that there were "four specific occasions" where he was asked if Stringer had said anything to him about the shooting and Lyles said no (*id*. at 289). *See Stringer*, 301 A.3d at 1222 (repeating same).

Lyles stated at trial that he was "reluctant" to talk about the shooting because "[he] was scared for [his] safety and the safety of [his] family" (8-14-06 Tr. 287, 312). He also denied accusing Stringer of having an affair with Lyles's wife in 2002 (*id*. at 303). In closing argument, the prosecutor argued that if Lyles had been biased against Stringer because of an affair in 2002, that alleged bias would not explain why Lyles waited until 2004 to tell detectives about the statements from Charles and Stringer, both of which implicated Stringer in the murder (8-16-2006 p.m. Tr. 28).

approximately 3:17 a.m., after which time the next contact between the two telephones was more than six hours later at 9:22 a.m. (*id*.). The Sprint phone records also indicated that Charles called the Campbell residence (3208 28th Street, SE) four times between 3:25 a.m. and 3:28 a.m. on June 3, 2003 (*id*.).[8]

Stringer called Charles on June 4, 2003, at approximately 11:00 a.m. (GX.14). Shortly thereafter—apparently within minutes—someone who identified himself/herself as the subscriber for Charles's number called Sprint and requested that the cell-phone number be changed (8-14-06 Tr. 241-242; GX.14). There was no further activity for Charles's telephone number after 11:13 a.m. on June 4, 2003 (*id*.).

Police seized Charles's phone on June 27, 2003, after executing a search warrant at his home (8-14-06 Tr. 225; 8-15-06 Tr 399, 401).[9] On that same date, Stringer called Tiffany Thompson, the subscriber listed for Stringer's cell phone and

[8] At the time of the murder, Jermaine Campbell lived with his twin brother, James Campbell, his mother, and his cousin in an apartment at 3208 28th Street, about 150 feet from the crime scene (8-14-06 Tr. 244-45). Charles was friends with James. Jermaine testified that Charles called that night and asked what they were doing; Jermaine told Charles that he was asleep, and then hung up (*id*. at 247-249; 8-15-06 Tr. 403). The timing of these calls suggests that Johnson was murdered between 3:17 a.m. (the last call between Stringer and Charles) and 3:25 a.m. (the first call from Charles to the Campbell residence).

[9] Police also recovered 9mm ammunition, but further analysis determined that the ammunition did not come from the same lot as the casing found in Johnson's car (8-15-06 Tr. 382-90, 438, 456-57, 461).

directed her to have the cell-phone service turned off (8-15-06 Tr. 349-50). When Thompson asked why, Stringer responded, "I can't tell you" (*id*.). Thompson contacted AT&T, the service provider for Stringer's telephone, and requested that service be terminated (8-16-06 a.m. Tr. 595).[10]

Law-enforcement authorities also obtained a letter that Stringer wrote to Charles from jail. In the letter, Stringer told Charles that "we fucked up," but "it won't be long before we get home, all you have to do is ride this shit out" (see R1.88). Stringer urged Charles "to live by the code, see nothing, know nothing, [and]

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[10] Tiffany Thompson was the subscriber listed for the cell phone number that Stringer used (202-256-9730) (8-16-06 a.m. Tr. 595; GX.36). She bought this phone in November or December 2002 when she went to the store with Stringer and Carlos Sly, her son's father (8-14-06 Tr. 315-16). Sly had asked her to get a cell phone for Stringer (8-15-06 Tr. 345-46). She knew the phone was for Stringer and, in fact, Stringer used that phone (although Sly paid for the phone—and paid the bills) (*id*. at 345-46, 355).

Lead Detective Scott Gutherie first met with Thompson at her home on June 27, 2003, when Thompson told him the phone was "passed around [by] some girlfriends," and she thought the name of the friend was "BUI" or something like that (8-15-06 Tr. 352-54, 365-66, 446-57, 458). Then she called the police back and said that "Barry" had the phone (*id*. at 365-66). On June 29, 2003, she gave a written statement explaining that she had obtained the phone for Stringer at Sly's request, and that Stringer used the phone (8-15-06 Tr. 446-47). She explained that she had called Stringer on this phone the week before, asked him to take her son to get a haircut, and he had done so, asking her later that day to turn the phone off (*id*.). She adopted this statement in the grand jury (8-14-06 Tr. 322). Sly had been killed by 2004 (8-14-06 Tr. 315). At trial in 2006, she testified that Sly had asked her to purchase the phone for his own use, and that both Stringer and Sly had asked her to turn the phone off; she was impeached with her grand-jury testimony to the contrary (8-14-06 Tr. 318-27; 8-15-06 Tr. 344-46, 349).

hear nothing" (*id*.). Attached to the letter was a copy of a confidential, internal jail document listing the inmates who were to be kept separated from Charles (*id*.; 8-15-06 Tr. 369-71). Written on the document—in what the government argued was Stringer's handwriting—was: "These are the n****s that got a seperation [sic] on you" (*id*.). Stringer referred to these persons as "rats" (*id*.).[11]

The Defense Evidence

Stringer's defense theory was that Charles had acted alone in killing Johnson (8-16-06 a.m. Tr. 47, 83). Mark Vanderhall, Stringer's stepson, testified that Charles told him he had "shot somebody" "[b]ehind some houses" (8-15-06 Tr. 428-29). Vanderhall did not know precisely when or where this shooting had occurred, and Vanderhall did not ask Charles any detailed questions about the shooting (*id*. at 431). Ahman Driver, aged 31, who had known Stringer since he was 15, testified that Charles, while smoking marijuana one evening, told Driver that he had robbed someone and then shot him in the head (8-16-06 a.m. Tr. 547-49). Driver was unable

[11] Stringer's brief contains multiple citations (at 9, 10, 11, 16, 38) to comments by defense lawyers, the prosecutor, or the trial judge at various stages of Stringer's and Charles's case. These citations are not evidence nor are they arguments by the parties to the jury about the evidence; indeed, several of the citations are to comments by parties in Charles's case and are not properly part of the record on appeal. See, e.g. Brief at 9 (trial court commenting pre-trial on proffer of Charles's statement to Lyles); *id*. at 10, 38 (Charles's lawyer commenting in Charles's case that he was "surprised" Stringer was indicted); *id*. at 11 (prosecutor commenting in Charles's D.C. Code § 23-110 hearing on his view of the strength of the evidence at trial).

to provide specific information regarding when the conversation occurred, and he did not ask Charles any questions about the matter (*id*. at 550-551).

