NOT YET SCHEDULED FOR ORAL ARGUMENT

23-CM-433

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

DEVON GREENFIELD,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The Superior Court
Of The District Of Columbia

OPENING BRIEF FOR APPELLANT DEVON GREENFIELD

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DISCLOSURE STATEMENT

Appellee in this Court is the United States. Counsel who appeared for the United States before the Superior Court were Assistant U.S. Attorneys Molly Smith, Thomas Derbish, Taylor Payne, Elizabeth Ginsburg, Courtney Silva, Giovanni Sanchez, and George Brown.

Defendant in the Superior Court and Appellant in this Court is Devon Greenfield. Counsel who appeared for Mr. Greenfield before the Superior Court was Kevin Robertson. Appellate counsel now appearing before this Court is Richard P. Goldberg of Goldberg & Goldberg, PLLC.

RULE 28(A)(5) STATEMENT

This appeal is from a final order or judgment that disposes of all of the parties' claims at issue.

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ISSUES PRESENTED

1. At trial, the only evidence of the defendant's intent was that a highly trained police officer could identify PCP. Where the government has failed to prove that the defendant could also identify PCP, and therefore failed to prove intent, can a conviction for attempted possession of a controlled substance stand?

2. Where a small container inside the defendant's bag was searched without a warrant, without probable cause or even reasonable suspicion, before his arrest, and then he arrested only due to what was found during that search, will the search be upheld under the Fourth Amendment?

3. Where the trial court abuses its discretion in permitting the government to admit an exhibit in rebuttal, and without that exhibit, the evidence would have been insufficient to convict, may the conviction stand?

STATEMENT OF THE CASE

Devon Greenfield was charged by superseding criminal information with Possession of an Open Container of Alcohol ("POCA"), in violation of D.C. Code § 25-1001(a)(1) (2001) and D.C. Code § 25-1001(d) (2001); and Attempted Unlawful Possession of a Controlled Substance, in violation of D.C. Code § 48-904.01(d) (2001) and D.C. Code § 48-904.09 (2001). A.3.[1] The charges stemmed from an incident on December 1, 2022, during which police stopped and searched Mr. Greenfield, finding small bottles alleged (but apparently never tested) to contain PCP. *See* A.3.

At the conclusion of a two-day bench trial, Mr. Greenfield was found guilty on both counts. A.39. He was sentenced to time served on the POCA count, A.62, and to 180 days the count for Attempted Possession, A.63, to run concurrently, and a VVC fine of $50 for each count, A.63; A.64. Having filed a timely notice of appeal, A.6, Mr. Greenfield now appeals his convictions.

STATEMENT OF FACTS

Before trial, the defense filed a motion to suppress evidence. The government filed an opposition. But the hearing was not held before trial. Instead, the trial court, over the objections of defense counsel, held the suppression hearing as part of the bench trial. *See* Tr. 04/19/2023 at 5-6 (defense counsel objecting); *id*. at 28, 29, 30 (further objections). Furthermore, defense counsel stated, *and the trial court agreed*, that because the hearing and trial would be held concurrently,

[1] Citations to the appendix are in the form, "A.[page number]"; citations to the two-day hearing and trial transcripts are in the form "Tr. [date] at [page number]."

the defense's objections to introduction of material found during the search of Mr. Greenfield and its motion to suppress that evidence were continuing.[2] Tr. 04/19/2023 at 32; A.26.

The government called two witnesses: MPD Senior Officer Scott Brown, who testified as an expert; and MPD Officer Carter Moore, who testified as a fact witness. (The combination of the suppression hearing and the actual trial caused a great deal of confusion, and the expert testimony was referred to throughout the hearing-trial proceedings.) The defense did not call any witnesses.[3]

A. Officer Brown testified as an expert in identifying the odor of PCP.

As its first witness, the government called Senior MPD Officer Scott Brown as an expert witness. Tr. 04/19/2023 at 39. However, first there was argument regarding whether an expert should be called at all.

According to the government—during argument over whether an expert should be admitted, in which argument the government ultimately prevailed—the expert was necessary, in part, to testify about "the characteristics of PCP, including its odor." Tr. 04/19/2023 at 19. The defense objected that an expert witness is

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[2] The court suggested that defense counsel would be "reserving" his objections to admissibility, and counsel's position on the motion to suppress, because he feared that he might "forget to re-raise them." The court, therefore, stated that it would "understand them to be continuing." Tr. 04/19/2023 at 32.

[3] The defense also did introduce any exhibits as part of the trial; it did, however, seek to introduce exhibits as part of the suppression hearing. *See, e.g.*, Tr. 04/19/2023 at 129 (admitting Exhibit D1 "for the limited purpose of the suppression motion."); *id.* at 151 (striking D1 and D2 due to confusion of exhibits). As a result, the defense eventually used Government's Exhibit 1. Tr. 04/19/2023 at 151-53.

supposed to provide information in "a unique area that is so unknown to the public that an expert is needed to help provide information linked to that specific issue, that only the expert would have that specialty." Tr. 04/19/2023 at 19-20. Agreeing with that standard, the government explained that its expert would provide "specialized knowledge. It requires years of training and experience to acquire that knowledge." Tr. 04/19/2023 at 20 (AUSA Sanchez). The government prevailed, and the court denied the defense objection to introduction of expert testimony, finding that Officer Brown would be called "as an expert in the area[] of identifying the controlled substance [PCP]." Tr. 04/19/2023 at 21.

Officer Brown testified that he had been an officer with MPD for 32 years, with 20 of those years as part of the Violent Crime Suppression Division, detailed to the Safe Streets Task Force with the FBI. Tr. 04/19/2023 at 39. He explained that he had also been a detective with the Narcotics and Special Investigative Division before he retired—and then returned two weeks later as part of the Senior Police Officer program. Tr. 04/19/2023 at 39-40.

Officer Brown explained that his expertise was drawn from thousands of narcotics cases, including many with PCP. Tr. 04/19/2023 at 41. He had also taken training with the DEA, including PCP remediation training. Tr. 04/19/2023 at 44. Ultimately, the government tendered Officer Brown as an expert witness, explicitly (among other areas) in the "specific characteristics" and "identification" of PCP, including its odor. Tr. 04/19/2023 at 48-49. All of this was over the repeated objections of defense counsel. *See, e.g.*, Tr. 04/19/2023 at 49.

Officer Brown further testified that he had no first-hand knowledge about the facts in the case, and he was not "at the scene" in the case. Tr. 04/19/2023 at 49. Generally, though, he testified that PCP is packaged in glass vials, "perfume bottles," and that it is always in liquid form in D.C. Tr. 04/19/2023 at 50. Further drawing on his expertise, he testified that PCP may come in varying colors: It is "usually a light yellowish color . . . all the way to a kind of amber color, but . . . it fluctuates in between, like I said, a light yellowish color to like an orange amber color." Tr. 04/19/2023 at 50. He explained that PCP may also be transferred to cigarettes, "dipper[s]," or "little tin packets." Tr. 04/19/2023 at 50-51.

Officer Brown was asked to give his expert opinion about the "specific odor of PCP." He testified that "[i]t's a a chemical kind of distinct odor . . . a strong, pungent odor." Tr. 04/19/2023 at 51. "PCP . . . has a, you know, a unique odor to it" that is "a different odor" than that of marijuana. Tr. 04/19/2023 at 53. Turning to the the evidence collected in the case, Officer Brown testified that the vials had "a yellowish liquid inside of them which I've commonly seen as being a vessel used to resell PCP," which he confirmed was "similar to the packaging [he was] describing earlier" in his testimony. Tr. 04/19/2023 at 54.

B. Officer Carter Moore testified about how his extensive training and experience allowed him to identify PCP, and about the seizure and search of Mr. Greenfield and his bag.

The government's sole fact witness was Officer Carter Moore, who had been an MPD officer for about four years. Tr. 04/19/2023 at 80. He testified that he was assigned to the Sixth District Crime Suppression Team, which specialized in volent crime, firearms, and illegal narcotics. Tr. 04/19/2023 at 80. Officer

Moore (like Officer Brown) had specific training in PCP, which included "the way [PCP] is commonly packaged" as well as its "distinct odor." Tr. 04/19/2023 at 82. Officer Moore also testified that he had been involved with over 200 narcotics cases, including 50 to 60 PCP cases. Tr. 04/19/2023 at 83. He also explained that he was "very familiar" with recognizing the smell of PCP, based on his experience with drugs in the Sixth District. Tr. 04/19/2023 at 93-94. He further explained that PCP has a "very chemical[] smell," something he was trained to recognize at the police academy. Tr. 04/19/2023 at 95.

Through Officer Moore, the government admitted Government's Exhibit 1, a portion of the officer's body-camera footage from the incident in question, which was played in open court.[4] Tr. 04/19/2023 at 88-89. He then testified that he exited his patrol car because he (or another officer) saw a group of individuals standing in the park, and he intended to "make contact with the individuals in the park since it was after hours," by which he meant the sun was down, "and it had been an area complaint [*sic*] for PCP use and sale." Tr. 04/19/2023 at 90. As he approached the individuals, Officer Moore testified, one of the three "separated and began to walk away." Tr. 04/19/2023 at 91. As he approached the remaining two individuals, he "could smell the odor of PCP in the air." Tr. 04/19/2023 at 94.

