BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-198

DANIEL GREENE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2015-CF3-002834

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ISSUE PRESENTED

Whether the trial court abused its discretion in denying appellant Daniel Greene's motion for relief under D.C. Code § 23-110, based on claims of ineffective assistance of counsel, where (A) Greene procedurally defaulted his claims by failing to file his motion during the pendency of the direct appeal and cannot show cause and prejudice to excuse his default; and (B) in any event, Greene fails to show deficiency from his trial counsel's unexpectedly eliciting prejudicial testimony from a government witness and from counsel's allowing Greene's co-conspirator to appear in front of the jury when it was not clear he would refuse to testify, and, given particularly the trial court's curative instructions and the substantial evidence against Greene, any deficiency did not prejudice Greene.

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COUNTERSTATEMENT OF THE CASE

On February 25, 2015, a grand jury indicted appellant Daniel Greene and his co-defendant Sean Williams for (1) conspiracy under D.C. Code § 22-1805a; (2) first-degree theft under D.C. Code §§ 22-3211, -3212(a); (3) unauthorized use of a vehicle (UUV) to facilitate a crime of violence under D.C. Code § 22-3215(d)(2)(A); (4) receiving stolen property (RSP) under D.C. Code §§ 22-3232(a), -3232(c)(1); (5) armed carjacking of a senior citizen under D.C. Code §§ 22-2803(b)(l), -3601; (6) armed

robbery of a senior citizen under D.C. Code §§ 22-2801, -4502, -3601; and (7) two counts of possession of a firearm during a crime of violence (PFCV) under D.C. Code § 22-4504(b) (R. 200-06 (PDF) (Indictment)); see 3/3/15 Tr. 3-4).[1] After a five-day jury trial before the Honorable John McCabe on July 27-30 and August 3, 2015, Greene was found guilty of armed carjacking of a senior citizen, PFCV, and UUV on August 4, 2015 (8/4/15 Tr. 23-24).[2] On March 4, 2016, Judge McCabe sentenced Greene to an aggregate sentence of 181 months of incarceration and five years of supervised release (R. 338 (PDF) (Order)).[3]

After this Court affirmed his convictions on direct appeal on March 1, 2023 (A. 33), Greene, on March 13, 2023, filed a motion to vacate his

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[1] "R." refers to the record on appeal; "Tr." refers by date to the transcript of trial court proceedings; and "A." refers to appellant's appendix.

[2] Greene was found not guilty of RSP (8/4/15 Tr. 23-24), and the government dismissed the remaining charges before jury selection (see 7/27/15 Tr. 13-14).

[3] Greene received the mandatory-minimum sentence of 180 months of incarceration on the charge of armed carjacking of a senior citizen; the mandatory-minimum sentence of 60 months of incarceration on the PFCV charge; and one month of incarceration on the UUV charge (R. 28-29 (PDF) (Docket)). The sentences for armed carjacking and PFCV were to run concurrently, and the additional one month of incarceration on the UUV charge was to run consecutively (*id.*).

sentence and for a new trial under D.C. Code § 23-110 based on a claim of ineffective assistance of counsel (A. 12). The trial court denied his motion on February 21, 2024 (A. 4). Greene filed a timely notice of appeal on March 4, 2024 (R. 345 (PDF) (Notice)).

The Evidence at Trial

In the direct appeal, this Court summarized the evidence at trial as follows:

> In the early morning hours of August 1, 2014, Mr. Greene, who also went by "Worm" and "Tracy," rode with his friend, Sean Williams, and Mr. Williams's girlfriend, Alayshia Whitted, in a minivan that Mr. Williams had stolen a few hours earlier. With Mr. Williams driving, Ms. Whitted in the front passenger seat, and Mr. Greene in a rear seat, the three traveled from the Trinidad area in northeast Washington, D.C., to southeast D.C. During the drive, Ms. Whitted saw in the minivan a drawstring bag that was familiar to her: she had seen it on previous occasions in Mr. Greene's car. Ms. Whitted opened the bag and saw a gun with shiny black tape around the handle. Mr. Greene told Ms. Whitted that she was "nosey" and added, "[N]ever leave the house without it."
>
> At around 1:20 a.m., Don Darden, a 65-year-old retiree, left his house in southeast D.C., got into the driver's seat of his 2010 Toyota Matrix (which was parked on the street), and lowered the driver's side window. Mr. Williams, Ms. Whitted, and Mr. Greene pulled up next to Mr. Darden and Mr. Greene wondered aloud if Mr. Darden was asleep. Mr. Williams got out of the minivan with the drawstring bag containing the gun, pointed the gun at Mr. Darden's face, and ordered Mr. Darden out of his car. Mr. Greene then got into the driver's

seat of the minivan. As he did so, he told Mr. Williams to check Mr. Darden's pockets.

Mr. Darden got out of his car as ordered, moved the gun Mr. Williams was holding away from his head, and walked away from the car. Mr. Greene and Ms. Whitted drove away in the minivan and Mr. Williams drove away in Mr. Darden's Toyota. Mr. Darden immediately went into his house and his wife called 911.

Mr. Greene and Ms. Whitted (in the minivan) and Mr. Williams (in the Toyota) drove back to the Trinidad neighborhood and reconvened in an alley. During the drive, Mr. Greene told Ms. Whitted that if they get caught, she should "[t]hrow the police off." In the alley, Mr. Greene told Ms. Whitted to drive Mr. Darden's Toyota Matrix to her home in Suitland, Maryland, where Mr. Greene would pick it up the next day. Despite not knowing how to drive, Ms. Whitted agreed. Mr. Williams said he would drive the minivan and that Ms. Whitted could follow him until she knew the rest of the way to her house. Mr. Greene stayed in the Trinidad area.