Charles, aged 21, also testified on Stringer's behalf (8-15-06 Tr. 482). He denied telling Lyles that he and Stringer had robbed Johnson or that Stringer had shot Johnson (*id*. at 485; 8-16-06 a.m. 541-43). Charles had heard that Stringer had an affair with Lyles's wife in 2002, but he had no first-hand knowledge of it (8-15-06 Tr. 485, 492-93). Charles spoke to Johnson on his cell phone the night of June 2-3, 2003, only to give him directions (*id*. at 496). He also spoke by phone that night to Sly and Jermaine Campbell (8-15-06 Tr. 486). He was home waiting for Johnson at about 3:00 a.m. on June 3, 2003, but Johnson never showed up (8-16-06 a.m. Tr. 544-45). He spent some time that night with James Campbell (8-15-06 Tr. 486). When asked about the robbery and murder of Johnson, Charles invoked his Fifth Amendment rights (8-16-06 a.m. Tr. 545).

In his trial testimony, Stringer, aged 39, denied shooting Johnson, being in the alley that night, or having any conversations by phone or in person with Charles the night of June 2-3, 2003 (8-16-06 a.m. 569, 572, 581, 590). He denied using the cell phone purchased by Thompson, and said that Sly used the phone, although he might have occasionally used it if he was with Sly (8-16-06 a.m. 572-73, 582). He stated

that he had an affair with Lyles's wife in 2002 and not spoken with Lyles since that time; he denied speaking with Lyles about the murder (*id*. at 573, 583).[12]

Stringer admitted writing the letter to Charles and attaching a copy of the separation order, but he denied writing on the separation order (8-16-06 a.m. Tr. 585-86).[13] He also admitted that he sent the letter to his mother and asked her to mail it to Charles because Stringer was not allowed to have direct communication with Charles (*id*. at 588). Stringer testified that when he wrote in the letter to Charles that "we fucked up," and that "all you have to do is ride this shit out," he meant that he and Damien Lyles (Lyles's son) were in the same cell, and that he "didn't have no commissary money, so [he] was asking [Charles] . . . to assist [them]" by sending them items sold in the commissary like food, sodas, and chips (*id*. at 579, 587). He

[12] Stringer testified that he did not speak to Charles the night of June 2-3, 2003, although "I am not saying I remember that date in particular" (8-16-06 a.m. Tr. 584). In closing argument, the prosecutor stated: "[Stringer] remembers specifically that he didn't speak to Ricky in June of 2003. How is that possible? . . . He says he didn't even know about the murder until 2004. But he is going to take the stand here, August 2006, and remember three years ago I never talked to Ricky. . . . But he knows why that phone is important." (8-16-2006 p.m. Tr. 31.)

[13] The prosecutor argued in closing that Stringer claimed not to have written the note in the separation order about the "Rats," but asked the jury, "take your time, compare the handwriting. You'll see how close they are from each of these letters." (8-16-2006 p.m. Tr. 24; see also *id*. at 7.) As Attachment A illustrates, even to the untutored eye, there was a very strong similarity between the handwriting in the letter and the handwriting on the separation order (see Att. A (comparing handwritten "R," "niggas," "the," "tha," and "you" in the two documents); R1.88).

also testified that the portion of the letter in which he directed Charles to "live by the code, see nothing, know nothing, hear nothing" was simply a warning "not to say anything about his legal work" (*id*. at 580). Stringer admitted that his letter did not mention commissary, soda, chips, or legal work (*id*. at 588).

The Direct Appeal

This Court affirmed Stringer's convictions on direct appeal, rejecting his challenges to sufficiency of the evidence and admission of Charles's statements to Lyles as declarations against penal interest. *Stringer*, No. 06-CF-1515, at *1. The Court noted the corroborating circumstances that indicated the trustworthiness of Charles's statements to Lyles, including (1) the fact that Charles was speaking to his uncle within days of the murder; (2) the telephone records; (3) the fact that Johnson had come from Frederick to meet Charles; and (4) the positioning of Johnson's car in the alley and the way he was killed. *Id*. at *4. This Court further found "considerable evidence" of Stringer's guilt, including (1) Stringer's admission to Lyles; (2) the telephone records showing calls between Johnson and Charles and Charles and Stringer; and (3) Stringer's letter to Charles stating that "we fucked up." *Id*. at *3.

The IPA Motion

In his December 15, 2014, motion, Stringer proffered an affidavit from himself attesting, without more, that he is innocent (R2.94), and an affidavit from Charles, purporting to be dated June 19, 2014, and witnessed by defense investigators Christopher and Ron Reece (R2.92). Charles attested that he killed Johnson (R2.92). He claimed that on June 3, 2003, Johnson called Charles and asked him to travel with him to Boston and sell drugs, to which Charles agreed; that Charles and James Campbell met with Johnson; that Sly was supposed to meet them as well but his phone "kept going to answering service" and Charles realized that he did not need Sly as a "decoy"; that Charles "pull[ed] out [his] gun and pull[ed] the trigger before [Johnson] even g[ot] a chance to see [him]"; and then Charles ran "out [of] the alley and jump[ed] in the car with James and [they] end[ed] up at [his] house" (*id*.).

In its March 4, 2015, opposition, the government argued that Charles's affidavit was unreliable, having been taken by two investigators without the knowledge or permission of Charles's lawyer (R2.108 (Opposition); R2.139 (email from Arthur Ago, Esq.)). The government further proffered the written witness statement given by Charles to police on June 27, 2003 (R2.141 (June 27, 2003, statement of Roderick Charles)). In his statement, Charles denied involvement in the

murder, claimed that he had last spoken with Johnson four months before, and stated that he had never been in Johnson's car (*id*.).

The Evidentiary Hearing

The sole evidence Stringer presented at the October 23, 2018, evidentiary hearing was the testimony of Roderick Charles. Charles testified that late in the evening of June 2, 2003, he received a phone call from Tilford Johnson, a "good friend," asking if he wanted to drive to Boston to see some women and sell marijuana (10-23-18 Tr. 5-6). Johnson told Charles he had $13,000 and needed help finding marijuana to purchase (*id*. at 6). Charles was at the laundromat with James Campbell when he received the call, and Johnson was driving to Washington, D.C., from Frederick, Maryland (*id*. at 7-8). Charles called Sly several times to arrange the purchase, with several calls going to voicemail (*id*. at 9-11). Charles and Campbell met Johnson on D Street near RFK Stadium, then Charles directed Johnson to follow him to Campbell's house because Campbell was not going to Boston (*id*. at 15-17). Charles stated that Sly was supposed to meet them at Campbell's house, but on the drive there, Charles realized he did not need Sly in order to kill Johnson, so Sly left (*id*. at 18-20).