Officer Moore testified that he observed Mr. Greenfield walking away "in a hastily [*sic*] manner." Tr. 04/19/2023 at 96. Defense counsel objected, and the court clarified that "hastily" simply meant that Mr. Greenfield's speed had

[4] Appellant has filed an unopposed motion to supplement the record with Government's Exhibit 1.

increased: "Either he thinks he's moving faster or he thinks he doesn't. *Hastily isn't about a state of mind*. It's about his actual physical movements, so I'm going to overrule," later adding "he is either moving faster or he's not." Tr. 04/19/2023 at 97 (striking the portion of the officer's answer that Mr. Greenfield was attempting "to get away from the uniformed law enforcement") (emphasis added). Eventually, Officer Moore testified, Mr. Greenfield was about 40 feet from the officers. Tr. 04/19/2023 at 98-99. The officer testified that he could recognize that the odor of PCP grew stronger as he approached Mr. Greenfield. Tr. 04/19/2023 at 99. His description was, literally, *cartoonish*: It was "[t]he same sense as—if you're smelling something being cooked like the cartoons where something's floating to a pie, it's the same thing." Tr. 04/19/2023 at 99. He also agreed that "[t]he smell of PCP, much like cigarette smoke, can be on someone if they're around other people smoking PCP." Tr. 04/19/2023 at 211.

When the officers reached Mr. Greenfield, they instructed him to stop and informed him that he was being stopped by police. Tr. 04/19/2023 at 100. Officer Moore testified that he asked Mr. Greenfield whether he had any firearms in his bag, not because he had any reason to believe Mr. Greenfield was armed, but because "I try to make it a practice to ask everybody I come into contact with . . . . It's a chance for them to let law enforcement know that they are in possession of a firearm." Tr. 04/19/2023 at 100. Officer Moore further testified that Mr. Greenfield said that he had a beer in his bag; the officer then continued the questioning, asking Mr. Greenfield to show him what was inside the bag, "just so I could ensure that there was [*sic*] no weapons in play." Tr. 04/19/2023 at 101.

Officer Moore then explained that in response to his further questioning, Mr. Greenfield removed from the bag a bottle of whiskey in an "open container." Tr. 04/19/2023 at 101.

Officer Moore testified that he waited until additional officers arrived, and he noted that he began smelling a strong odor of PCP "from the boo[k] bag." And, he testified, "I instructed officers to go ahead and place him in handcuffs at which point he was placed under arrest for the possession of an open container of alcohol. And I searched his bag, searched it incident to arrest and located the PCP vials in the bookbag." Tr. 04/19/2023 at 103. Asked about whether his detection of PCP had changed since he initially arrived on the scene, Officer Moore testified that "[i]t was just a constant strong smell of PCP," though "greater" than the odor before. Tr. 04/19/2023 at 104.

Officer Moore even testified (under oath) that he could detect that the smell was coming from a specific portion of the backpack: "either the front flap or the little tiny zipper on the side." Tr. 04/19/2023 at 104. When he searched the bag, he discovered a headphones case that, inside, contained three vials of what he recognized to be PCP, based on his training and experience. Tr. 04/19/2023 at 104. The smell of the headphone case "was about the same as the—when I was standing there with the bookbag." Tr. 04/19/2023 at 104. Officer Moore then testified that he advised the other officers that Mr. Greenfield would be arrested for possession with intent to distribute PCP.

What followed was testimony in which the government repeatedly asked questions about the packaging of the vials, upon which was attached a "DEA-7"

form, as well as the PD-81 (property record), as Government's Exhibit 4. Tr. 04/19/2023 at 109-18. Defense counsel objected, as hearsay, but the trial court overruled the objection. Tr. 04/19/2023 at 112-13, 115.

Turning back to the incident, Officer Moore testified that Mr. Greenfield *seemed* nervous when officers approached, though he admitted that because he did not know Mr. Greenfield otherwise, could not know anything about his normal behavior. Tr. 04/19/2023 at 120. He also admitted that when he arrived on the scene, he and another officer (Schimmel) actually *ran* after Mr. Greenfield. Tr. 04/19/2023 at 133. Although "it seemed like he just kept trying to get away and go home," Tr. 04/19/2023 at 120, Mr. Greenfield stopped when told, after which Officer Moore grabbed him and would not let him move further, Tr. 04/19/2023 at 133. At the time, he and the other officers were in full uniform, emblazoned with a blue MPD badge; all of the officers had sidearms, and in addition to he and Officer Schimmel, there were other officers approaching as well. Tr. 04/19/2023 at 156. Officer Moore took care to note, however, that Mr. Greenfield "did not take flight." Tr. 04/19/2023 at 132. He was merely walking away. *Id.*

Officer Moore testified that MPD had received multiple calls from concerned citizens (he did not testify that they were anything other than anonymous) that the area in which he encountered Mr. Greenfield was being used for the use and sale of PCP. Tr. 04/19/2023 at 83, 85.

C. Officer Moore's body-worn camera captured sound and video from virtually the entire incident.

Through Officer Moore, the government successfully admitted, as Government's Exhibit 1, the officer's body camera footage. The video shows that

after Officer Moore and Officer Shimmel run after Mr. Greenfield and reach him, the following may be heard and seen on the video:

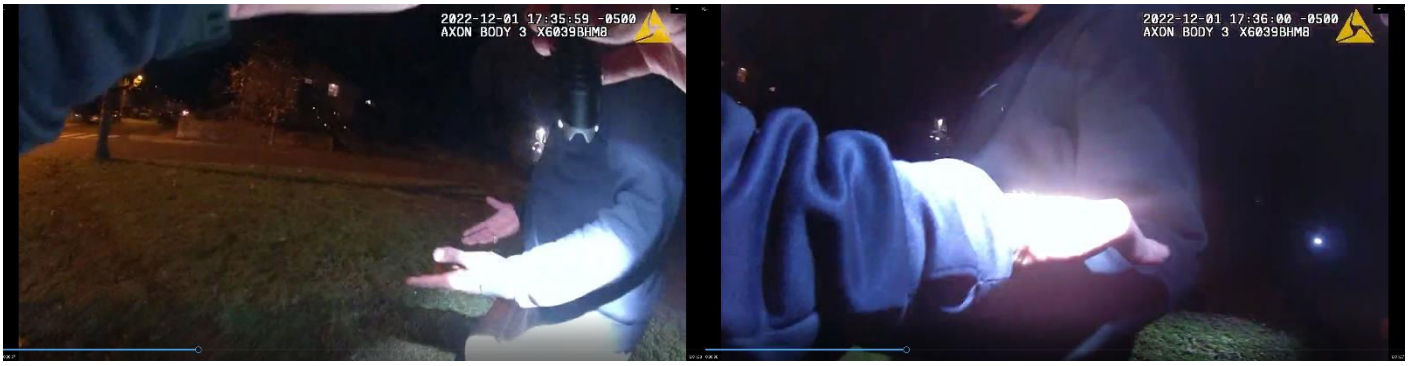
Officer Moore: Stop stop stop stop stop stop stop.

Officer Moore: What you got in your hand?

Defendant: Nothing

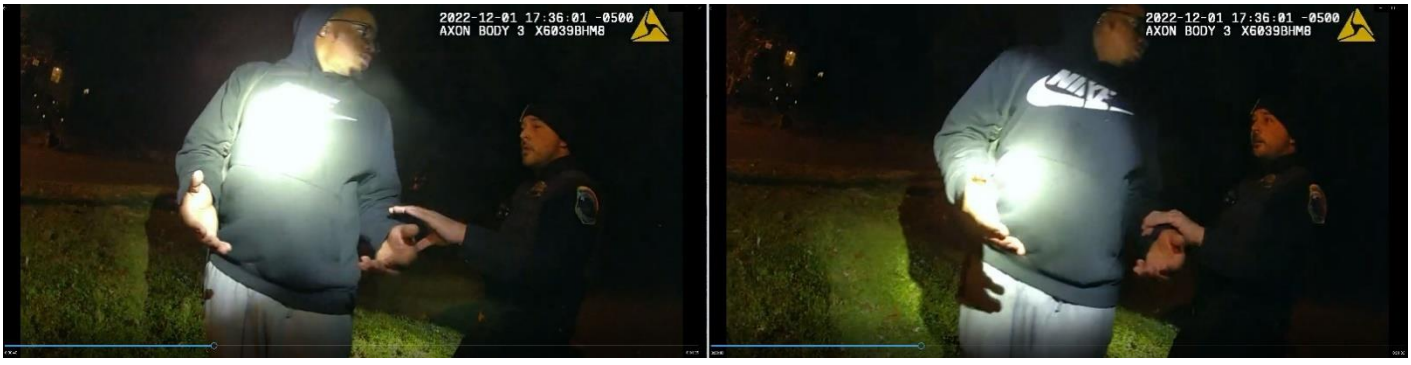
Officer Moore: Nothing? Stop stop st st st st stop.

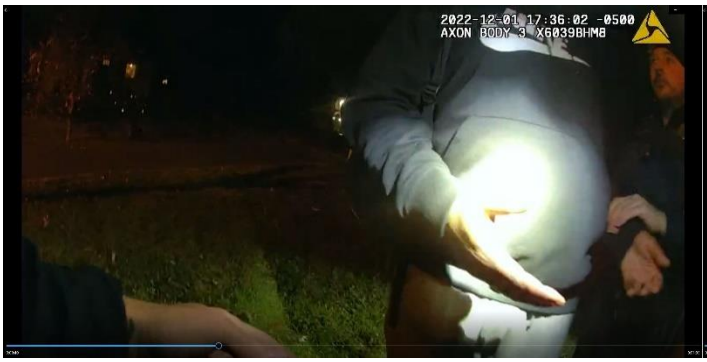
Officer Moore then grabs Mr. Greenfield by the arm.