Meanwhile, officers of the Metropolitan Police Department (MPD) were looking for both Mr. Darden's Toyota and the minivan. At around 2:00 a.m., an MPD officer saw the Toyota Matrix traveling on Good Hope Road in southeast D.C. and activated his lights and sirens. Mr. Williams, who was driving the minivan in front of Ms. Whitted, began speeding away, and Ms. Whitted, driving the Toyota, followed suit. After making multiple turns at high speeds on residential streets, Ms. Whitted eventually lost control and crashed the Toyota. Ms. Whitted tried to flee but was captured by police officers. Mr. Williams stopped the minivan in the middle of the street, got out, and watched as officers arrested Ms. Whitted.

Mr. Williams called Ms. Whitted's mother, Cilenia Whitted (to whom we will refer as Cilenia to avoid confusion),

> and asked her to come to D.C. because, he falsely claimed, Ms. Whitted had gotten into a fight and was being treated roughly by the police. Around 2:15 a.m., Cilenia drove from Suitland, Maryland, and met Mr. Williams near the police presence involving Ms. Whitted. Cilenia approached a police car in which Ms. Whitted was being held and told the officer that the woman in the back was her daughter. Officers, curious how Cilenia could have been aware of the situation, saw Mr. Williams in the back of Cilenia's car and detained him. Mr. Darden, who had been brought to the scene by police officers, identified Mr. Williams as the individual who had taken his car at gunpoint.
>
> At the police station, Ms. Whitted told officers that Mr. Williams and a person named Tracy were involved in the carjacking; and, to "throw off" the police, she added that an individual named "Mike" had also been with them. The investigation eventually led officers to Mr. Greene. Cell-site location information showed that a phone used by Mr. Greene was near in time and location to the crime and other locations where, according to Ms. Whitted, she, Mr. Greene, and Mr. Williams had been together that night. Cell phone records also showed several calls that night between two phones used by Mr. Williams and Mr. Greene.
>
> Approximately two months later, Mr. Greene went to Ms. Whitted's house and told her to stay quiet and "keep everything on the hush."

Greene v. United States, No. 16-CF-0286, Mem. Op. & Judgment ("MOJ"), at 2-4 (Mar. 1, 2023) (reproduced at A. 34-36).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by denying Greene's § 23-110 motion as procedurally barred. While his case was on direct appeal, Greene did not file a § 23-110 motion pursuing his ineffective-assistance-of-counsel claims before the trial court, as required by *Shepard v. United States*, 533 A.2d 1278, 1280 (D.C. 1987). Nor did Greene establish cause and prejudice to excuse his procedural default. Greene was clearly aware of his claims, as he raised the same two substantive issues alleged here in his direct appeal, and his trial counsel's actions were readily apparent in the trial record. Contrary to his claim, Rule 1.7(a) of the D.C. Rules of Professional Conduct does not prevent a lawyer from espousing adverse positions on behalf of the same client, as the commentary to the rule makes clear. Greene also cannot show prejudice because his ineffectiveness claims lack merit.

Even if Greene's ineffectiveness claims were not procedurally barred, the trial court did not abuse its discretion in rejecting those claims on the merits. First, Greene failed to establish his trial counsel was ineffective by eliciting on cross-examination Cilenia Whitted's testimony that Williams told her Greene wanted to "hurt" her daughter,

which led to Cilenia's redirect testimony that Williams told her Greene was a "dangerous young man." Counsel did not act unreasonably and, especially given the trial court's curative instruction and the substantial evidence of guilt, Greene cannot show prejudice.

Second, Greene failed to establish his trial counsel was ineffective by not objecting to Williams appearing before the jury and ultimately refusing to testify. Neither the parties nor the court knew for certain that Williams would refuse to testify in front of the jury, and any inferences from Williams's refusal to testify did not add "critical weight" to the government's case. *Bouknight v. United States*, 641 A.2d 857, 862 (D.C. 1994). Greene's counsel also made a reasonable strategic choice to allow Williams to appear in front of the jury given that it was unclear whether Williams's testimony would assist or hurt Greene's case. In any event, Greene cannot establish that he was prejudiced by Williams's ultimate refusal to testify in front of the jury. The court's curative instruction mitigated any improper inferences against Greene arising from Williams's refusal to testify, and, again, there was strong evidence of his guilt.

ARGUMENT

The Trial Court Correctly Denied Greene's § 23-110 Motion as Procedurally Barred and Meritless.

Greene argues (at 7-10) that the trial court erred in denying his § 23-110 motion as procedurally barred because he established "cause" and "prejudice" for not raising his claims of ineffective assistance of counsel during the pendency of the appeal. Greene also argues (at 10-23) that the trial court erred in denying relief on the merits of his ineffectiveness claims. Greene's arguments are meritless.

A. Additional Background

1. Whitted's Testimony

Cilenia Whitted, Alayshia Whitted's mother, testified at trial primarily about the night of the carjacking (see 7/29/15 Tr. 428-41). On direct examination, she also briefly described a conversation she had with Alayshia on September 30, 2014, about a time when "one of Sean [Williams]'s friends," named "Worm" (i.e., Greene), came "to the house to see" Alayshia (*id.* at 441-42). Cilenia did not elaborate on the conversation, but "[p]robably a couple days afterward" she asked Alayshia's attorney to contact the prosecution about it (*id.* at 444).