At Campbell's house, Campbell went inside, and Charles directed Johnson to pull into the alley (10-23-18 Tr. 22). Charles testified that he shifted his gun into the pocket of his hooded sweatshirt, got into the passenger seat of Johnson's car, and

when Johnson turned his head, "that was [his] window and [he] shot him in the head" (*id*. at 22-23). Charles shot Johnson once; the bullet left a hole in the rear driver's-side window, but the window was still intact (*id*. at 24-25, 72). Charles took the bag of money from the back seat, grabbed Johnson's phone, and got in his own car (*id*. at 25-28). When he left, the keys were still in the ignition of Johnson's car and the car was still running; Charles did not lock the doors or touch Johnson's wallet (*id*. at 27, 72). Charles called Sly and met him at a carryout to purchase the marijuana (*id*. at 28-30). He also called Campbell's house three times (*id*. at 30). Afterwards, Campbell walked to the carryout and the two men drove to Charles's mother's house; he explained that "that's what [he] was talking about in [his] affidavit when [he] said we got in the car and went to [his] mother's house" (*id*. at 31).

Charles claimed that Stringer had no involvement with the murder and that Charles never spoke to Stringer that night (10-23-18 Tr. 32). Charles said that he did not come forward earlier because he was young, selfish, and inconsiderate (*id*. at 33).

On cross-examination, Charles stated that Stringer was his uncle, and they were "pretty tight" (10-23-18 Tr. 35). Charles was arrested for the Johnson murder in December 2004 and Stringer was arrested for the Johnson murder in October 2005 (*id*. at 35-36). Charles stated that while they "were both in jail," Stringer sent Charles a letter stating that "it won't be long before we get home, all you have to do is ride

this shit out," "it's something small compared to a giant like you," and "it's in our blood to live by the code, see nothing, know nothing, hear nothing" (*id*. at 35-37).[14] Charles admitted that, although he was represented by Assistant Public Defender Arthur Ago at the time, he never told Ago that Stringer was not present for the murder (*id*. at 38).

Charles admitted that, when he was arrested, he gave a false sworn statement to police in which he claimed that he did not know who murdered Johnson, was not present, and had not spoken to Johnson in years (10-23-18 Tr. 39-40). He later told detectives that he spoke to Johnson that night and agreed to meet him at the laundromat, but that Johnson never appeared (*id*. at 41). At his own trial, Charles did not testify, but his defense was that he was not present (*id*. at 41). Charles admitted that, after he was convicted, he lied in his testimony at Stringer's trial by stating he was at home at the time of the murder (*id*. at 44). He also admitted that he knew Stringer was innocent at the time but never told the jury that he killed Johnson or that he knew Stringer was not there (*id*. at 45).

Charles and Stringer were not incarcerated in the same facility until 2013 when both men were at the D.C. Jail (10-23-18 Tr. 46). Charles did not tell his lawyer

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[14] Although Stringer is correct (at 14, 35) that corrections officials obtained the letter in June 2005 before Stringer was indicted in this case (see R1.78 (Government Motion in Limine to Admit Statements), this fact was not presented during the IPA proceeding.

about the investigators or the affidavit (*id*. at 49-50). Charles initially stated that he had not been resentenced when he gave the affidavit, and then testified that, at the time he executed the affidavit, he had already been resentenced and was waiting at the jail "to go back to the feds" (*id*. at 54-55).

Charles testified that he parked on 28th Street, and that after the murder he went to his car, not to Buena Vista Terrace on the other side of the alley (10-23-18 Tr. 69, 73). He said that Sly knew nothing about Charles's involvement in the murder but admitted that he turned off his phone after getting a call from Sly's number (*id*. at 83). He admitted that both Sly and James Campbell were now deceased, and that there was no bad blood between him and his other uncle, Robert Lyles (*id*. at 77, 81).

The Trial Court's 2019 IPA Order

The court noted that Stringer's motion hinged "entirely" on Charles's account and discredited that testimony for several reasons (R2.167-73 (Order)). First, the court found that Charles's testimony was "inconsistent with the physical evidence" at trial, which established that the car doors were locked, the rear driver's-side window was broken out, Johnson's wallet was empty, and there was a blood trail from the car toward 3209 Buena Vista Terrace (*id*. at 167-68). However, at the hearing, Charles testified that he left the car doors unlocked and the car still running, the bullet made a single hole but did not shatter the window, he did not touch

Johnson's wallet, and Charles left the murder scene by walking to his car on 28th Street and never crossed to Buena Vista Terrace on the other side of the alley (*id*.).

Second, the court had "difficulty squaring" Charles's testimony with the June 3-4 phone records, which "detracted" from Charles's credibility (R2.168-70). Charles had claimed that the phone he called multiple times the night of the murder was used by Sly, not Stringer, and Charles's testimony was consistent "up to a point"—the murder of Johnson (*id*.). The court found, however, that Charles's testimony did not explain the nine calls made between the two numbers after the claimed drug transaction was complete (*id*.). The court found it more plausible that Charles changed his phone number after a phone call from Stringer, not Sly, especially because, according to Charles, Sly knew nothing about Charles's role in the murder (*id*. at 10). Connecting the post-murder phone calls to Stringer was more consistent with Thompson's grand-jury testimony that she bought the phone for Stringer, instead of her trial testimony that she bought the phone for Sly (*id*.).

Third, the court found that Charles's testimony contradicted his 2014 affidavit as well as his testimony at Stringer's trial, which Charles now acknowledged had been false (R2.170-72). There were "minor" discrepancies between Charles's description of the calls with Sly and James Campbell, and a "not minor" discrepancy with respect to Charles's claim in 2014 that Campbell was with him during the murder and his testimony in 2018 that Campbell was not with him at the time of the

murder (*id*. at 11). The court "ha[d] difficulty believ[ing] that Mr. Charles has a specific memory of the events surrounding the killing—including how it was arranged, how he did it, and what he did immediately afterward—but cannot remember who was with him when it happened" (*id*. at 171).