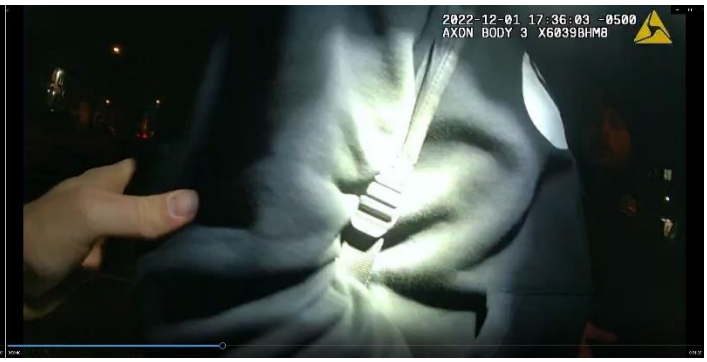


Officer Schimmel: You are being stopped. All right, relax.

Officer Schimmel grabs Mr. Greenfield by the arm.







. . .

Officer Moore: Drinking a beer?

Mr. Greenfield: Yeah.

Officer Moore: You don't got no guns in your bag or nothin'?

Mr. Greenfield: Nah

Officer Moore: Mind if I see?

Mr. Greenfield: I ain't got no guns.

By this point, Officer Moore has asked Mr. Greenfield four increasingly invasive questions, beginning with whether Mr. Greenfield is holding anything in his hands, proceeding to whether Mr. Greenfield has been drinking, and continuing to whether Mr. Greenfield any guns. Officer Moore has also asked whether he can look into Mr. Greenfield's bag, and Mr. Greenfeld has declined to permit it.

Officer Moore: Mind if I see in your bag—make sure there ain't a gun there?

Mr. Greenfield: I ain't got no guns.

Officer Moore: Just beer?

Mr. Greenfield: Yeah

Officer Moore: No PCP?

Mr. Greenfield: Nah.

At this point, after an additional three questions, increasing to questioning about PCP, and another request to search the bag, Mr. Greenfield reaches into his bag and pulls out a Fireball bottle, then a closed can of beer.

Officer Moore: Ok. Why do I smell PCP coming from your bag, man?

Mr. Greenfield: I was just drinking a beer.

Officer Moore: Yeah, but I smell PCP coming from your bag. . . . yeah, go ahead—your, your, go ahead, put your hands behind your back, yup.

Two officers then handcuff Mr. Greenfield, as Officer Moore seizes the bag and searches it, finds a headphones case, manipulates it while it remains closed, then unzips it, and shines a flashlight inside.

Officer Moore: No. PCP. Yup.

Officer Moore then speaks into the radio—the first time he has spoken into the radio during the video.

Officer Moore: PWID PCP. [*He turns his attention to Mr. Greenfield*.] You're under arrest, all right.

Mr. Greenfield: We was just drinking a beer, man.

Officer Moore: No, you got PCP on you; I could smell it coming from your bag.

See Government's Exhibit 1.

D. The parties argued the motion to suppress.

The government rested. Tr. 04/19/2023 at 215. The court then moved on to the motion to suppress. In a written motion, the defense had argued that Mr. Greenfield's purportedly voluntary showing of the contents of his bag was not voluntary at all, because he had complied with the officer's show of authority. The defense also argued that any statements made by Mr. Greenfield, after he was unlawfully seized and his bag searched, should be suppressed. A.9-11. In court, the defense further argued (citing cases in the written motion) that police had

neither reasonable suspicion nor probable cause to stop and search Mr. Greenfield. Tr. Tr. 04/19/2023 at 221, and that the seizure was unlawful, *id.* at 225.

The government argued that Mr. Greenfield had been arrested immediately after officers saw the bottle of Fireball, and only after the arrest had they searched the bag to find PCP. A.17. It argued that Mr. Greenfield's act of walking away was "unprovoked flight," and that combined with the status of the park as a "high-crime area" used to sell and consume PCP, and the "very strong odor" of PCP, constituted reasonable, articulable suspicion to stop Mr. Greenfield. A.20. The government further argued that once police had stopped Mr. Greenfield under *Terry*, they developed probable cause to search his bag—presumably including inside the headphones container—because they believed he had violated the District's open-container law. A.20. The government further argued that the odor of PCP provided "independent[]" probable cause to *arrest* (though it did not argue to search) Mr. Greenfield. A.21-22 (arguing first that police had "probable cause," and that this meant "probable cause to arrest"). It was this *probable cause to arrest* that, according to the government, gave rise to "probable cause to search his backpack." A.22. Finally, it argued that Mr. Greenfield's statements were made voluntarily, because Mr. Greenfield was not in custody (though officers were, in fact, holding his arms) and not interrogated (though they were, in fact, asking questions). A.21-22.

E. The trial court denied the motion to suppress.

Denying the motion to suppress, the trial court determined that Officer Moore had conducted a *Terry* stop, as a result of the odor of PCP. In addition, the

court found, the following factors contributed to its decision: (1) it was night; (2) there had been reports of crime at the park, including the use and sale of PCP; (3) although the officers tried to get Mr. Greenfield to stop, they had to "lay a hand on him" to make him stop. Tr. 04/19/2023 at 234-35. The court found that Mr. Greenfield was asked whether he was armed, and he said no, and then he was asked if he would show is bag—and, the court found, "*he agreed* to show his bag, and *voluntarily* opened his bag and pulled out of the bag and half-showed what he was pulling out of the bag, was an open container of alcohol." Tr. 04/19/2023 at 235 (emphasis added).

The court then found that, "At that point he is arrested." Tr. 04/19/2023 at 235. "At that moment *you could hear it on the body-worn camera footage . . . .* The officer indicates that he is arresting him. He is holding him and he is arresting him." Tr. 04/19/2023 at 235 (emphasis added). The court further determined that at that point, Officer Moore began to search the bag "incident to the arrest." Tr. 04/19/2023 at 235. "He smells the PCP. He opens up the bag. He opens up the container. He feels the container to make sure that—according to his testimony, to make sure that it's safe. And then when he opens it, there are three vials of what he has identified as PCP in the—in the smaller container. Tr. 04/19/2023 at 235-36.

F. After the parties rested, the government sought to admit a new exhibit.

The defense then moved for judgement of acquittal, Tr. 04/19/2023 at 235-36; A.47, which the court denied, *id.* After Mr. Greenfield, in consultation with his attorney, declined to testify, the defense rested—without examining further

witnesses or introducing further evidence. Tr. 04/19/2023 at 239. But as the parties and the court were discussing the scheduling of closing arguments, the government discovered that it had an additional exhibit that it wished to enter into evidence. Tr. 04/19/2023 at 240.

Government's Exhibit 4 made its first appearance during the testimony of Officer Brown. Because the exhibit contained what the government contended was PCP (though no chemical or field test was entered into evidence or discussed), an officer was required to escort the sealed evidence. *See* Tr. 04/19/2023 at 213.[5] So when the government sought to use the evidence—which it first did without admitting it—the officer already had it in his possession, on the stand. Tr. 04/19/2023 at 54. After Officer Moore's direct testimony, the defense cross-examined him, Tr. 04/19/2023 at 58, and the government asked questions on redirect, Tr. 04/19/2023 at 71. Thereafter, the defense did not call any witnesses or introduce any evidence. It was not until the defense rested that the government realized it had never admitted Exhibit 4 though its only fact witness. It had mentioned the exhibit with its expert witness, who had apparently examined the vials prior to trial; but then the government did not use the exhibit then, and it failed to admit it any other time.

When the government sought to admit Exhibit 4, the defense objected, noting that there were several objections planned—including a hearsay objection to the DEA-7—but none had to be made because ethe government never attempted

[5] Court: "Are you responsible for the evidence?" Officer Moore: "Yes, Your Honor . . . I signed it out so it's under my name."

to enter the exhibit. Tr. 04/19/2023 at 240-41. The government countered that it would seek to enter the exhibit in its rebuttal case, to which the trial court agreed, Tr. 04/19/2023 at 241, and the exhibit was admitted over the objections of the defense, *id.* at 242-43.

G. The trial court makes new findings of fact and law, which are not identical to those it made in its decision on the motion to suppress.

At the conclusion of trial, the trial court found a number of facts. It found that Officer Brown, who testified as an expert, had been with MPD for 32 years, which included 20 years in Violent Crimes Suppression and in the Safe Streets Joint Task Force with the FBI. Tr. 04/20/2023 at 30. Prior to that, he was a detective in narcotics, and he had handled "thousands of narcotics cases, including, among others, PCP specifically." Tr. 04/20/2023 at 30. The court noted that Officer Brown had "specifically PCP training," and had served as an expert in a "handful of matters." Officer Brown, the court recounted, testified to a number of matters, as an expert (and as relevant here): (1) the packaging of PCP; (2) "the color and the odor specifically" of PCP, including "expert testimony concerning the unique signature smell of PCP, its chemical, strong, pungent smell"; and (3) that the contents of the government's Exhibit 4, based on its smell (though the plastic heat-sealed government packaging), was—in his expert opinion—PCP. Tr. 04/20/2023 at 31-32.