During cross-examination, Cilenia testified she did not "know" Greene and had "never met anyone named Worm" (7/29/15 Tr. 445). The defense then questioned Cilenia about her understanding of Williams's relationship with Greene, eliciting unexpected testimony:

> Q. Did you ever talk with Sean about anybody named Worm?
> A. I have.
> Q. And did Sean indicate his relationship with Worm?
> A. Yes.
> Q. And what did he say?
> A. *He told me that the young man wanted to hurt my daughter*. . . .
> Q. And it was [before Sean and Alayshia were arrested for the carjacking] that Sean told you that Worm wanted to hurt Alayshia?
> A. Yes.
> Q. And was it because of jealousy?
> A. To my understanding, Alayshia didn't feel like this young man was a problem to her. Me—my conversations with . . . Sean made me feel like my daughter was in danger. . . .
> Q. Just say why you thought she was in danger.
> A. According to . . . Sean.
> Q. And that was before any of this took place?
> A. Yes.
> Q. And so did you—did Alayshia say she felt she was in danger?
> A. No, ma'am.
> Q. Did you even know if Alayshia knew Mr. Greene?
> A. Alayshia told me she doesn't know him.
> Q. And you never saw him at your house, right?
> A. No.
> Q. And you never saw him at your house on that September date, right?
> A. No, I have never seen this young man before today. (*Id.* at 445-48 (emphasis added).)

On redirect examination, the government attempted to clarify Cilenia's conversation with Williams:

> Q. When did this conversation with Sean Williams about Worm take place?
> A. It was on the phone.
> Q. Where was Sean Williams at the time?
> A. Incarcerated.
> Q. Was it before or after Alayshia was incarcerated?
> A. Before.
> Q. And was it before or after Alayshia told you that Worm had come to your house?
> A. It was after.
> Q. And what is it that Sean Williams told you that made you fearful?[4]
> [A.] Sean told me that Worm had asked him did he want him to get rid of Alayshia. And Sean said that he told the young man no, Alayshia, she good. She all right. Ain't that serious.
> Q. Did Sean tell you why he was giving you this information?
> A. No—yeah, he did. When I asked Sean—like I said, I don't know none of those young men. *He said that the young man was a very dangerous young man.* (7/29/15 Tr. 451–52 (emphasis added).)

After a lunch recess, the defense moved for a mistrial in light of the above testimony that Williams told Cilenia that Greene "was a dangerous man" and asked in the alternative that the testimony be stricken (7/29/15 Tr.

[4] At this point, defense counsel objected, but then immediately withdrew the objection, and the trial court directed the witness to answer the question (7/29/15 Tr. 452).

460, 465).[5] After reviewing the transcript, the court confirmed that Greene's trial counsel had initially elicited the testimony about Cilenia's conversation with Williams, seemingly not expecting what she was eliciting, and then withdrawn the objection to the government's questions on the same topic (*id.* at 462-65). The government explained that its redirect had been aimed at clarifying the testimony elicited during cross-examination, and that Cilenia's statements about Greene's dangerousness were not expected (*id.* at 466-68).[6] The court made clear that "neither [party] would have expected something like this" (*id.* at 467-68). Nevertheless, the government "agree[d] that the statements . . . should be stricken" and supported giving a curative instruction, while opposing the "drastic remedy" of a mistrial (*id.* at 466-67). The court

[5] As grounds for the mistrial, counsel also cited the prospect that Williams would refuse to testify, but the trial court noted that was premature because at that time it was unclear "what's going to happen" with Williams (7/29/15 Tr. 465).

[6] Cilenia had not testified to that effect before the grand jury, and there were no records of the jail call she described (7/29/15 Tr. 452-53, 466-67). The government suggested that the call may have been made through a jail account other than Williams's, which would explain why it was not gathered and produced in discovery (*id.* at 453, 467).

recognized that "some remedy is appropriate," but deferred its ruling (*id.* at 467-68).

The next day, after considering "the statements and the full context of Ms. Cilenia Whitted's testimony and Ms. Alayshia Whitted's testimony and everything else that's gone on in the trial," the trial court denied the defense request for a mistrial (7/30/15 Tr. 586-88). Although the challenged statements could be viewed as inadmissible hearsay, and "even though there's a valid concern on the part of the defense that the statements that [Cilenia] Whitted made were prejudicial to Mr. Greene," a mistrial was not "appropriate" (*id.*). Among other things, Cilenia's "tone" while giving the testimony, and her later "statements . . . discounting what Mr. Williams had told her," "indicat[ed] that her daughter Alayshia did not feel that Mr. Greene was a problem" (*id.* at 587-88). But the court agreed to give a curative instruction (*id.* at 588).

Immediately after its ruling, using language parties had agreed upon, the court instructed the jury as follows:

> One of the witnesses yesterday was Ms. Cilenia Whitted, and during her testimony she gave some answers that referred to statements that she claimed Sean Williams had made to her. And what I'm telling you is that those statements should not have been admitted and are without any basis. So any of those statements that Ms. Whitted testified to about things that Mr.

> Sean Williams had supposedly told her, you're not to consider those statements in any way. (7/30/15 Tr. 590.)

On the next trial day (Monday, August 3), the defense renewed its motion for a mistrial, citing both Cilenia's testimony and Sean Williams's refusal to testify (8/3/15 Tr. 7-8). The court again denied the motion "for the reasons that we went over last week" (*id.* at 8).

2. Williams's Refusal to Testify

On July 21, 2015, right before trial, Williams, who was then Greene's co-defendant, pleaded guilty to one count of carjacking of a senior citizen and one count of PFCV (see 7/20/15 Tr. 7; R. 92-97 (PDF) (Plea Agreement)); R. 99-119 (PDF) (Transcript)). As part of the agreement, Williams waived his Fifth Amendment privilege against self-incrimination (R. 93 (PDF) (Plea Agreement)). In its opening statement, the government indicated to the jury that it would hear testimony from Williams (7/27/15 Tr. 74, 80, 84).