Fourth, the court found other reasons to doubt Charles's testimony (R2.172-73). Charles had a "powerful motive to lie" because he was Stringer's nephew and had known Stringer all his life (*id*. at 172). The court found that "[a]fter they were both arrested for the murder," Stringer wrote Charles in jail stating that "we fucked up," that Charles should "live by the code," and "See nothing. Know nothing. Hear nothing." (*Id*.) The court found that Stringer's letter to Charles evidenced their close relationship and strongly suggested the two men had "fucked up" together and were now facing the consequences (*id*.). Stringer's explanation that the letter referred to legal papers and commissary snacks was "not at all credible" (*id*.). Stringer's letter to Charles made no "sense if, as Mr. Charles claims, Mr. Charles committed the murder alone and Mr. Stringer had nothing to do with it" (*id*. at 172-73).

The court also found that the timing of Charles's decision to execute the affidavit for Stringer for the first time in 2014 could be "coincidental" but "more likely" indicated that the two had conspired to produce the affidavit: (1) Charles waited eight years to swear to the affidavit and 2014 was the first time they two men were incarcerated together; and (2) Charles had "nothing to lose by lying in this

case" because his conviction had been affirmed on appeal and he had "no reason" not to falsely exonerate Stringer (R2.173).

Appeal of the 2019 IPA Order

On appeal, Stringer asserted clear error in the trial court's credibility finding. Because this Court was "uncertain about the bases for some of the court's findings," the Court remanded for reconsideration. *Stringer*, 301 A.3d at 1220. The Court also noted that Judge Becker had not been present for the trial and had not premised her findings of Charles's hearing testimony on his demeanor or behavior at the hearing, and thus the Court was more likely to assess the evidence for itself. *Id*. at 1227-29.

With respect to the windows, door locks, and blood trail, the Court found the inconsistencies suggested only that Charles was not present or had a "faulty" memory, making the significance of the inconsistencies was "unclear." *Stringer*, 13 A.3d at 1229. The Court found that the inconsistency regarding Johnson's wallet was "not an inconsistency of much significance" because the evidence that Johnson had money in the wallet "strikes us as speculative." *Id*. at 1230.

The Court was "less convinced" than the trial court that Charles's account was "significantly inconsistent" with the phone records. *Stringer*, 13 A.3d at 1230. The Court reasoned that the trial court had "no basis" for assessing the credibility of Thompson's grand-jury testimony (that Stringer had the phone) or her trial recantation (that Sly had it). *Id*. at 1233-34.

With respect to inconsistencies between Charles's 2018 IPA testimony, and his 2014 affidavit and 2006 trial testimony, the Court found some inconsistencies "minor" and not posing a "direct contradiction" to Charles's 2018 account. *Stringer*, 301 A.3d at 1231. The Court found that Charles's discrepancies about whether he was with James Campbell at the time of the murder were "overstate[d]" by the trial court and "more sensibly attributed to sloppiness or memory lapses than to a lack of credibility as to Mr. Stringer's involvement." *Id*.

With respect to the timing of Charles's 2014 affidavit, the Court stated that there was "no affirmative basis" for inferring that Charles and Stringer communicated during the time they were both housed at the D.C. Jail. *Stringer*, 301 A.3d at 1232. As to the trial court's inference that Charles had "nothing to lose" by proffering the affidavit to exculpate Stringer, the Court found that the record was unclear what sentencing exposure Charles faced, or believed he faced, when he signed the affidavit in June 2014. *Id*.

Finally, the Court admonished the trial court on remand to "consider the potential weaknesses in the government's case" to a greater extent. *Stringer*, 301 A.3d at 1233 (internal quotation marks omitted). The Court observed that Lyles's testimony raised "significant questions," noting that Lyles "four times" denied speaking to Stringer about the murder. *Id*. at 1234. The Court also surmised that, according to Charles's account to Lyles, it was "most reasonable" that Stringer was

in the back seat. *Id.* Given this inference, the Court suggested it was "worth questioning whether, if Mr. Stringer had in fact shot Mr. Johnson from a back seat toward the front driver's seat, the bullet would have exited through the rear driver's side window, as it did." *Id*.

The Trial Court's 2024 Order After Remand

Judge Becker "carefully considered" the remand order, the 2018 evidentiary record, the 2006 trial record, and the initial filings of the parties; the court also "t[ook] seriously" the Court's direction on evaluation of inconsistencies (R3.49 (2024 Order)). After doing so, the court reached the "same conclusion," that Stringer had failed to demonstrate his innocence by either a preponderance or clear and convincing evidence (R3.49-50).

The court had taken note of Charles's "demeanor, facial expressions, body language, and the like" when it observed him testify in 2018, but had "elected instead to focus on the objective evidence" before it (R3.57 (2024 Order)). Recalling the 2018 demeanor evidence, the court found Charles's testimony "unconvincing" (*id*.). While "nothing in Mr. Charles's demeanor clearly suggested he was lying," there was "nothing that persuaded the Court he was telling the truth rather than relating a story that would help clear his uncle's name" (*id*.). His affect was "flat," even when making his statement that "there was 'an innocent man standing over there and he didn't have anything to do with this'" (*id*.). Charles showed no remorse (*id*. at 58).

While recognizing that "judgments about demeanor are highly subjective," the court found that Charles's demeanor and behavior on the stand "contribute[d] to the decision not to credit Mr. Charles" (*id*.).

With respect to the windows, door locks, and blood trail, the court stated that the significance of the discrepancies "is not simply a matter of inconsistencies" (R.3.50 (2024 Order)). The court found "that the *only* way to square Mr. Charles's testimony with the physical evidence is for someone else to have been in the car at the time of the shooting" (*id*. (emphasis in original)).

The court offered several reasons for its finding (see R3.50-52 (2024 Order)). First, Charles testified that after the shooting he got into his car on 28th Street; although it was "theoretically possible" he misremembered this fact, his testimony on this point "does not explain how he would have left a blood trail behind" from the car to the building on Buena Vista Terrace (*id*. at 50-51). Second, the court found that "the largest amount of the blood from the shooting was on the rear seat and rear floorboard," and the physical evidence supported the conclusion that "Johnson was shot from his right side and not from behind" (*id*. at 51). "The logical conclusion, therefore, is that there were two people in the car with Mr. Johnson; one on his right side who did the shooting, and one in back who trailed the blood away from the car" (*id*.). The court found that there was "no way to know" who was in the front and

who was in the back but Charles's account that he was alone in the car with Johnson "does not withstand scrutiny" (*id*.).[15]

The court reevaluated the telephone records, acknowledging, per this Court's decision in *Stringer*, that it had no objective reason to credit Thompson's grand-jury testimony over her trial testimony (R3.52-53 (2024 Order)). The Court found the telephone record evidence to be in "equipoise" between (1) Charles calling Sly about selling marijuana and (2) Charles calling Stringer about the murder (*id*. at 53). The court set aside its inference that the phone records discredited Charles and assumed that the records neither supported nor detracted from Stringer's claim of innocence (*id*. at 54).