The trial court found that the government's fact witness, Officer Moore, served on the 6D Crime Suppression Team—a "specialized unit," with the "focus . . . to go after violent crimes, firearms, and narcotics." Tr. 04/20/2023 at 32. "Officer Moore," the trial court explained, "has handled hundreds of narcotics

matters. He estimated between 50—upwards of 50 to 60 PCP cases, specifically." Tr. 04/20/2023 at 33. The trial court also found that "[t]he park was targeted as a high-use, high-drug, high-volume area for the use and sale of PCP, particularly at night." Tr. 04/20/2023 at 33. "The officer ID'd [*sic*] the defendant from the arrest in the park. The officer was involved in the arrest in the park." Tr. 04/20/2023 at 33.

The court also explained its view on the law of intent: the "*actus reus* of the attempted possession of a controlled substance is the possession itself," and the "*mens rea* is the accused's belief that the controlled substance in his possession is, in fact, a controlled substance, whether or not it is," concluding that "[t]he substance need not be a controlled substance at all . . . . [because] what matters is . . . that the [defendant] believed it to be one." Tr. 04/20/2023 at 34.

The trial court also stated that it "took the opportunity to review [the body-worn camera footage] in slow motion, including all of the available video and audio." Tr. 04/20/2023 at 35. The court observed that while the officers were walking, Officer Moore said, "I smell PCP," as they chased Mr. Greenfield, "pass[ing] quickly two individuals on either side of the footbridge." Tr. 04/20/2023 at 35 (noting that Officer Moore also noted the smell of PCP a second time). They eventually caught up to Mr. Greenfield, who was "hastily walking away."[6] Tr. 04/20/2023 at 36.

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[6] *See* Facts, Section B (testimony of Officer Moore), regarding the Court's understanding and use of "hastily" to mean nothing about a person's state of mind, bur only that "he's moving faster." Tr. 04/19/2023 at 97.

When they reached Mr. Greenfield, the officers slowed their run to a walk. It was "clear that they are in MPD uniforms." Tr. 04/20/2023 at 36. The court found that one officer ordered Mr. Greenfield to "stop, stop," and then another officer ordered him to stop, and then told Mr. Greenfield, "You're being stopped." Tr. 04/20/2023 at 36. "The other officer inquires why the defendant is walking away. What is he doing. He said he was just drinking beer." Tr. 04/20/2023 at 36. The defendant, the court found, said he did not want to stop. The trial court then found that Officer Moore asked, "do you mind if I see to make sure you don't have a gun?" Tr. 04/20/2023 at 36. The defendant then, according to the trial court, pulled his backpack off his shoulder, opened it, and "says again, no guns, just beer. I was just drinking beer." Tr. 04/20/2023 at 36-37. "*And then the question . . . no PCP*. Defendant denies, nah [*sic*]." Tr. 04/20/2023 at 37 (emphasis added). Then Mr. Greenfield "pulls the whisky bottle that's partially consumed . . . . and he concedes he's drinking in the park. He tries to partially open the backpack because he's trying to just show the bottle of Fireball. Then he ultimately puts his hand back in, and he pulls back out a large beer can that appears to be closed." Tr. 04/20/2023 at 37.

The trial court also found, as a matter of fact, that Mr. Green was alone in the park with the officers, and that no other person can be seen near them—"so there's nobody else around." Tr. 04/20/2023 at 36.

The trial court further found that Officer Moore asked "why am I smelling PCP from the bag? And the defendant says, I'm just drinking beer." "At that time," the court found, "he is arrested, presumably for conceding that he's drinking

beer and having the bottle in public in a park."[7] Tr. 04/20/2023 at 37. In the video, "[t]he court could see clearly the officer with the flashlight looking at the outside and the inside of the bag," searching it." The officer then "sees a small black bag or pouch. It has a zipper. To the court, it appeared to be neoprene. It's described later as a headphone case by Officer Moore. The flashlight reflects the vials." Tr. 04/20/2023 at 37. The court recounted that Officer Moore then identified the vials as containing PCP by smelling them, unopened. Tr. 04/20/2023 at 37. According to the trial court, "Officer Moore then immediately says into his recording, put PCP [*sic*], and he—it's as though he's giv[ing] an instruction to somebody else." The court finds that the defendant says that his grandmother lives nearby the park. Tr. 04/20/2023 at 38. After discovering in the search what they believed to be PCP, the trial court found, the officers arrested Mr. Greenfield: "He's arrested *at that point* by other officers." Tr. 04/20/2023 at 38 (emphasis added).

Convicting Mr. Greenfield of attempted possession, the court relied on the following facts: (1) "The defendant walked away. He continuously tried to leave. And while not illegal, our court has held that can be considered indicia of belief—indicia of his mental state." (2) "the bag smells like PCP. It has a unique, strong signature odor." " In the bag . . . are the three vials." (3) "The park is a known PCP location for sale and for use." And (4) "The defendant is carrying the bag,"

[7] *See* Section III.1. regarding the factual findings whether Mr. Greenfield was actually arrested at this time.

and "because [t]here [wa]s no one else around him[,] . . . [t]here's no possible reasonable doubt that that's his bag." Tr. 04/20/2023 at 38.

With regard to the POCA charge, the trial court found that Mr. Greenfield "gave up and conceded quickly the alcohol because he was hoping no one was going to look in the bag further. He opened it just enough to sort of pull out and show the Fireball and the beer can. He's hiding the pouch." Tr. 04/20/2023 at 39.

STANDARD OF REVIEW

When considering a challenge to the sufficiency of the evidence, this Court "view[s] the evidence in the light most favorable to the government, giving full play to the right of the [fact-finder] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence." *DeAndre Brooks v. United States*, 130 A.3d 952, 955 (D.C. 2016) (second alteration original). "[T]he evidence is sufficient if, after viewing it in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (alteration original).

This Court reviews challenges to the sufficiency of the evidence *de novo*. *Carrell v. United States*, 165 A.3d 314, 326 (D.C. 2017) (en banc). Review of a motion for judgment of acquittal is also *de novo*. *Tann v. United States*, 127 A.3d 400, 424 (D.C. 2015). Furthermore, "[e]ven though a general motion for acquittal is broadly stated, without specific grounds, it is deemed sufficient to preserve the full range of challenges to the sufficiency of the evidence." *Newby v. United States*, 797 A.2d 1233, 1238 (D.C. 2002) (internal quotation marks omitted). In

fact, "it is well settled in this jurisdiction that a 'full range of challenges' to the sufficiency of the evidence are automatically preserved at a bench trial by a defendant's plea of not guilty." *Carrell*, 165 A.3d at 326 (quoting *Newby*, 797 A.2d at 1237-38). And "sufficiency challenges encompass challenges to the requisite elements of the crime." *Id.*

This Court reviews questions of fact under the "clearly erroneous" standard. *United States v. Felder*, 548 A.2d 57, 61 (D.C. 1988). This Court "will not disturb the judge's factual findings unless they are clearly erroneous, or without substantial support in the record." *Harris v. United States*, 738 A.2d 269, 274 (D.C. 1999). This Court reviews issues of statutory interpretation *de novo*. *McNeely v. United States*, 874 A.2d 371, 387 (D.C. 2005).

"[A]n error is considered harmless if the government can 'show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Carrell*, 165 A.3d at 328 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). Determination of a proper sanction for a violation of the Jencks Act is reviewed for abuse of discretion. *Ulcenat v. United States*, 260 A.3d 684, 688 (D.C. 2021).

ARGUMENT SUMMARY

At trial, the government failed to prove beyond a reasonable doubt that Mr. Greenfield intended to possess PCP. Not only did it failed to introduce *any* evidence of any scientific test to prove, beyond a reasonable doubt, that he actually did possess PCP, the government failed to introduce any evidence that Mr. Greenfield would believe that whatever was in the perfume bottles was

actually PCP. Without more, Mr. Greenfield's conviction for attempted possession of PCP—which required not only acts to prove that Mr. Greenfield thought the substance was PCP, but also the specific intent to possess PCP—was based on insufficient evidence.

Furthermore, the discovery by police of the alleged drugs, found inside small bottles, which were found within a small headphones case, which was found inside Mr. Greenfield's backpack, was the result of an unconstitutional search. The increasingly intrusive questions, once Mr. Greenfield had been surrounded and also physical seized by police, rendered his purported consent to search his bag involuntary. As a result, any arrest for POCA (absent any indication of it) was unlawful, and the search could not have been incident to a lawful arrest. Moreover, the mere odor of PCP, without more (and there was no more), could not support probable cause for a search. The entirety of the search should have been excluded. And without the evidence obtained during the unconstitutional search, there was no remaining evidence that could have proved beyond a reasonable doubt that Mr. Greenfield was guilty of either POCA or attempted possession

Finally, the government's trial exhibit that consisted of the bottles discovered during the search were improperly admitted as evidence. Although they could have been admitted as part of the government's case in chief, through its sole fact witness, the government declined to do so. It only sought to admit the evidence after it had rested, after the defense had rested—and the defendant had declined to testify. This was *not* rebuttal evidence, because it was available to the government during its case-in-chief, and it was not admitted *on rebuttal* in

response to anything the defense had done—as it had not done anything since the government's final redirect of its own witness.

For these reasons, this Court should reverse the trial court's verdicts.