On the third day of trial, immediately before the government planned to call Williams to testify, Williams's counsel informed the court that Williams wished to withdraw his guilty plea (7/29/15 Tr. 420-21). The government agreed to call witnesses out of order so that Williams could discuss the issue further with his counsel (*id.* at 422-23).

At a bench conference that afternoon, Williams's counsel clarified that Williams did not wish to withdraw his guilty plea but would nevertheless refuse to testify (7/29/15 Tr. 468-69). All parties agreed that Williams had waived his Fifth Amendment privilege against self-incrimination, meaning that he could be held in contempt for the refusal (*id.* at 470). The court suggested that Williams be voir-dired outside the presence of the jury, and, after being sworn, Williams answered questions from the court and the government (*id.* at 471-76). The court outlined in detail the potential consequences Williams could face for refusing to testify, including time in jail for contempt and a potentially higher sentence under his plea agreement (*id.* at 480-82). Williams stated that he understood but would not testify (*id.* at 482).

The government argued that under the circumstances, Williams "appear[ed] more like a reluctant witness than a nontestifying witness," since he had "come out, raised his hand, agreed to tell the truth, said his name, was sworn, and answered questions from counsel and because he . . . voluntarily" entered a plea agreement that waived his Fifth Amendment privilege (7/29/15 Tr. 483). Greene's trial counsel initially stated that she would object to calling Williams in front of the jury (*id.* at

515). The court deferred resolving the issue and directed that Williams be brought to court again the following day (*id.* at 482-83, 515).

On July 30, still outside the jury's presence, the court again confirmed that Williams understood the potential consequences for refusing to testify, and Williams stated that he would not answer questions (7/30/15 Tr. 526-30). However, the government then asked, and Williams answered, questions about Alayshia Whitted, Cilenia Whitted, and his relationship with them:

> Q. Mr. Williams, you don't want to answer questions is that correct?
> A. Yes.
> Q. Why do you not want to answer question?
> A. I just don't want to answer no questions.
> Q. You do know who Alayshia Whitted is?
> A. Yes, I do.
> Q. And you two used to be in a romantic relationship, right?
> A. (No response.)
> Q. And you do know that you are in jail right now, right?
> A. Yes, I do.
> Q. And you're facing up to 15 years just on these counts, right?
> A. Yes, I do.
> Q. And that you're facing even more time if you continue to refuse to answer questions?
> A. Yes, I do.
> Q. Now, you know who Cilenia Whitted is, right?
> A. Yes, I know who she is.
> Q. You used to stay at her house sometimes, right?
> A. I stayed there multiple times.
> Q. And she lives out in Maryland? . . .
> A. Yeah, she stay in Maryland.

Q. She was pretty nice to you, right?
A. I ain't never used to see her like that.
Q. And Alayshia – (*Id.* at 532-33.)

At that point, Greene's trial counsel objected that the government was "now eliciting testimony" and that "if we are going to elicit testimony, we should have the jury here" (7/30/15 Tr. 533). Greene's counsel argued that the court should "order [Williams] again . . . to answer questions in front of the jury and see if he says yes or no" (*id.* at 534). Greene's counsel further stated that "if [Williams] refuses to testify, I don't know where we go. I really don't know." (*Id.* at 535.) Counsel also noted that if Williams testified, "I would ask him about [things] that I think would be beneficial to my client," and that "[t]here are also things that I think if he doesn't testify that that is fine too" (*id.*). Counsel added that she believed the caselaw required Williams to refuse to testify in front of the jury (*id.*). The government reiterated that, despite Williams's stated intention not to testify, he was nevertheless giving testimony and should therefore be called before the jury (*id.* at 536-37).

The court confirmed with Williams that he understood he was being ordered to testify, and that he was refusing to do so (7/30/15 Tr. 539-40). After a brief recess, the court asked the parties if there was "[a]nything

else" they wished to say on the issue (*id.* at 540). Greene's counsel responded that there was "[n]othing" further (*id.*).

The court ruled that, despite the risk that Williams would refuse to testify, it would allow the government to call him in front of the jury (7/30/15 Tr. 541-42). The court observed that while Williams had "obviously expressed a reluctance to testify," he was not asserting any privilege and had in fact "answer[ed] some questions that were posed to him by [the government] a little while ago when [the court] told him that he should answer" (*id.* at 540-41).

The government then called Williams to the stand in the jury's presence (7/30/15 Tr. 542). When Williams stepped forward to be sworn, he acknowledged that he understood the oath, but he said multiple times, "I don't want to talk" (*id.* at 542-43). He then refused to respond to any of the government's five questions (*id.* at 543-44). The court quickly dismissed the jury (*id.* at 544-45). Outside the presence of the jury, Williams again confirmed his refusal to answer questions, and the court held him in contempt (*id.* at 545-46). He was not called before the jury again. Later that day, the court proposed, and the parties agreed to, a

standard jury instruction against drawing an adverse inference from a witness's refusal to testify (see *id.* at 579-80, 597).

On the next court day, August 3, the court once again confirmed with Williams outside the jury's presence that he refused to testify (8/3/15 Tr. 6). The government also attempted to voir-dire Williams, who now refused to answer or even to make eye contact with the prosecutor (*id.* at 6-7). The government made no further requests to question Williams or call him to testify.