With respect to the timing of Charles's sentencing, the court noted it was possible the resentencing court could have received the affidavit before Charles was resentenced, but found there was no evidence about the likelihood of this occurring, or whether Charles believed he could be exposing himself to a higher sentence by signing the affidavit (R.54-55 (2024 Order)). Given the failure to notify Charles's counsel, the court inferred Charles was not advised about the legal ramifications of

[15] For the purposes of the remand determination, the court "set aside" inferences made from inconsistencies regarding Johnson's wallet, whether Charles spoke to Sly on the night of the murder, whether James Campbell was with him at the time of the murder or met him later, and whether the timing of Charles's affidavit suggested collusion between Stringer and Charles (R3.52, 54).

his affidavit (*id*.). In view of this lack of evidence, the court declined to draw an inference from the timing of Charles's sentencing—either that Charles believed he was risking a higher sentence (which would strengthen his credibility) or believed he faced no adverse consequences (which would not strengthen his credibility) (*id*.).

The court reiterated its findings (see supra p. 22), which were "unquestioned" in *Stringer*, regarding Charles's bias in relation to Stringer, Stringer's letter to Charles and its implication that they had committed the murder together, Stringer's incredible explanation for the letter at trial, and the trial court's finding that Stringer's letter made no "sense" if Charles had acted alone (R.3.56 (2024 Order)).

Turning to the strength of the evidence at trial, the court found that Lyles's testimony reflected "reasons to doubt the credibility of his trial testimony" (R.56 (2024 Order). The court recognized, however, that in an IPA proceeding, Stringer bore the burden of demonstrating actual innocence by a preponderance, even if, where the government's case is weak, it may be easier for the defendant to meet this burden (*id*. at 57).

In summary, the court emphasized "two critical facts": (1) Charles's testimony could not be reconciled with the physical evidence at trial; and (2) Stringer's letter to Charles in jail supported the conclusion that the two men committed the crime together and undermined Charles's claim that he acted alone

(R3.58-59). Given the weight assigned to these facts by the trial court, Stringer could not demonstrate his innocence even by the lower preponderance standard (*id*. at 59).

SUMMARY OF ARGUMENT

On remand, the trial court made clear that it was grounding its finding that Charles was not credible in its observations of his demeanor and manner of testifying at the 2018 evidentiary hearing. When combined with the trial court's finding of major factual inconsistencies in Charles's hearing testimony, the trial court's credibility determination is entitled to substantial deference by this Court. Contrary to Stringer's claims on appeal, the factual inconsistencies found by the trial court were not clearly erroneous. Nor did the trial court clearly err in weighing Charles's incredible testimony against the evidence as a whole. For all these reasons, the trial court did not abuse its discretion in denying Stringer's IPA motion.

ARGUMENT

On Remand from Denial of Stringer's IPA Motion, the Trial Court Did Not Clearly Err in Discrediting Roderick Charles and in Finding Stringer Had Not Proved His Actual Innocence.

Contrary to Stringer's claim (at 41-48), the trial court did not clearly err in discrediting Charles or in evaluating the evidence against Stringer.

A. Standard of Review and Applicable Legal Principles

"The IPA provides that '[a] person convicted of a criminal offense in the Superior Court of the District of Columbia may move the court to vacate the conviction or to grant a new trial on grounds of actual innocence based on new evidence.'" *Williams v. United States*, 187 A.3d 559, 561 (D.C. 2018) (quoting D.C. Code § 22-4135(a)); *Caston v. United States*, 146 A.3d 1082, 1089 (D.C. 2016) (same). The movant must "set forth specific, non-conclusory facts" which "identify[] the specific new evidence," "[e]stablish[] how that evidence demonstrates that the movant is actually innocent despite having been convicted at trial or having pled guilty," and "[e]stablish[] why the new evidence is not cumulative or impeaching." D.C. Code § 22-4135(c). "'Actual innocence' or 'actually innocent' means that the person did not commit the crime of which he or she was convicted." D.C. Code § 22-4131(1).

In considering an IPA claim, a court "may consider any relevant evidence," but "shall consider" "(A) The new evidence"; "(B) How the new evidence demonstrates actual innocence"; "(C) Why the new evidence is or is not cumulative or impeaching"; and "(D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial." D.C. Code § 22-4135(g)(1). If, after considering those factors, the court "concludes that it is more

likely than not that the movant is actually innocent of the crime, the court shall grant a new trial." D.C. Code § 22-4135(g)(2). If the court "concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice." D.C. Code § 22-4135(g)(3).

This Court reviews the denial of an IPA motion for abuse of discretion. *Williams*, 187 A.3d at 562; *Caston*, 146 A.3d at 1090. The Court applies the clearly erroneous standard of review to the trial court's assessment of alleged newly discovered evidence. *Williams*, 187 A.3d at 562-63. Thus, the scope of the Court's review is "narrow on the question of whether that new evidence establishes appellant's actual innocence." *Id*. at 563 (internal quotation marks, ellipses, and brackets omitted).

B. The Trial Court Did Not Clearly Err in Discrediting Charles's Hearing Testimony Given the Court's Assessment of Charles's Demeanor and Multiple Non-Trivial Factual Inconsistencies.

Based on the court's observation of Charles's "expressionless demeanor," his "flat affect," his lack of remorse, and the sense that he was merely "relating a story that would help clear his uncle's name," the court found his testimony "unconvincing" (R3.57-58 (2024 Order)). Thus, the court clarified that its credibility determination rested not only on objective inconsistencies in the testimony, but also

on the trial court's unique opportunity to observe Charles's manner of testifying. *See Stringer*, 301 A.3d at 1229 (finding that the trial court "did not refer to Mr. Charles's demeanor or describe aspects of his behavior on the stand that called into question his trustworthiness," and applying the principle that "credibility determinations based on objective inconsistencies are more likely to be found clearly erroneous than those that rest on the trial court's unique opportunity to assess the witness's mien and manner of testifying").