ARGUMENT

I. The government failed to prove that Mr. Greenfield had the specific intent to possess PCP.

This Court has long held that to prove "*attempted* possession [of a controlled substance]. . . . [t]he government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance, *and* the requisite criminal intent." *Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989) (second emphasis added). These two factors are not identical. "The *mens rea* element requires proof that appellant had the 'intent to commit the crime[]' of attempted possession of a controlled substance." *Fields v. United States*, 952 A.2d 859, 865 (D.C. 2008) (quoting *Blackledge v. United States*, 447 A.2d 46, 48 (D.C. 1982)). The *conduct* (or *actus reus*) element requires proof of "the performance of 'some act toward its commission,'" *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996) (quoting *Blackledge*, 447 A.2d at 49). However, with regard to the intent element, this Court has warned that "Where a defendant's acts are of themselves commonplace or equivocal, and are as consistent with innocent activity as they are with criminal, it will be necessary for the government to adduce objective facts to establish criminal intent." *Seeney*, 563 A.2d at 1083-84. The government failed on both counts.

To be clear, this Court has encountered numerous cases in which a defendant's acts were neither commonplace nor equivocal. For example, in

Thompson, the defendant had received a bundle of small packets, each containing what appeared to be cocaine, shortly thereafter handed one of them to another man, who complained that it was "not real." 678 A.2d at 28. After that man was shot, she went home and immediate took out the bundle and began counting its contents. *Id.* All of this, the Court held, combined with expert testimony that described her role as that of a "runner" in the drug-selling business, was sufficient to establish her *intent* to distribute what was in the packets. *Id.* Similarly, in *Williams v. United States*, "the government presented an evidentiary case where the illegal nature of the substance could be inferred from a transaction during which the defendant had manifested his intent" to sell a particular drug. 966 A.2d 844, 848 (D.C. 2009) (quoting Fields, 952 A.2d at 865) (internal quotation marks omitted).

Two other cases are both instructive and representative. In *Newman v. United States*, the defendant possessed "green plant material" that resembled marijuana *and* when he saw police, he moved at a fast pace and disposed of it. This Court agreed that the act of discarding the substance showed that the defendant "knew that it was something illegal." 49 A.3d 321, 324-25 (D.C. 2012). And in *Lesher v. United States*, the "green weed-like substance both smelled like and was packaged like marijuana," *and* it was "found stuffed behind a radiator, an out-of-sight location," which supported the inference that they had been "hidden or secreted because what they contained was thought to be illegal to possess." 149 A.3d 519, 525 (D.C. 2016).

Here, the circumstances were both commonplace *and* at least equivocal. Mr. Greenfield did not engage in *any* behavior indicating either drug sales or use:

He did not do anything with the perfume bottles that would indicate he was attempting to divide up their contents, as in *Thompson*, 678 A.2d at 28, or sell them, as in *Williams*, 966 A.2d 844, 848. He did not try to dispose of a drug-like substance as in *Newman*, 49 A.3d at 324-25. He did not secrete a drug-like substance in a hidden location so he would not be found with it, as in *Lesher*. 149 A.3d at 525. Nor did he have on him any items that would indicate sale or use, like "dipper[s]" (a cigarette dipped into liquid PCP to be smoked), as the government's expert explained are *the* way PCP is used and distributed in the District. Tr. 04/19/2023 at 50. Rather, he merely carried the items—glass bottles, in a protective neoprene case. Tr. 04/20/2023 at 37. Carrying a substance and doing nothing extraordinary with it is commonplace. It cannot create evidence of intent to possess a controlled substance, which requires a showing of intent.

To prove intent, the trial court relied upon the following facts: (1) When police approached, Mr. Greenfield walked away. (2) expert testimony, as well as the highly trained testimony of the government's fact witness, established that PCP has a unique smell, and the bag smelled of it. And the bag contained the vials of what an expert or a trained police officer would identify as PCP. (3) Location in a park known for PCP use and sales. And (4) The bag belonged to Mr. Greenfield, and there was no one else around.[8] Tr. 04/20/2023 at 38. Yet none of this establishes the specific intent required under the attempted-possession statute.

[8] Although Appellant did not contest that the bag was his at trial, and does not do so on appeal, that factor does not lend anything to the analysis.

1. The fact that Mr. Greenfield walked away—but did not flee—from police provided no evidence of consciousness of guilt.

As this Court has observed, "in those cases in which flight has been held to indicate consciousness of guilt, the accused reacted to a known police presence by running, rather than walking away." *Green v. United States*, 662 A.2d 1388, 1391 (D.C. 1995) (citing *Smith (John) v. United States*, 558 A.2d 312, 316-17 (D.C. 1989)). "Leaving a scene hastily may be inspired by innocent fear, or by a legitimate desire to avoid contact with the police. A citizen has as much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not [even] justify his detention." *Smith (John)*, 558 A.2d at 316 (noting that the defendant "at most [had] had walked at a fast pace").

That is to say, merely walking away from police will not even support a finding of the articulable suspicion of a crime required for a mere *Terry* stop, because it doe not indicate consciousness of guilt. Indeed, Officer Moore testified that Mr. Greenfield *did not flee*: "He did not take flight, no." Tr. 04/9/2023 at 132. This fact, relied upon by the trial court, carries no weight at all.

2. The government itself established that recognition of the odor of PCP requires specialized training and expertise—the kind that an ordinary court, or defendant, would not have.

The government spent most of its trial time arguing, over the objection of the defense, that recognizing the odor of PCP requires an expert—or at least someone specifically trained in recognizing it.

"Judicial estoppel is an 'equitable doctrine' invoked at a court's discretion to prevent 'improper use of judicial machinery.'" *Hardy v. United States*, 988 A.2d

950, 964 (D.C. 2010) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). "The purpose of applying this doctrine is 'to protect the integrity of the judicial process by prohibiting parties from deliberately changing position according to the exigencies of the moment.'" *Id.* (quoting *Mason v. United States*, 956 A.2d 63, 66 (D.C. 2008)). There are three elements of judicial estoppel: (1) "a party's later position must be clearly inconsistent with its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (quoting *Mason*, 956 A.2d at 66).

That is exactly the trick the government attempted to pull at trial. There, the defense objected to the government's use of an expert, which could only be used to provide information in "a unique area that is so unknown to the public that an expert is needed to help provide information linked to that specific issue, that only the expert would have that specialty." Tr. 04/19/2023 at 19-20. The government accepted this formulation, explaining that its expert—a 32-year veteran of MPD, a narcotics detective, and an expert in narcotics—was necessary, in part, to testify about "the characteristics of PCP, including its odor." Tr. 04/19/2023 at 19. The government agreed that its expert would provide "specialized knowledge," arguing that it took "years of training and experience to acquire that knowledge." Tr.

04/19/2023 at 20. The government's expert had drawn his expertise from *thousands* of narcotics cases, including many with PCP, Tr. 04/19/2023 at 41; he had trained with the DEA, including PCP remediation training, Tr. 04/19/2023 at 44; and his expertise was superficially in (among other areas) the "specific characteristics" and "identification" of PCP, including its odor. Tr. 04/19/2023 at 48-49. Although he defense repeatedly objected, *see*, *e.g.*, Tr. 04/19/2023 at 49, the government prevailed, and the court denied the defense objection to introduction of expert testimony, finding that Officer Brown would be called "as an expert in the area[] of identifying the controlled substance [PCP]." Tr. 04/19/2023 at21.

That is to say, the government proved to the trial court that recognition of PCP *by its smell* was the province of experts. Yet by closing, the government was arguing—and the trial court eventually accepted—that *anyone* would recognize that odor as PCP. Yet there was not a scintilla of evidence introduced at trial that Mr. Greenfield had knowledge of the specific odor of PCP. (In fact, there was no evidence introduced, notably in the age of COVID-19, that he could smell anything at all.) Surely there was no evidence that Mr. Greenfield was the kind of highly trained expert that could recognize it like Senior Officer Brown.

Nor did the government bother to put on evidence that the vials actually contained PCP. Apparently, there was a DEA-7 form on the evidence. The record was totally absent any indication that what was in the vials was actually PCP. At most, it smelled like PCP—to an expert.

To be sure, the government also used its fact witness to buttress the expert's opinion. But there too, it made clear that this opinion was the stuff of highly trained officers. Officer Moore made clear that his team specialized in illegal narcotics, Tr. 04/19/2023 at 80, and that he had training in PCP, which included the way PCP is commonly packaged and its "distinct odor," *id.* at 82, *and* that he had been involved with more than 200 narcotics cases, including *50 to 60 PCP cases*, *id.* at 83. As a result of this training and experience, gained in part from his time at the police academy, Tr. 04/19/2023 at 95, and his work with drugs in the Sixth District, he had become "very familiar" with recognizing the smell of PCP.

So what training and experience did the government establish at trial that Mr. Greenfield had? What experience identifying PCP did the government prove that Mr. Greenfield should have employed? What ability did Mr. Greenfield have to detect the particular smell of PCP and identify it as illicit? None at all.

3. The claim that the park was a high-crime area for drugs does not tend to prove that those inside are actually engaged in the use or sales of drugs.

As this Court held in *Green*, even efforts to walk away from police *combined* with citizen reports of criminal activity would be insufficient to rise to the level of reasonable suspicion, much less proof beyond a reasonable doubt of specific intent. 662 A.2d at 1391 (noting that even these two facts taken together could not support reasonable suspicion).

Nor was any power lent by the purported fact that the park was a high-crime area where drug transactions take place. As this Court explained in *Anderson v. United States*, even presence in a high-crime area, standing with other individuals at night, walking quickly away from police, and obvious nervousness, could justify

articulable suspicion, much less proof beyond a reasonable doubt of intent. 658 A.2d 1036, 1038 (D.C. 1995).