With the parties' agreement (7/30/15 Tr. 579-80, 597), the court instructed the jury as follows:

> In this case, Sean Williams refused to answer questions after being instructed by the Court to do so. You must not guess what Mr. Williams would have said if he had not refused to answer any questions and you must not hold it against the defendant that Mr. Williams took the stand and refused to answer any questions. (8/3/15 Tr. 45.)

3. The Direct Appeal

On direct appeal, Greene raised several issues, including whether the trial court erred in allowing the government to call Williams as a witness when, Greene claimed, the government knew that Williams would refuse to testify, and whether the trial court erred in denying a mistrial based on both Williams's refusal to testify and the admission of

Cilenia Whitted's prejudicial testimony. *See* MOJ at 1-2 (A. 33-34).[7] He did not raise any claim of attorney ineffectiveness.

On March 1, 2023, this Court affirmed Greene's convictions. MOJ (A. 33). As relevant here, the Court ruled that Greene's claim related to Williams's refusal to testify was waived because Greene's trial counsel cooperated in and did not object to the trial court's decision to put Williams in front of the jury. *Id.* at 4-8 (A. 36-40). The Court also held that the trial court did not abuse its discretion in denying a mistrial related to Cilenia Whitted's testimony. *Id.* at 8-11 (A. 40-43). The Court questioned the trial court's assumption that Cilenia's statements about what Williams told her were hearsay rather than having been offered simply to show their effect on Cilenia. *Id.* at 10-11 (A. 42-43). In any event, the Court noted, the evidence against Greene, including Alayshia's testimony and cell-site location data, was "substantial"; Cilenia's statement "was brief, isolated, and counterbalanced to some extent by other evidence"; and the trial court's curative instruction was "succinct

[7] Greene was represented at trial by Betty Ballester, Esq., and on appeal first by Robert Cappell, Esq., and then, when Cappell died, by Deborah Persico, Esq.

and unambiguous," and juries are presumed to follow their instructions. *Id.* at 11 (internal quotations and citations omitted) (A. 43). In rejecting Greene's claim that Williams's refusal to testify in front of the jury also necessitated a mistrial, the Court reiterated that Greene had waived his objection and added that the trial court gave a "clear and thorough curative instruction with respect to Mr. Williams's refusal, thereby mitigating any harm." *Id.*

4. The § 23-110 Motion

In his § 23-110 motion, which was filed on March 13, 2023, Greene argued that his trial counsel failed to provide him effective representation by not objecting to Cilenia Whitted's prejudicial testimony painting Greene as a dangerous young man and by not objecting to Williams's appearance before the jury and refusal to testify (A. 12). On October 13, 2023, the government filed its opposition to the motion, arguing that Greene procedurally defaulted those claims and that regardless, those claims did not warrant relief (R. 303 (PDF) (Opposition)). On December 13, 2023, Greene filed his reply (R. 332 (PDF) (Reply)).

In denying the § 23-110 motion, Judge McCabe ruled that the claims were procedurally barred because Greene did not file a § 23-110 motion while the direct appeal was pending, as required by *Shepard v. United States*, 533 A.2d 1278, 1280 (D.C. 1987) (A. 6). In rejecting Greene's assertion of cause, he reasoned that Greene "was aware of the grounds for alleging counsel's ineffectiveness," as he raised the same two issues on direct appeal (A. 5).

In the alternative, Judge McCabe addressed the merits of Greene's claims and ruled that neither ineffective-assistance-of-counsel claim warranted relief (A. 7-10). The court rejected Greene's claim regarding Cilenia Whitted's testimony, finding no prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), because her statement was "brief" and "isolated," the trial court's instruction to disregard the statements cured any harm, and the evidence against Greene was substantial (A. 9). The court also rejected Greene's claim regarding Williams's refusal to testify: although "trial counsel mistakenly concluded that [Williams] must indicate in front of a jury any refusal to testify," which was not the law, "it was not clear to the parties or to [the court] that he would refuse to answer any questions since he had answered some substantive

questions outside the presence of the jury" (A. 7). Moreover, the court reasoned that "trial counsel may also have had strategic reasons for not objecting" to Williams's testimony (A. 8). Regardless, Greene failed to show prejudice under *Strickland* because the trial court provided a clear and thorough curative instruction and the evidence of Greene's guilt was "overwhelming" (A. 8).

B. Standard of Review and Applicable Legal Principles

"Section 23-110 is not designed to be a substitute for direct review." *Head v. United States*, 489 A.2d 450, 451 (D.C. 1985). Generally, "an appellant should collaterally attack his conviction on the basis of ineffective assistance of counsel during the pendency of his direct appeal." *Brown v. United States*, 181 A.3d 164, 166 (D.C. 2018). "[I]f an appellant does not raise a claim of ineffective assistance of counsel during the pendency of the direct appeal, when at that time appellant demonstrably knew or should have known of the grounds for alleging counsel's ineffectiveness, that procedural default will be a barrier to th[e] [C]ourt's consideration of appellant's claim." *Shepard*, 533 A.2d at 1280. "Where a defendant has failed to raise an available challenge to his

conviction on direct appeal, he may not raise that issue on collateral attack unless he shows both cause for his failure to do so and prejudice as a result of his failure." *Head*, 489 A.2d at 451 (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)).

To establish "cause" sufficient to overcome procedural default, the defendant must show that he "was prevented by exceptional circumstances from raising the claim at the appropriate time." *Washington v. United States*, 834 A.2d 899, 903 (D.C. 2003) (cleaned up). That is, the defendant must prove that some "objective factor external to the defense impeded [defendant's] efforts" to raise the claim earlier. *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Three types of objective factors have been identified as constituting sufficient "cause": (1) interference by government officials; (2) constitutionally ineffective assistance; and (3) "a showing that the factual or legal basis for a claim was not reasonably available." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). If the basis for cause is ineffectiveness, the ineffectiveness must have prevented bringing the claim, i.e., been external to the trial defense. *See Murray*, 477 U.S. at 488.