When a trial judge watches a witness testify, observes the witness's demeanor and behavior on the stand, and then makes a credibility determination on those grounds, that determination is "virtually unreviewable." *See Walker v. United States*, 167 A.3d 1191, 1210 (D.C. 2017) ("As a rule, a trial judge's witness credibility determinations are 'virtually unreviewable,' and '[w]e will not redetermine the credibility of witnesses where . . . the trial court had the opportunity to observe their demeanor and form a conclusion.'") (internal citation omitted); *Sutton v. United States*, 140 A.3d 1198, 1202 (D.C. 2016) ("virtually unreviewable"); *Jenkins v. United States*, 902 A.2d 79, 87 n.12 (D.C. 2006) ("The judge saw both women testify, and we are in no position to second-guess her assessment. The result we reach flows logically from the judge's *virtually unreviewable* determination as to which of the women was telling the truth.") (emphasis added); *see also Estate of Kittrie*, 318 A.3d 1200, 1206-07 (D.C. 2024) ("[E]xcept under rare circumstances not alleged

here, a judge's credibility determination is 'virtually unreviewable'") (citing *Jenkins*, 902 A.2d at 87 n.12)).

Although the trial court was careful not to overstate its conclusions—recognizing that "judgments about demeanor are highly subjective"—it anchored its credibility assessment in its personal observations of Charles's behavior on the stand—testimony that spanned 83 transcript pages (see R3.58 (2024 Order); 10-23-18 Tr. 4-87 (Charles's testimony)). This Court should defer to the trial court's demeanor-based credibility finding "if for no other reason than that [this Court has] no appraisal of the witness's comportment to compare against the trial court's." *Stringer*, 301 A.3d at 1228; *see Turner v. United States*, 116 A.3d 894, 927 (D.C. 2015) ("[A] credibility determination, made after the judge had the opportunity to hear the recanting witnesses' live testimony and observe their demeanor, may be overturned only if it is wholly unsupported by the evidence.") (internal quotation marks omitted); *David v. United States*, 957 A.2d 4, 8 (D.C. 2008) (This Court "will not substitute its judgment for that of the fact-finder when it comes to assessing the credibility of a witness . . . based on factors that can only be ascertained after observing the witness testify.") (alterations in original) (citation and internal quotation marks omitted); *In re Temple*, 629 A.2d 1203, 1208-09 (D.C. 1993) ("The factfinder who hears the evidence and sees the witnesses is in a better position to make such determinations, having the benefit of those critical first-hand

observations of the witness'[s] demeanor or manner of testifying which are so important to assessing credibility."). Although Judge Becker did not preside over Stringer's trial, deference to her credibility determination is warranted because of her expertise as a trial court judge in determining facts and the likelihood that her factual determinations are significantly more accurate than those produced by an appellate court. *Stringer*, 301 A.3d at 1218 (listing same, and citing *Anderson*, 471 U.S. at 574, and *Henderson v. United States*, 276 A.3d 484, 489 (D.C. 2022)).

Here, the trial court paired its demeanor-based credibility findings with two "critical" factual inconsistencies: (1) that Charles's testimony that he was alone when he shot Johnson cannot be reconciled with the physical evidence at trial; and (2) that Charles's testimony that he acted alone was undermined by Stringer's letter to Charles in jail that "we fucked up" and advising him to "live by the code" (R3.58 (2024 Order)). As the trial court found, these inconsistencies were not minor because they went to the heart of Charles's claim that he acted alone (*id*. at 50-52, 56, 58). Nor, as the trial court also found, could these inconsistencies be the product of a faulty memory. Charles knew whether he acted alone, he knew where he went when he got out of the car, and the letter—and Stringer's obvious lies seeking to explain it—speaks for itself (*id*.).[16] For these reasons, the trial court did not clearly err in

[16] The court might have added skepticism that the two people Charles claimed to have been with the night of the murder had since died, and that Charles, facing a (continued . . .)

discrediting Charles. *See, e.g., Williams*, 187 A.3d at 565 (credibility determination in IPA case not clearly erroneous where trial court disbelieved witness after observing and hearing him testify and inconsistencies relied upon by the court were not minor); *Bouknight v. United States*, 867 A.2d 245, 251, 257-58 (D.C. 2005) (same).

C. The Trial Court's Determination that Charles's Testimony Was Inconsistent with the Physical Evidence Was Not Clearly Erroneous.

Stringer asserts (at 41-44) that the trial court clearly erred in finding that Charles's testimony was inconsistent with the physical evidence at the scene. His claim lacks merit.

The trial court found that Charles testified that he shot Johnson from the front-passenger seat of the Acura, "immediately" went to his car on 28th Street, and never crossed the alley in the other direction toward 3209 Buena Vista Terrace (R3.50 (2024 Order); R2.167 (2019 Order)). The court further found that there was blood on the exterior of the car and a "blood trail" including a "little piece of tissue" leading toward 3205 or 3209 Buena Vista Terrace (R3.50). The court recognized that it was "theoretically possible" that Charles "misremembered what he did after the

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murder charge and represented by able counsel from the Public Defender Service, never told his lawyer that Stringer wasn't there (see 10-23-18 Tr. 38, 81).

shooting" (*id.*). But this evidence alone—that Charles left the car in the direction of 28th Street, and someone left a blood trail from the car in the opposite direction—was sufficient to support the trial court's finding that Charles's solo-participant theory could not be squared with the physical evidence on the scene. D.C. Code § 17-305(a).

The court further found that the largest amount of the blood from the shooting was on the rear seat and rear floorboard, and only a small amount of blood was on the front-passenger side (R3.51 (2024 Order)). The court reasoned that the trajectory of the gunshot suggested the shooter was in the front-passenger seat (*id*.). Further, although the trial court did not discuss it, the front-passenger seat was pushed forward when police discovered the locked car (see supra pp. 5-6 & n.4), thus permitting the inference, as the government urged in closing, that *two persons* were in the car with Johnson, one in the front and one in the back (for whom the seat-back had to be pushed forward to permit the rear-seat passenger to emerge from the two-door coupe) (8-16-2006 p.m. Tr. 22-23). From these facts, the "logical conclusion" was that there were two people in the car, a shooter in the front-passenger seat and a second person who left the blood trail in the back seat (id.). These findings were permissible. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

For the first time in this (second) appeal of the trial court's denial of his IPA motion, Stringer claims (at 41-45) that the blood-spatter evidence at trial demonstrates that only one person was in the car with Stringer, and that person was in the front-passenger seat, and could not have been in the back-passenger seat.[17] Relying (at 42-44) on cases in which the court received expert blood-spatter testimony-- something not presented here -- Stringer claims (at 4, 44) that the back seat was "covered" in blood, and infers that the lack of blood-spatter "void" in the rear-seat passenger area suggests that no one had been sitting there.