As this Court has made clear, facts do not "assume added significance because they happen to have occurred in a high crime area." *Curtis v. United States*, 349 A.2d 469, 472 (D.C. 1975). "The mere fact that a neighborhood is high in crime may, in some circumstances, amplify otherwise suspicious activity. . . . But it does not transform innocuous behavior" into criminal intent. *See Maye v. United States*, 260 A.3d 638, 646 (D.C. 2021). Indeed, the trial court found that Mr. Greenfield told police that his grandmother lived nearby the park. Tr. 04.20.2023 at 38; *see* Government's Exhibit 1; *see also* Tr. 04/19/2023 at 207 (Officer Moore: "I don't recall the exact address, but I do recall something to the effect of [Mr. Greenfield] saying he lived nearby.").

* * *

The government, relying too heavily on the fact that its police expert, and a well-trained police officer, could identify the contents of the perfume bottles as spelling and looking like they contained PCP, failed to adduce evidence that *Mr. Greenfield* would have been able to so identify them. It literally produced *no* evidence at trial that Mr. Greenfield could identify PCP, or (in the age of COVID-19) could even smell them. It did not elicit *any* testimony, or introduce *any* evidence, that, for instance, Mr. Greenfield had the kind of training or even experience of which its police witnesses had the benefit: involvement with 50 to 60 PCP cases, *see*, *e.g.*, Tr. 04/19/2023 at 83, or the benefit of being "very familiar" with recognizing the smell of PCP, Tr. 04/19/2023 at 93-94. The

government introduced literally *no* evidence of the kind at trial. And without at least *some* evidence that Mr. Greenfield, like the government's highly trained police officers, could identify PCP by smell and sight, its reliance on his presence in a high-crime park, and his desire not to want to engage in a police encounter, could not make up the glaring gap in evidence. The government did not even bother to test the purported drugs it had in its possession. One wonders why it did not take that risk.

II. The government failed to prove that the search of Mr. Greenfield and the containers within his bag was constitutionally permissible.

At trial, it was the government's burden to prove that the warrantless search of Mr. Greenfield's bag, and the containers within it, were supported by probable cause, *Gilliam v. United States*, 46 A.3d 360, 365 (D.C. 2012), or that a *Terry* stop and search was supported by reasonable articulable suspicion that he had committed a crime *and* was presently armed and dangerous, *Mayes v. United States*, 653 A.2d 856, 861 (D.C. 1995). The government did not meet that burden.

As in many such situations, the analysis requires many steps. *First*, the search of Mr. Greenfield's backpack that produced the open bottle of Fireball whisky was not voluntary, but rather was the result of coercive police conduct that a reasonable person would not have felt free to decline. As a result, anything that might have followed from the purported arrest for POCA (though no such arrest actually took place) was not the product of a lawful arrest, because within the unlawful search, police had no evidence of POCA.

Second, even if police were permitted to search Mr. Greenfield himself incident to arrest, the exception only allows officers to additionally search the area

within his immediate control. Yet by the time of the search, Mr. Greenfield was being restrained and handcuffed by two armed police officers, and a third officer had control of the bag being searched. Neither the search of the backpack, nor the small headphones container within it, were within Mr. Greenfield's reach.

Third, at most, a search for weapons under *Terry v. Ohio*, 392 U.S. 1 (1968), or for evidence of the POCA offense, would not reasonably have included the container found within Mr. Greenfield's backpack: a small, neoprene headphones case, which could contain neither a weapon nor alcohol paraphernalia. As a result, the search of the headphones container was unconstitutional under the Fourth Amendment.

Fourth, the search of Mr. Greenfield's backpack was not supported by probable cause. This Court has *never* held that the mere smell of a drug emanating from a person will support probable cause to search that person's bags. And it should decline to do so here. *Fifth*, there was no exigency: Mr. Greenfield was in handcuffs, and his bag was in the possession of police—who could have, if they believed they had probable cause—attempted to secure a warrant. And there was no reason to believe the evidence police sought, which apparently survived four months to the date of trial, would magically disappear in the time it would take to obtain a warrant.

For these reasons, the evidence obtained in the unconstitutional search of Mr. Greenfield's bag, and the container therein, should be suppressed. As this Court, and the Supreme Court have repeatedly made clear, "the exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal

search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality." *Smith (Gregory) v. United States*, 283 A.3d 88, 98 (D.C. 2022) (quoting *Utah v. Strieff*, 579 U.S. 232, 237 (2016)) (internal quotation marks omitted).

1. The search of Mr. Greenfield's backpack that produced the open Fireball whisky bottle and the can of beer was not voluntary.

"Where the government contends the person agreed to a pat-down, it bears the burden to prove that 'consent was, in fact, freely and voluntarily given.'" *Dozier v. United States*, 220 A.3d 933, 940 (D.C. 2019) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). When "'statements and conduct evidencing consent to a search are given contemporaneously with the illegal seizure, with no break in the causal chain, the actions of the person seized are not free from the taint of unlawful detention and are thus insufficient to show consent.'" *Id.* (quoting *Jones (Albert) v. United States*, 154 A.3d 591, 598 n.20 (D.C. 2017)). This Court, in *Dozier*, aptly described the situation here:

> "[W]hen a visibly armed police officer in full uniform and tactical vest emerges without warning from a police cruiser to interrupt a person going about his private business, the encounter is not between equals. . . . . [W]here questioning is at least implicitly accusatory (if not explicitly so), a reasonable person's reaction is not only to show respect for the officer's authority, but also to feel vulnerable and apprehensive. In such an atmosphere . . ., a reasonable person who can tell from the inquiries that the officer suspects him of something, and who cannot know whether the officer thinks there is sufficient reason to detain him, may well doubt that the officer would allow him to avoid or terminate the encounter and just walk away."

Dozier, 220 A.3d at 941-942 (quotation marks and citations omitted).

In *Dozier*, ordinarily armed police officers had approached an African-American man, *id.* at 943, in an alley, where he was alone (police had ignored the other man he was with), in an area known for drug activity (attested to by numerous complaints), *id.* at 937-38. An officer asked whether Mr. Dozier had any weapons, and he responded that he did not (showing his waistband). Officers then asked whether they could pat him down for weapons, and Mr. Dozier responded "yes, you can check me." At that time, there were two officers with Mr. Dozier and two others back at the police cruiser. *Id.* at 938.

This Court held that Mr. Dozier had been seized "'by the time [he] submitted to the officers' request to a pat-down." *Id.* at 941. The Court explained that "[a]n innocent person in appellant's situation," "alone, at night, in a secluded alley" blocked by police, "with two additional officers standing by," "would not have felt free to decline that request after he had been approached by two uniformed and armed police officers who engaged in repeated questioning and escalating requests, culminating with a request" for a search. *Id.* at 941.

This Court listed a number of factors that contributed to that result: *First*, that police were "visibly armed" and "in full uniform . . . emerg[ing] without warning from a police cruiser to interrupt a person going about his private business." *Id.* at 941. *Second*, the questioning was "at least implicitly accusatory (if not explicitly so), [so that] a reasonable person's reaction is not only to show respect for the officer's authority, but also to feel vulnerable and apprehensive." In that atmosphere, "a reasonable person who can tell from the inquiries that the officer suspects him of something, and who cannot know whether the officer

thinks there is sufficient reason to detain him, may well doubt that the officer would allow him to avoid or terminate the encounter and just walk away." *Id.* at 941-42. The situation is "particularly intimidating . . . if the person is by himself, if more than one officer is present, or if the encounter occurs in a location that is secluded or out of public sight." *Id.* at 942.

Third, because he was penned in, Mr. Dozier would not have felt free to walk away, and police "persisted even after appellant initially did not respond and continued on his way." *Id.* And *fourth*, the fact that the encounter took place in a "'high crime area' and involved an African-American man." *Id.* at 943 (noting there had been "numerous complaints" of drug activity in the area). In *Dozier*, of course, the Court found that the initial seizure was unconstitutional. But the holding of *Dozier* remains: Where a person is seized, in similar circumstances, a purportedly "voluntary" search is nothing of the kind.

Here, of course, police made clear that Mr. Greenfield was not permitted to walk away. *See, e.g.*, Tr. 04/19/2023 at 158 (Police: "You're being stopped."); *see Dozier*, 220 A.3d at 945 ("[T]wo officers, in uniform and armed, were closing on appellant in a secluded alley and calling to him, two other officers were waiting in a police cruiser parked at the egress point of the alley toward which appellant had been walking."). Nonetheless, the government portrayed Mr. Greenfield's willingness to show police the contents of his backpack as *consensual*. As made clear in *Dozier*, it was not.

Mr. Greenfield, an African-American man, *see Dozier*, 220 A.3d at 943, was approached in a dark park, separated from the individuals he had been standing

with earlier, surrounded only by police, with no one else around, Tr. 04/20/2023 at 36; *see Dozier*, 220 A.3d at 941. Because police asked Mr. Greenfield a series of explicitly accusatory questions, making clear that he would be detained until he proved they should allow him to move on, "a reasonable person's reaction is not only to show respect for the officer's authority, but also to feel vulnerable and apprehensive." Government's Exhibit 1; *see Dozier*, 220 A.3d at 941. The government's reliance "on the fact that the officers made 'requests' and did so in conversational tones, without orders, shouting, or threats" was of no moment, because these factors "do not necessarily counter a reasonable person's perception of the coercive nature of the interaction with the police." *Dozier*, 220 A.3d at 946. Because the search of Mr. Greenfield's bag was not voluntary, and police did not articulate *any* reason to believe he had a weapon, Tr. 04/19/2023 ("I asked if he would mind showing me what's inside of his bag, just so I could ensure that there was no weapons in play."), anything discovered in that search should have been "suppressed as the 'fruit of the poisonous tree.'" *Dozier*, 220 A.3d at 940 (quoting *Wilson v. United States*, 102 A.3d 751, 753 (D.C. 2014)).