To establish prejudice, the defendant must show prejudice that "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Washington*, 834 A.2d at 903 (quoting *Frady*, 456 U.S. at 170 (emphasis in original)). A defendant must establish "a reasonable probability that, but for [the alleged errors,] the result of the proceeding would have been different. *United States v. Pettigrew*, 346 F.3d 1139, 1144 (D.C. Cir. 2003) (quoting *Strickland*, 466 U.S. at 694).

If not procedurally barred, denial of a § 23-110 motion is reviewed for abuse of discretion. *Wright v. United States*, 979 A.2d 26, 29-30 (D.C. 2009); *Rivera v. United States*, 941 A.2d 434, 441 (D.C. 2008). In conducting that review, this Court assesses the trial court's findings of fact for clear error and determinations on questions of law de novo. *Jenkins v. United States*, 870 A.2d 27, 33-34 (D.C. 2005).

In order to prevail on an ineffective-assistance-of-counsel claim, an appellant must show that "his trial attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the error affected the outcome of the trial to his

prejudice." *Simpson v. United States*, 576 A.2d 1336, 1337 (D.C. 1990); *see Strickland*, 466 U.S. at 687-88.

C. The Trial Court Did Not Abuse Its Discretion By Denying Greene's Ineffective-Assistance-of-Counsel Claims as Procedurally Barred Because He Did Not Raise Them on Direct Appeal.

The trial court correctly denied Greene's § 23-110 ineffective-assistance-of-counsel motion as procedurally barred. Greene failed to raise his counsel's purported ineffective assistance during the pendency of his direct appeal, and thus defaulted his ineffectiveness claim. *See Shepard*, 533 A.2d at 1280. Nor did Greene establish cause and prejudice to excuse his procedural default. As the court explained (A. 5), and as Greene concedes (at 8), Greene raised the same two substantive issues alleged here in his direct appeal: (1) eliciting and not objecting to Cilenia Whitted's prejudicial testimony, and (2) allowing Williams to appear in front of the jury and ultimately to refuse to testify. He therefore cannot claim (at 8) that "the factual or legal basis for [his] claim was not reasonably available to counsel," *Washington*, 834 A.2d at 903 n. 8.

Greene's only argument on cause (at 9-10) is that, if he had claimed in a § 23-110 motion that trial counsel was ineffective for not objecting to

Williams's testimony at the same time he was arguing on appeal that counsel had preserved rather than waived that objection, he would have had to stake out "adverse positions," in violation of Rule 1.7(a) of the D.C. Rules of Professional Conduct. This argument misconstrues Rule 1.7(a). That rule is designed to provide notice of what constitutes a prohibited conflict of interest by attorneys. *See* Rule 1.7, Comment to 2007 Revision, at [1]. The "adverse positions" that are prohibited in Rule 1.7(a) refer to "situations in which a lawyer would be called upon to espouse adverse positions for *different clients* in the same matter." *Id.* at [4] (emphasis added). Moreover, the commentary expressly states that, "for purposes of Rule 1.7(a), an 'adverse' position does not include inconsistent or alternative positions advanced by counsel on behalf of a single client." *Id.* at [3]. Thus, even assuming that a § 23-110 motion would require counsel to make an argument inconsistent with what Greene sought to argue on appeal, Rule 1.7(a) imposed no barrier.[8] Greene's cause argument must be rejected.

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[8] Contrary to Greene's suggestion (at 9), both appellants and the government routinely raise alternative positions on appeal, such as that trial counsel did not waive a particular issue, but even if counsel did, the court plainly erred in ruling a certain way. *See, e.g.*, *Bell v. United States*,
(continued . . .)

Because Greene fails to show cause, the Court need not reach the question of prejudice, as both showings are required to overcome Greene's procedural default. *See Head*, 489 A.2d at 451. Yet Greene also fails to establish prejudice because, as will be discussed in the next two sections, neither of the purported instances of attorney ineffectiveness has any merit. The trial court's finding of procedural bar should be affirmed.

D. The Trial Court Did Not Abuse Its Discretion in Rejecting the Merits of Greene's Ineffectiveness Claims.

This Court need not reach the merits of Greene's claims of ineffectiveness of trial counsel. It may affirm the denial of the § 23-110 motion based on procedural bar alone. In any event, the trial court correctly ruled that Greene had failed to sustain his ineffectiveness claims.

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677 A.2d 1044, 1046, 1048 (D.C. 1996) (addressing appellate claims regarding trial court's admission of evidence and ineffectiveness claims based on counsel's failure to object to admission).

1. Cilenia Whitted's Testimony About Williams's Statements Concerning Greene

Greene faults his trial counsel (at 11) both for eliciting Williams's statement to Cilenia Whitted that Greene wanted to hurt Alayshia Whitted, and for not objecting to testimony on redirect that Williams told her that Greene was a "very dangerous young man." Greene fails to show either deficiency or prejudice.