This Court should reject Stringer's argument if only because it requires expert testimony which Stringer has not provided, and which this Court is not equipped to receive in the first instance. *See Eason v. United States*, 687 A.2d 922, 925–26 (D.C. 1996) (police officer with training in blood-spatter analysis properly qualified as an expert); *see also District of Columbia v. Arnold & Porter*, 756 A.2d 427, 434 (D.C.

[17] Because Stringer chose not to brief this claim on his first appeal at a time when he could have done so, *see, e.g., Nixon v. United States*, 730 A.2d 145, 151-53 (D.C. 1999) (considering arguments that weapons offenses merged on direct appeal), this Court should now deem the claim waived. *See Parker v. United States*, 254 A.3d 1138, 1142-43 (D.C. 2021) (deeming defendant's argument waived because he failed to present it on direct appeal); *Thoubboron v. Ford Motor Co*., 809 A.2d 1204, 1215 (D.C. 2002) ("[I]t is a general principle of appellate practice that 'where an argument could have been raised on an initial appeal, it is inappropriate to consider the argument on a second appeal following remand.'") (quoting *Hartman v. Duffey*, 88 F.3d 1232, 1236 (D.C. Cir. 1996)); *see also Breezevale Ltd. v. Dickinson*, 879 A.2d 957, 967 n.10 (D.C. 2005) (party to civil action waived argument on second appeal by failing to raise it in first appeal).

2000) (trial judge is in best position to evaluate the qualifications of an expert witness).

Even if the Court were to assess Stringer's argument on its own, his claim fails for a lack of evidence. As a purely factual matter, no witness described the back seat as "covered" in blood. No photograph of the back seat was received into evidence at trial. Accordingly, even if this Court were to embrace Stringer's blood-spatter theory for the first time on appeal, *on this record there is no evidence that the blood spatter in the back seat was inconsistent with a second person sitting there*. Stringer bears the "heavy burden" of demonstrating clear error on appeal, *see Jones v. United States*, 828 A.2d 169, 174 (D.C. 2003), and here he cannot carry that burden.[18]

[18] The authorities relied upon by Stringer (at 42-45) suggest a general principle that a body receiving blood spatter can leave a "void pattern" or "shadow" on the surface behind it. *See* Suzanne Bell, *A Dictionary of Forensic Science*, "Void Pattern" (Oxford University Press 2012) (Brief at 43). Those cases shed no light on whether the blood spatter in Johnson's case erupted onto the front-seat passenger, the back-seat passenger, or both, and, of course, cannot answer whether there was a void pattern on the back seat and what significance, if any, that pattern held. *See Lambert v. State*, 435 P.3d 1011, 1014 (Alaska Ct. App. 2018) (reciting testimony of blood-spatter expert describing "void in the blood spatter"); *State v. Fischer*, 360 P.3d 105, 114-15 (Ariz. Ct. App. 2015) (same; reciting testimony); *Bess v. State*, No. AP-76377, 2013 WL 827479, at *5 (Tex. Crim. App. Mar. 6, 2013) (unpublished) (same); *State v. Mickles*, No. L-05-1206, 2006 WL 2053306, at *2 (Ohio Ct. App. 2006) (unpublished) (same). In *Bryant v. State*, 181 So. 3d 1087, 1148–49 (Ala. Crim. App. 2011), counsel was not ineffective per se for failing to present a blood-

(continued . . .)

For these reasons, the trial court's factual finding was permissible, and Stringer cannot show plain error. *Anderson*, 470 U.S. at 575; D.C. Code § 17-305(a).

D. The Trial Court's Determination that Charles's Testimony Was Inconsistent with Stringer's Letter to Charles Was Not Clearly Erroneous.

Contrary to Stringer's claim (at 45-47), the trial court's factual inferences from Stringer's letter to Charles were not clearly erroneous.

Stringer claims (at 45-47) that the trial court erred by finding that Stringer wrote the letter "[a]fter they were both arrested for the murder" (R2.172-73 (2019 Order); R3.56 (2024 Order)). However, Stringer's focus on the timing of the letter does not undercut the trial court's finding about the significance of the letter and its contents. First, there was abundant evidence before the court that Stringer was well aware that he and Charles had "fucked up" and could be charged with Johnson's murder if Charles did not "live by the code." Recall that right after Stringer called Charles on June 4, Charles called to change (or cancel) his phone number (see supra p. 10). In addition, the day police executed the search warrant at Charles's home, Stringer called Thompson and told her to cancel his phone. Even according to Thompson's trial testimony, she claimed that Sly *and* Stringer called her to cancel

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spatter expert at trial. *State v. Meyer*, 832 P.2d 357, 364–65 (Kan. Ct. App. 1992), involves inconsistent jury verdicts in a forgery case.

the phone (see supra p. 11 n.10). Ultimately, the fact that Stringer had not been charged with the murder at the time he wrote the letter to Charles only strengthens the court's inference: Stringer and Charles had killed Johnson together and Stringer needed to be sure that Charles, who had been charged with the crime, kept to the "code" of silence and did not himself "rat" on Stringer (see R3.56 (2024 Order)).

Stringer's explanation at trial—which the trial court deemed "not at all credible"—only reinforced the court's finding of Stringer's consciousness of guilt (R3.56 (2024 Order)). And although the court did not mention it, Stringer's admission at trial that he had written the letter but had not written the notes on the confidential separation order strained credulity, especially given the obvious similarities in the handwriting on various parts of the document (see Exh.A). For all of these reasons, the trial court's findings were not plainly wrong or without evidence to support them. D.C. Code § 17-305(a).

E. The Trial Court Did Not Clearly Err in Weighing the Proffered New Evidence Against the Strength of the Government's Case.

Nor, contrary to Stringer's claim (at 47-48), did the trial court clearly err in evaluating the strength and weaknesses of the evidence against Stringer at trial. The court focused on the three areas identified by Stringer and this Court: the testimony of Thompson (which it found, per *Stringer,* to be in equipoise), the testimony of Lyles (which reflected some reasons to doubt his credibility), and the value of

Collins's testimony regarding Johnson's wallet (which the court set aside) (R3.52-54, 56 (2024 Order)). The court drew a distinction between the burden carried by the government at trial and that carried by Stringer in his IPA motion (*id*. at 57). Under the latter standard, the court found that Stringer could not demonstrate actual innocence given Charles's lack of credibility and the weight of the major inconsistencies in his testimony (*id*. at 57-58).

The court was under no obligation to discuss explicitly the two defense witnesses, Driver and Vanderhall, whom the jury had not credited, and whose vague testimony appeared biased—Vanderhall because Stringer was his stepfather, and Driver by his long friendship with Stringer (8-15-06 Tr. 428-29; 8-16-06 p.m. Tr. 549-50).