As a result, the purported arrest of Mr. Greenfield for POCA was unlawful, because without his involuntary search, police would have had no evidence of an open container. Moreover, the trial court's factual finding that Mr. Greenfield was arrested *prior* to the search of his bag was clearly erroneous and contradicted by the record. There were two such findings, one supporting the court's denial of the suppression motion, and one supporting the court's verdict.

In deciding the suppression motion, the trial court found that Mr. Greenfield was arrested *after* he showed police the bottle of Fireball but *before* his bag was searched. And the trial court's findings of fact in its verdict may be read similarly. This finding was clearly erroneous. The court first found that, immediately after police saw the bottle of Fireball, "[a]t that point he is arrested." Tr. 04/19/2023 at 235. The trial court explained its finding: "At that moment you could hear it on the body-worn camera footage . . . . The officer indicates that he is arresting him. He is holding him and he is arresting him." Tr. 04/19/2023 at 235. But the video is part of the record on appeal, and the officer does not say that Mr. Greenfield is being arrested. Rather, the officer says, "yeah, go ahead—*your*, *your*, go ahead, put *your* hands behind your back, yup" and then begins to search the bag. Ex. 1 at 1:20-1:23 (emphasis added). Mr. Greenfield was certainly handcuffed; but there was no other indicia of arrest.

In reaching its verdict, the trial court actually found that Mr. Greenfeld was arrested at contradicting points of time. It first found that he was arrested *at the time* he was handcuffed: At that time, he is arrested, presumably for conceding that he's drinking beer and having the bottle in public in a park." Tr. 04/20/2023 at 37. But then it found he was actually arrested *at the time* he was led off, *after* the search of his bag. "At that time, the defendant is le[d] off, and I think it's in handcuffs. He's arrested at that point by other officers." Tr. 04/20/2023 at 38.

More important, other than the handcuffs (by now ubiquitous in *Terry* stops in the District), there were no indicia of arrest until police found the PCP they were looking for. Mr. Greenfield was not read his rights; he was not informed of any

charges; and he was not led away. Nor did police—contrary to the trial court's factual findings that an officer said "put PCP" into the radio (whatever that might mean), Tr. 04/20/2023 at 38, say anything that indicated Mr. Greenfield was being arrested, rather than detained. The fact of his purported arrest appears to have been used merely to justify the warrantless search that police were determined to conduct without probable cause.

2. Even if police were permitted to search Mr. Greenfield's backpack, they were not permitted to search small containers within that were not capable of containing either weapons or evidence of the reason for his arrest that he could reach.

Even if *some* search were lawful, the search-incident-to-arrest exception allows arresting officers to search *only* "the arrestee's person and the area 'within his immediate control.'" *Davis (Willie) v. United States*, 564 U.S. 229, 232 (2011) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). The allowable search is not limitless. The Supreme Court explained the limits of the search in *Chimel*: (1) to remove any weapons to which the arrestee may have access, and (2) to prevent concealment or destruction of evidence on the arrestee's person. 395 U.S. at 753-54. These limits were later affirmed in *Arizona v. Gant*, in which the Supreme Court held that the search of a passenger car incident to the driver's arrest was permissible only insofar as the arrestee "could have accessed his car at the time of the search." 556 U.S. 332, 344 (2009). The Supreme Court further concluded that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 343.

By the time that Mr. Greenfield's backpack was searched, he was being held and handcuffed by two armed police officers. He could not, therefore, reach his backpack, which was in the sole possession of a third armed officer. And although police might have suspected that there was further evidence of the POCA violation within the backpack, they could not possibly have reasonably expected to find evidence within the headphone case that was within that backpack. Nor did the officer expect to find such evidence, as he actually narrated his search for PCP, not evidence of the POCA arrest.

In *United States v. Davis (Howard)*, 997 F.3d 191 (4th Cir. 2021), the Fourth Circuit examined similar situation. There, Mr. Davis had attempted to elude police, eventually running in a swamp with his backpack, but got stuck in the water. As police ordered him to exit the swamp, Mr. Davis returned to dry land, dropped the backpack, and lay down on his stomach. Handcuffing Mr. Davis, police unzipped the closed backpack and discovered cash and cocaine. *Id.* at 194. Ultimately, the Fourth Circuit applied the holding of *Gant* to "non-vehicular containers that were not on the arrestee's person—in this case, his backpack," observing that because the Supreme Court relied on *Chimel* (a non-vehicle case) in reaching its holding in *Gant*, there is no reason to limit *Gant* to the vehicle context. *Id.* at 197 (quotation marks omitted).

Other circuits agree. *United States v. Naim Nafis Shakir*, 616 F.3d 315, 318 (3rd Cir. 2010) ("[T]here is no plausible reason" to limit *Gant* to the vehicle context.); *United States v. Cook*, 808 F.3d 1195, 1199 n.1 (9th Cir. 2015) ("We do not read Gant's holding as limited only to automobile searches because the Court

tethered its rationale to the concerns articulated in *Chimel*, which involved a search of an arrestee's home."); *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019) (interpreting *Gant* as "focusing attention on the arrestee's ability to access weapons or destroy evidence at the time of the search, rather than the time of arrest, regardless of whether the search involved a vehicle"). Likewise *this Court* has limited the search-incident-to-lawful-arrest exception to areas in which "evidence of the offense of arrest would be found." *United States v. Taylor*, 49 A.3d 818, 828 (D.C. 2012).

3. Police did not reasonably believe that that evidence of the arrest would be found in the headphones case.

In *United States v. Taylor*, this Court upheld suppression of a gun found in a glovebox of a car, after an arrest for DUI, because police did not have reason to believe "that evidence of the offense of arrest would be found there." 49 A.3d at 828. This Court held that a search incident to arrest only permitted police to search in areas where it would be "reasonable to believe that such evidence [of drinking] might be found. *Id.* at 826. In *Taylor*, this Court made clear that it must be more than "*possible* that evidence of drinking" would be found in the place to be searched, but rather that it must be reasonable to find that evidence—that is, that police had a "particularized and objective basis for suspecting that the search" will uncover that evidence. *Id.* at 826 (quotation marks omitted, emphasis original).

Similarly, in *Smith (Gregory)*, this Court reversed the denial of a suppression motion after police, having found a partially consumed bottle of Rémy Martin V, searched a small "otter box" and found, within it, three vials containing

PCP. 283 A.3d at 81. The Court held that "[t]he authority to search—whether justified by a warrant, probable cause, or reasonable, articulable suspicion—is limited to those containers where the object of the search might be concealed." *Id.* at 97. Although the government had argued that the otter box might have contained small items like shot glasses or mini liquor bottles, this Court made clear that the question was not "whether something related to alcohol might conceivably have fit into that otter box, but whether the type of items that officers had reasonable, articulable suspicion to search for would fit in it." *Id.* (holding that officers lacked reasonable suspicion, much less probable cause, to support the search).

At trial, the government provided *no evidence* that police believed they would find either weapons or evidence of POCA in the headphone case—no larger than the otter box in *Smith (Gregory)*—within Mr. Greenfield's backpack. The search of that headphones case, then, even if justified by a lawful arrest (which it was not), was unreasonable and therefore unconstitutional under the Fourth Amendment. The evidence found within the headphones case must be excluded.

4. The search of Mr. Greenfield's backpack was not supported by probable cause.

The smell alone emanating from Mr. Greenfield's immediate area did not provide a particularized suspicion that his backpack contained PCP. In fact, this Court has *never* squarely held that the aroma of a drug near a *bag* to be searched (as opposed to a *place* to be searched), *alone,* provides probable cause to search the bag.

To be sure, a number of cases have held that the smell of a drug, *along with other indicia*, may provide probable cause to search. *See, e.g.*, *Wilson v. United States*, 802 A.3d 367 (D.C. 2002) (police detected "a really strong odor of PCP" *and* saw tin foils consistent with PCP packaging); *United States v. Bolden*, 429 A.2d 185 (D.C. 1981) (police officer smelled marijuana *and* saw tinfoil packets, which in his experience were used to package PCP); *Thompson v. United States*, 368 A.2d 1148 (D.C. 1977) (police officers smelled marijuana *and* saw a hand-rolled cigarette); *United States v. Burton*, 327 A.2d 308 (D.C. 1974) (police officer saw a driver smoking a hand-rolled cigarette, identified the "strange odor" of the smoke, *and* observed a passenger hide something as he approached).

Likewise, this Court has held that the smell of drugs emanating from a vehicle on the street—combined with the vehicle-search exception—will provide probable cause to search the vehicle. *Minnick v. United States*, 607 A.2d 519 (D.C. 1992); *Butler v. United States*, 102 A.3d 736 (D.C. 2014) ("*Minnick*'s holding pertained to [whether] . . . "a police officer who smells the identifiable aroma of a contraband drug emanating from a car . . . can thus search the car and any containers therein under the automobile exception to the warrant requirement."). Furthermore, this Court has held that, in the context of probable cause *to arrest*, "*in appropriate circumstances* odor may serve as the basis or the principal basis for *probable cause to arrest*[,] . . . the officer [must] be able to link the unmistakable odor of [the drug] . . . to a specific person or persons [and] the linkage must be reasonable and capable of articulation." *Butler*, 102 A.3d at 741 (emphasis added, fourth and final alterations added). Yet as this Court made clear

in *Butler*, probable cause *to search* and probable cause *to arrest* "require[] a showing of probabilities as to somewhat different facts and circumstances. . . . The distinction is a critical one . . . [and] there may be probable cause to search without probable cause to arrest, and vice-versa." *Id.* at 740-41 (quoting 2 LaFave, Search and Seizure § 3.1(b) at 12) (first alteration added).