First, although the trial court did not address deficiency, Greene's counsel's conduct here did not "f[a]ll below an objective standard of reasonableness." *Simpson*, 576 A.2d at 1337. Starting with the cross-examination, trial counsel did not intentionally "elicit" the testimony that Greene wanted to hurt Alayshia Whitted, as Greene now claims (at 13-14). The trial court found that this testimony was unexpected by all parties (7/29/15 Tr. 467-68), and Greene has not asserted, much less shown, clear error in the court's finding. "[A]n attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Moreover, as this Court noted in the direct appeal, it is far from clear that Cilenia's testimony about

Williams's statements was inadmissible hearsay, rather than admissible to show the statements' effect on Cilenia. MOJ at 10-11 (A. 42-43). A claim of ineffective assistance based on proposed objections that are not legally meritorious cannot succeed. *See Bell*, 677 A.2d at 1048-49. Finally, trial counsel immediately tried to diffuse the testimony about Greene wanting to hurt Alayshia by eliciting that her conversation with Williams occurred before the charged carjacking, that Alayshia never told Cilenia she felt in danger, that Alayshia claimed not to know Greene, and that Cilenia had never seen Greene before trial (7/29/15 Tr. 445-48). Greene cannot show that counsel's strategic choice in responding to unexpected testimony amounted to deficient performance. *Harrington*, 562 U.S. at 109 (reviewing court should not second-guess trial counsel's strategic choices); *Jenkins v. United States*, 870 A.2d 27, 38 (D.C. 2005) (same).

Greene also fails to show any deficiency with respect to how counsel handled the redirect testimony about Greene being "a very dangerous young man." Counsel promptly moved for a mistrial based on that testimony or, in the alternative, for the testimony to be stricken (7/29/15

Tr. 460, 465).[9] The court granted counsel's alternative relief to strike the testimony and issued a curative instruction to the jury.

Moreover, as the trial court found, Greene cannot establish any prejudice from Cilenia's testimony. Cilenia's limited testimony about Williams's statements was a "brief" and "isolated" part, MOJ at 11 (A. 43), of a 13-witness trial that spanned five trial days over two weeks. The court, which heard the testimony firsthand, found that the "tone" and "full context" of Cilenia's testimony lessened any prejudicial effect (7/30/15 Tr. 587-88). Neither party mentioned Williams's statements in closing arguments. Indeed, the court struck the testimony and gave a curative instruction telling the jury not to consider them, which this Court described as "succinct and unambiguous." MOJ at 11 (A. 43). "Juries are presumed to follow their instructions." *Parker v. United States*, 249 A.3d 388, 410 (D.C. 2021); *see also Atkinson v. United States*, 121 A.3d 780, 789 (D.C. 2015) (curative instruction "sufficiently

[9] Although counsel waited until after the lunch recess to make that motion, Greene does not argue that the delay reflected deficiency, nor could he establish prejudice from that delay. *See, e.g.*, *Williams v. United States*, 966 A.2d 844, 850 (D.C. 2009) (curative instruction that came "after another defense witness had testified and an overnight recess" was not "too late").

neutralized [any] prejudice inflicted upon appellant from the errant evidence"); *McRoy v. United States*, 106 A.3d 1051, 1061 (D.C. 2015) ("[T]he court issued a clear curative instruction, which we presume the jury followed, absent evidence to the contrary.").

Finally, as this Court found, the evidence of Greene's guilt was "substantial." MOJ at 11 (A. 43); see also A. 8 (trial court finding that evidence was "overwhelming"). Alayshia's testimony implicating Greene was corroborated in relevant parts by Darden's recollection of hearing a male voice inside the minivan saying, "check his pockets" (7/27/15 Tr. 94, 98-99, 100), and cell-site location data from Greene's phone placing him near the carjacking and other relevant locations (7/28/15 Tr. 300-02).[10] Greene cannot show that absent his counsel's purported ineffectiveness, the result of the trial would have been different. *Pettigrew*, 346 F.3d at 1144.

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[10] Greene suggests (at 23-24) that the court erred in relying on "physical evidence" in the case when there was none that tied Greene to the carjacking. But the court correctly found that "other physical evidence in the case"—such as screwdrivers used in stealing the minivan found near the abandoned Toyota Matrix, Williams's white tank top found in Cilenia's car, and Alayshia's phone found on Williams's person—corroborated Alayshia's testimony regarding the events of that night (A. 8), making her testimony more reliable.

2. Allowing Williams to Refuse to Testify in Front of the Jury

Greene fails to establish that his trial counsel was ineffective by not objecting to Williams appearing before the jury and ultimately refusing to testify. To start, counsel's performance was not deficient because Williams's appearance on the stand was not error. "In determining whether a witness' refusal to testify in front of a jury constitutes error requiring reversal, this Court considers (1) whether there was prosecutorial impropriety and (2) whether, 'in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.'" *Bouknight v. United States*, 641 A.2d 857, 862 (D.C. 1994) (quoting *Burkley v. United States*, 373 A.2d 878, 880 (D.C. 1977)). Both factors weigh against Greene's claim that his trial counsel should have objected.

First, the government's decision to call Williams was not improper. As the court explained in denying the § 23-110 motion (A. 7), neither the parties nor the court knew that Williams would refuse to testify in front of the jury. The court's factual finding is entitled to deference, *Jenkins*, 870 A.2d at 33-34, and regardless was not clearly erroneous but instead

was supported by all parties' understanding at the time. Williams was not asserting his Fifth Amendment privilege against self-incrimination, which he had waived in his plea agreement (7/29/15 Tr. 483; see also 7/30/15 Tr. 536-37), but instead was simply saying he did not want to testify. Nevertheless, when the court and the government questioned Williams multiple times outside the jury's presence, he answered some of the voir-dire questions, including substantive questions about Alayshia and Cilenia (7/29/15 Tr. 471-76; 7/30/15 Tr. 532-33). The fact that Williams ultimately refused to testify before the jury does not change the fact that none of the parties could know with certainty that would happen. *See Burkley*, 373 A.2d at 879-81 (where witness "vacillated several times over whether he would answer questions if called to the stand," the Court found that the prosecutor could not "kn[o]w with any certainty" that he would refuse to testify).[11]

[11] Greene's reliance (at 17) on *Martin v. United States*, 756 A.2d 901 (D.C. 2000), and specifically on Greene's trial counsel's error in reading the case law, does not alter this conclusion. Unlike in *Martin*, where the witness "ha[d] declared unequivocally that he will not testify," Williams was not put in front of the jury "for the sole purpose," or even the primary purpose, "of observing his refusal to testify," *id.* at 904-05, but rather for the purpose of hearing his testimony, which the parties expected could be substantive.