In addition, there remained "considerable evidence" of Stringer's guilt. *Stringer*, 301 A.3d at 1233 (quoting *Stringer*, No. 06-CF-1515 at *3). It was hardly a coincidence that both Thompson and Lyles, who had no known connection, each identified Stringer directly or indirectly as culpable for the murder (supra pp. 7-8, 11 n.10; see also 10-23-18 Tr. 111). Recall that Thompson had identified Stringer in June 2003 to police in a phone call after they visited her house and did so without police mentioning his name (see supra p. 11 & n.10). In doing so, she provided authentic detail about calling Stringer to get a haircut for her son, and his calling her back the same day to tell her to cancel the phone (*id*.). Moreover, she adopted this

statement in the grand jury, and it was only after Sly died, when she was forced to recount her testimony in front of Stringer, and it became clear she was incriminating him in a murder, that she recanted (*id*.).

And Lyles, despite the natural suspicion that a cooperating witness can invite, told police the first time he was asked about the murder in April 2004 about the statement from Charles identifying both Charles and Stringer as participants in the murder (see supra p. 8 n.7). Charles testified in 2018 that he acted alone and never discussed the murder with Lyles (10-23-18 Tr. 75). But there was no explanation for how Lyles could have known so many details about the murder when he spoke to Detective Gutherie in April 2004—that Johnson traveled from Maryland to meet Charles, that Charles lured him into the alley, that Charles and Stringer planned to rob Johnson of money and weed, that Stringer shot Johnson in the head, and that they ran out of the alley and jumped into a car (see supra pp. 7-8; see also 10-23-18 Tr. 108.).

Finally, as the trial court suggested (but did not rely on) (see R3.54-55 (2024 Order)), the circumstances of Charles's 2014 affidavit invited suspicion. Charles waited eight years after his conviction in 2006, and five years after his conviction was affirmed on appeal in 2009, to state that Stringer was not involved in the murder, *and he did so for the first time when Stringer just happened to be incarcerated with him at the D.C. jail* (see supra pp. 21-23). Stringer was Charles's uncle and 18 years

his senior (*id*.). It would have taken little for a jury to surmise that Stringer had influenced Charles in 2014, as he had tried to do by letter in 2005, especially because Stringer signed the affidavit admitting to a murder without even talking to his own lawyer (*id*.).

For all these reasons, the trial court did not clearly err in finding that Stringer had not demonstrated his actual innocence. *Williams*, 187 A.3d at 562-63; D.C. Code § 22-4135(g)(1).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

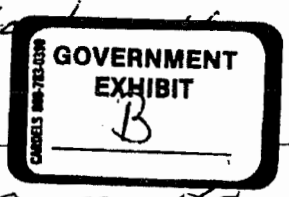
I HEREBY CERTIFY that I have caused a copy of the foregoing appellee's brief to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Gregory M. Lipper, Esq., Lipper Law PLLC, glipper@lipperlaw.com, on this 29th day of April 2025.

/s/
DAVID P. SAYBOLT
Assistant United States Attorney

ATTACHMENT A

Note: Colored boxes added to the exhibit for purposes of this appeal.

Still waiting on the first letter, if you don't write back this time nigga, you better get ready to [illegible] strings up.



What's up Rick

I haven't heard from you in a minute, just trying to see what's going on with you down their, for me I'm doing fine, by the way send me those pictures of Tcian sister and them other girls pictures you holding on to, nigga I told you before to stop holding on to them hoes nigga and start sharing, you know how I do it, and tell your woman to send me some pictures of her sisters and friends and not her. You know me and Treck be up here getting our workout in, that's right nigga, Big B getting ready for them real Bitches, yeah that's right, [illegible] out of town hookers, these D.C. Bitches are washed the fuck up, I heard about the move too nigga, get at us nigga, we fucked up, set it out nigga, and you know it won't be long before we get home, all you have to do is ride this shit out, it's something small compared to a giant like you (smile), but on a serious note, you know only the strong survive, and you know it's in our blood

to live by the code, see nothing, know nothing, hear nothing, get at a nigga soon as possible, stop faking nigga and push that pen, and tell Baby mother when she come and visit you she can bring a friend and call me out. You know her and your son can come see you any day of the week, if she want be she is considered out of town all she have to do is bring her Frederick D.D., tell her and her girlfriend too come on Saturdays and also tell her girlfriend to send some pictures, my address.

Barry L. Stringer 233755
1901 D St. SE.
Washington D.C. 20003

~~Big B~~
Keeping it real '96-'99

(See ya soon)

~~First Stop~~
Atlantic City

Inmate: CHARLES, RODERICK
Booking #: 2004-16597 Permanent ID: 303337

These are the niggas that got a seperation on you → RATS

Enemy Information

Inmate Lastname	STRINGER
Inmate Firstname	RODERICK
Inmate Middle Name	D
Inmate Affix	
Permanent ID	217993
Housing Block	5
Housing Section	SOUTH EAST
Housing Cell	45
Date and Time Enemy Added to List	12/09/2004 07:56
Notes	

Enemy Information

Inmate Lastname	STRINGER
Inmate Firstname	BARRY
Inmate Middle Name	
Inmate Affix	
Permanent ID	233765
Housing Block	3
Housing Section	SOUTH WEST
Housing Cell	57
Date and Time Enemy Added to List	12/09/2004 07:56
Notes	

Inmate: CHARLES, RODERICK
Booking #: 2004-16597 Permanent ID: 303337

Enemy Information

Inmate Lastname	CAMPBELL
Inmate Firstname	JERMAINE
Inmate Middle Name	
Inmate Affix	
Permanent ID	302414
Housing Block	
Housing Section	
Housing Cell	
Date and Time Enemy Added to List	03/22/2005 16:47
Notes	

Twin

Inmate: CHARLES, RODERICK
Booking #: 2004-16597 Permanent ID: 303337

Enemy Information

Inmate Lastname	MYERS
Inmate Firstname	JIMMY
Inmate Middle Name	
Inmate Affix	
Permanent ID	270239
Housing Block	1
Housing Section	SOUTH WEST
Housing Cell	03
Date and Time Enemy Added to List	12/16/2004 16:16
Notes	

Jimbo

Enemy Information

Inmate Lastname	WORTHY
Inmate Firstname	JULIUS
Inmate Middle Name	LEE
Inmate Affix	
Permanent ID	298470
Housing Block	
Housing Section	
Housing Cell	
Date and Time Enemy Added to List	01/15/2005 11:37
Notes	