This Court should decline to extend the exception further, and refuse to create the purported plain-smell doctrine (that the government has apparently been advocating for years), permitting a finding of probable cause to search *any bag or package within*, solely based on an officer's mere claim that he can smell drugs. There are ample reasons to decline to create such a doctrine. *First*, Officer Moore agreed at trial that the smell of PCP, much like cigarette smoke, can be "on someone" if they are merely around other people smoking PCP. Tr. 04/19/2023 at 211. As a result, although police believed that the smell was following *Mr. Greenfield*, they did not have any cause to believe that it was emanating from *his bag* in particular until after they had seized it and began to search it. *Second*, an odor that emanates from *a room*, including the space in a vehicle, can be fairly traced to that room. But bags are not like rooms. And to identify drugs within a bag usually requires the use of a drug-sniffing dog, which not only are more-reliable than humans, but must meet actual performance standards. *See Florida v. Harris*, 568 U.S. 237, 246 (2013) (holding that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert"). Yet even though the Supreme Court held, in *Florida v. Harris*, that a defendant "must have an opportunity to challenge such evidence of a

dog's reliability," *id.* at 247, there is apparently no requirement that a defendant be able to challenge the detection abilities of a human who purports to be able to follow the smell of PCP "like the cartoons where something's floating to a pie." Tr. 04/19/2023 at 99. Police must be required to have *at least some* other indicia of the presence of drugs. And here there were none. Police relied *solely* on the smell purportedly following Mr. Greenfield. The Fourth Amendment requires more.

5. No exigency required an immediate search of the bag and the containers therein.

There was no exigency that required police to search the bag on the spot, without a warrant. For instance, police may (in an appropriate amount of time) have held onto the bag while they obtained a warrant. *See, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) (suppressing evidence only because retention of the bag "exceeded the permissible limits" of time). And where the bag and train are leaving the station—figuratively or literally—police may rely on the exigency of their impending departure. *See Symes v. United States*, 633 A.2d 51, 55-56 (D.C. 1993) (holding that the "mobility of the train and its impending departure provided the requisite exigent circumstances").

Here, however, there was no such exigency. Mr. Greenfield was placed in handcuffs. (There were no automobiles or trains to be found.) Police were in complete and total control of both Mr. Greenfield and his bag. There was simply *no impediment* to obtaining a warrant to search the bag, and no reason to believe that any evidence would perish in the meantime. *See* Tr. 04/19/2023 at 58 (expert testifying that the smell of PCP would remain more than four months later).

III. Government's Exhibit 4 was improperly admitted, and without it and its attendant testimony, there was insufficient evidence to convict.

1. The court should not have permitted the government a rebuttal case solely to introduce evidence that it could have introduced in its case-in-chief.

Rebuttal evidence may only be presented "to refute, contradict, impeach or disprove *the evidence that the adversary has already elicited*." *Shelton v. United States*, 983 A.2d 979, 985 (D.C. 2009) (citing *Beynum v. United States*, 480 A.2d 698, 704 (D.C. 1984)) (emphasis added). A trial court's decision to allow rebuttal evidence is reviewed for abuse of discretion. *Id.* (citing *Rowland v. United States*, 840 A.2d 664, 680 (D.C. 2004)).

"[D]eterminations committed to the trial court's discretion are rational acts of decision-making. An *informed* choice among the alternatives requires that the trial court's determination be based upon and drawn from a *firm factual foundation*." *Johnson*, 398 A.2d at 364 (emphasis added). That firm factual foundation requires both valid reasons and supporting facts. "Just as a trial court's action is an abuse of discretion if no valid reason is given or can be discerned for it, so also it is an abuse if the stated reasons do not rest upon a specific factual predicate." *Id.* (citations omitted); *see also Punch v. United States*, 377 A.2d 1353, 1359 (D.C. 1977) ("Since no principled basis for the refusal by the trial judge to accept the plea of guilty is shown, we conclude the trial judge abused his discretion by refusing to accept the tendered plea of guilty, thereby committing error.") (cited in *Johnson*).

"[T]he core of 'discretion' as a jurisprudential concept," this Court explained in *Johnson v. United States*, "is the absence of a hard and fast rule that

fixes the results produced under varying sets of facts." 398 A.2d at 361. In *Johnson*, this Court described the basis of the prohibition of a formulaic answer to a problem that requires analysis: "Failure to exercise choice in a situation calling for choice is an abuse of discretion—whether the cause is ignorance of the right to exercise choice or mere intransigence—because it assumes the existence of a rule that admits of but one answer to the question presented. Similarly, when the trial court recognizes its right to exercise discretion but declines to do so, preferring instead to adhere to a uniform policy, it also errs." *Id.* at 363 (citations omitted).

That error is, in all cases, fatal: "An outright failure or refusal to exercise that judgment is wholly defeating." *Id.* "Purporting to be bound to rule as a matter of law will not satisfy the moving party's claim on the court's discretion." *Id.* at 364 (quoting *Grow v. Wolcott*, 194 A.2d 403, 404 (Vt. 1963)). "Purporting to be bound to rule as a matter of law will not satisfy the moving party's claim on the court's discretion." *Johnson*, 398 A.2d at 364 (quoting *Grow*, 194 A.2d at 404).

Here, the trial court did not canvass alternatives. It did not establish a factual foundation. It simply stated, "They get a rebuttal case." Tr. 04/19/2024 at 241. This is the anthesis of the exercise of judgment. It is simply the statement of an inflexible rule—the government may always put on a rebuttal case—without any exercise of discretion or any inquiry into the available alternatives.

The trial court's decision was also erroneous. The government's evidence was not introduced in rebuttal "to refute, contradict, impeach or disprove" evidence that Mr. Greenfield had elicited. *See Shelton*, 983 A.2d at 985. Mr. Greenfield had not put on a case or introduced any evidence. In fact, the last

evidence adduced by any party was on redirect by the government. Of course, the prejudice to the defendant of an additional, potentially damning (at least, according to the government, piece of evidence, was incalculable. The government opened *and* closed on the vials. *See*, *e.g.*, Tr. 04/19/2023 at 27; Tr. 04/20/2023 at 4, 5, 6, 7. They were the basis of the testimony of *both* government witnesses, including its only fact witness. They were *the proof* the government attempted to use that the smell of PCP could be identified by experts, and highly trained police officers, and therefore should be identifiable by those without any training or experience. For the government, at least, that evidence was key.

2. Much of the fact testimony that the trial court used in its verdict was related to Government's Exhibit 4, which should not have been admitted into evidence.

As a result of the trial court's error—its failure even to recognize, much less exercise, sound discretion—the damage to Mr. Greenfield was catastrophic. Without Exhibit 4. Most of the testimony about the vials elicited during the direct examination of Officer Moore would have to be struck from the record, inasmuch as much of his testimony involved him describing the evidence in his hand, and at times reading from it. Without that testimony—to which defense counsel repeatedly objected—the court may have entertained a reasonable doubt about whether the vials contained anything at all.

Separately, the trial court should have sustained the defense objection to introduction of the DEA-7 contained within the exhibit. *See Fields*, 952 A.2d at 860 (holding that admission of a DEA-7 report "violat[es] . . . appellant's constitutional right to confrontation"). Although the government did not rely on it,

the form was used by Officer Brown, the government's expert, Tr. 04/19/2023 at 56, *and extensively* by Officer Moore, the government's only fact witness, Tr. 04/19/2023 at 107, 112.[9]

With the exhibit excluded, the evidence would have been insufficient to prove Mr. Greenfield guilty. And these errors cannot be considered harmless, because the government cannot show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *See Carrell*, 165 A.3d at 328

CONCLUSION

Because the evidence for attempted possession of a controlled substance was insufficient for conviction, this Court should vacate the trial court's verdict and remand for dismissal. Otherwise, because the search of Appellant's backpack violated the Fourth Amendment, this Court should reverse the trial court's decision on the suppression motion, suppress the alleged (but never-tested) PCP vials under the exclusionary rule, and remand for a new trial without the unconstitutionally obtained evidence—or for dismissal.

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[9] Defense counsel attempted to make a record of Officer Moore's use of the form attached to Government Exhibit 4. "[T]he Government is realizing that what—that this officer didn't actually collect the evidence. There's different names on there. Now, they're trying to cure that by having him read the hearsay document. And for the record, he keeps peeking down when they ask him individuals related to the—and I noticed on three questions when they asked him who are officers with him when the evidence was collected, he peered down three different times upon those questions." Tr. 04/19/2023 at 112. And when the government sought to "refresh [the officer's] recollection," the trial court pointed out that the officer had not asked to refresh his recollection using the evidence, "[b]ecause it's sitting with him. That's kind of counsel's point." Tr. 04/19/2023 at 112.

February 29, 2024

Respectfully submitted,

s/ Richard P. Goldberg

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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2024, I caused the foregoing to be served via the Court's electronic filing and service system, upon all counsel of record.

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

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

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

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

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

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

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

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

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

s/ Richard P. Goldberg	23-CM-433
Signature	Case Number(s)
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