Second, any inferences from Williams's refusal to testify did not add "critical weight" to the government's case against Greene. *Bouknight*, 641 A.2d at 862. By the time Williams appeared before the jury, the jury had heard ample evidence implicating Greene, including Alayshia's full testimony (7/27/15 Tr. 111-68; 7/28/15 Tr. 181-266); Darden's testimony that he heard a male say, "check his pockets," and saw two figures inside the car after Williams exited (7/27/15 Tr. 94, 98-99, 100); cell-phone records showing Greene communicated with Williams at relevant times and in relevant locations (7/28/15 Tr. 283-301); and jail calls by Greene suggesting that friends lied in the grand jury for him (7/29/15 Tr. 508-13). Accordingly, Williams's refusal to testify was not "the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant." *Namet v. United States*, 373 U.S. 179, 189 (1963).

Contrary to Greene's argument (at 18), it is not at all clear that the jury would have inferred from Williams's refusal to testify was that "he was scared to testify because of possible retaliation by [Greene]." The jury had already heard that Williams was the main perpetrator of the vehicle theft and armed carjacking, but it was unaware that Williams had

waived his Fifth Amendment privilege against self-incrimination. Most likely, the jury inferred that Williams declined to testify to avoid further incriminating himself, an inference that would not have prejudiced Greene at all.

Greene's counsel also made a reasonable strategic choice to allow Williams to appear in front of the jury given that it was unclear whether Williams's testimony would assist or hurt Greene's case. Notwithstanding Greene's argument (at 19) that "[t]he overriding defense goal should have been to keep Williams off the witness stand," Greene's trial counsel acknowledged to the court that Williams's testimony could be beneficial to her client and expressed concern about not at least trying to elicit testimony from him in front of the jury (7/30/15 Tr. 535).[12] Trial counsel's strategic decision not to object to putting Williams in front of the jury hardly rises to the level of objective unreasonableness.[13]

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[12] This belief was consistent with Greene's own position—taken in a previous collateral attack motion—that Williams would have exculpated Greene (R. 39 (PDF) (IPA Motion)).

[13] Greene's passing argument (at 20) that the trial court erred in not granting an evidentiary hearing to probe these "strategic reasons" also (continued . . .)

In any event, Greene also cannot establish that he was prejudiced by Williams's ultimate refusal to testify in front of the jury. Although the government, Greene's trial counsel, Williams's counsel, and the court spent considerable time and attention discussing this issue and questioning Williams outside the presence of the jury, the time Williams spent in front of the jury was minimal in the context of a long trial (see 7/30/15 Tr. 542-45). *See Namet*, 373 U.S. at 189 (finding no prejudice where prosecutor asked four questions that witnesses refused to answer, which was minimal in context of entire trial). Greene asserts (at 16) that his counsel failed to "benefit[] from the windfall of having a previewed prosecution witness fail to appear before the jury," but Greene ignores both that his counsel could not have blocked Williams from testifying if he was likely to give substantive testimony, and that his counsel

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fails. In addition to finding the claims procedurally defaulted, the trial court could rely on both this Court's conclusions about the lack of prejudice and its own recollection of the ambiguity about whether Williams would testify in denying the § 23-110 motion without a hearing. *See Parker*, 249 A.3d at 411 ("a hearing is not required when 'the motion and files and records of the case conclusively show that the prisoner is entitled to no relief'" (quoting D.C. Code § 23-110(c))); *see also Wright*, 979 A.2d at 30 ("a hearing . . . is not required if the 'existing record provides an adequate basis for disposing of the motion'" (quoting *Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993))).

anticipated some benefit from him testifying. Regardless, Greene's mere speculation about how juries view an announced witness's non-appearance fails to satisfy his burden to show that, but for Williams's appearance on the stand, the result of the trial would have been different. Moreover, as this Court found, the trial court gave a "clear and thorough" curative instruction, which "mitigat[ed] any harm." MOJ at 11 (A. 43); *see Burkley*, 373 A.2d at 881 ("[A] cautionary admonition by a trial judge to the jury can cure error which might otherwise be prejudicial to a defendant.").[14] Although Greene speculates (at 22) that this instruction failed to cure any prejudice from Williams's refusal to testify, this Court "presume[s], unless the contrary appears, that the jury understood and followed the [trial] court's instructions," and "[h]ere, there was nothing to suggest that the jury did not comprehend and respect the admonitions of the trial court." *Burkley*, 373 A.2d at 881; *see also Zafiro v. United States*, 506 U.S. 534, 540 (1993).

[14] Although not a holding (see Br. at 21), this Court's assessment of the curative instruction reflects this Court's view of the efficacy of the instruction. Greene offers no reason why a new division should take a different view.

Finally, Greene cannot show he was prejudiced by Williams's refusal to testify in front of the jury because, as discussed, there was substantial evidence of his guilt.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Timothy Cone, Esq., on this 18th day of October, 2024.

/s/
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