Appeal No. 23-CO-52

DISTRICT OF COLUMBIA COURT OF APPEALS

KEITH JOHNSON,

Appellant,

v.

UNITED STATES,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT

SAMIA FAM

JACLYN FRANKFURT

*WILLIAM COLLINS

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20226
Telephone: (202) 628-1200

*Counsel for Oral Argument

DISCLOSURE STATEMENT

Appellant Keith Johnson was represented at trial in this matter by Attorney Marnitta King. Attorney Richard Stolker represented Mr. Johnson on appeal from the denial of his *pro se* § 23-110 motion, seeking reinstatement of the right to appeal his underlying convictions in this case. On remand following this appeal, Mr. Johnson was represented by Attorney A.J. Amissah, who filed a petition for writ of error *coram nobis* on his behalf. The Public Defender Service for the District of Columbia represents Mr. Johnson on his appeal from the denial of that petition.

The government was represented at trial in this matter by AUSA Jennifer Connor. AUSA Eliot Folsom represented the government during the *coram nobis* proceedings in this matter.

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ISSUES PRESENTED

Where Mr. Johnson sought reinstatement of the right to appeal via a petition for writ of error *coram nobis*, based on the trial counsel's ineffective assistance in the aftermath of his conviction and sentence:

1. Whether the trial judge erroneously subjected Mr. Johnson to a heightened burden of proof, when it concluded that his petition must fail under *Bangura v. United States*, 248 A.3d 119 (D.C. 2021), and given the "stringent" nature of *coram nobis* review, in light of his "fail[ure] to produce any evidence, other than his own testimony";
2. Whether the trial judge reversibly erred in concluding that the absence of corroboration for trial counsel's claim that Mr. Johnson told her to forgo a notice of appeal was irrelevant, given the absence of any burden of proof on trial counsel or the government;
3. Whether the trial judge reversibly erred in curtailing testimony regarding Mr. Johnson's desire to overturn his conviction because it involved a judicial finding that he had threatened to harm his daughter; and
4. Whether Mr. Johnson is entitled to relief as a matter of law, given trial counsel's testimony that he waived his right to appeal based on a mistaken impression that appealing would prevent him or counsel from "focus[ing]" on an appeal of a separate felony conviction or his ongoing custody litigation.

STATEMENT OF THE CASE AND JURISDICTION

Following a bench trial on March 12, 2019, Mr. Johnson was convicted on three counts of attempted misdemeanor threats to do bodily harm, D.C. Code §§ 22-407, -1810, sentenced to time served, and ordered to pay a fine of $150. *See* R. 9 at 160.[1] On June 10, 2019, 60 days after the time to note an appeal had expired, Mr. Johnson moved *pro se* to vacate or set aside his conviction and sentence, alleging counsel's ineffectiveness for failing to timely note an appeal. R. 15 at 3; R. A at 31. After the lower court denied this motion for failure to establish that Mr. Johnson was "in custody" as required by D.C. Code § 23-110, this Court reversed and remanded the case for consideration as a petition for writ of error coram nobis. R. 15 at 3; Order, *Keith Dimitri Johnson v. United States*, No. 19-CO-980 (July 16, 2020). On remand, the lower court held an evidentiary hearing and denied the writ of error coram nobis in an order dated January 12, 2023. R. 15 at 3-7. A timely notice of appeal followed on January 30, 2023. R. 16. This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1) (2001 ed.).

[1] "R. **" refers to docket entries in the appellate record based on the number assigned by the Appeals Coordinator. "7/25/22 Tr. **" refers to the transcript of the evidentiary hearing held in this matter on July 25, 2022. "3/12/19 Trial Tr. **" refers to the transcript of Mr. Johnson's bench trial in the underlying misdemeanor threats case. Because a copy of this transcript was attached as "Exhibit A" to the government's opposition to Mr. Johnson's *coram nobis* petition (R. 9), this Brief refers to the transcript using parallel citations to "R. 9 at ** (3/12/19 Trial Tr. **)."

STATEMENT OF FACTS

A. MR. JOHNSON'S CONVICTION FOR MISDEMEANOR THREATS

Following a bench trial on March 12, 2019, the Honorable Carol Ann Dalton found Mr. Johnson guilty of attempted misdemeanor threats to do bodily harm for statements he made to Joyce and Michael Boyd outside of the courtroom where his defamation lawsuit against them had been dismissed. *See, e.g.*, R. A at 29. At the time of these statements, Mr. Johnson had been seeking permanent custody of his daughter from the Boyds, who had been serving as her legal guardians. R. 9 at 134-35 (3/12/19 Trial Tr. 127-28).[2] After securing temporary custody and visitation rights with the Boyd's consent, Mr. Johnson sued them for defamation in relation to statements they made in the course of the custody proceedings. *Id.* at 135 (3/12/19 Trial Tr. 128). Judge Dalton found that after the lawsuit was dismissed, Mr. Johnson followed the Boyds to the elevators and threatened to throw them over the railing or to go to their house and shoot everyone, his daughter included. *Id.* at 136-37 (3/12/19 Trial Tr. 129-308).

Mr. Johnson was represented in this trial by Marnitta King, who also had represented him in an unrelated felony assault case, which had resulted in a 15-year sentence before Mr. Johnson went to trial for misdemeanor threats. R. 15 at 2. Mr. Johnson's misdemeanor convictions were based in part on evidence to which Ms.

[2] Mr. Johnson learned that he was N.H.'s father around Thanksgiving of 2016. R. 9 at 134 (3/12/19 Trial Tr. 127) (findings of the trial court). Thereafter, he petitioned for custody naming the Boyds as defendants. *Id.*

King strenuously objected. R. 9 at 36-38 (3/12/19 Trial Tr. 29-31).[3] In overruling Ms. King's objection to this evidence and finding Mr. Johnson guilty, Judge Dalton advised Mr. Johnson:

> [Y]ou have the right to appeal my decision. And you can do that within 30 days. And you can talk to --you have a very good attorney who you can talk to about that. The Court makes wrong decisions and the Court of Appeals finds those decisions to be wrong. And there is an issue about whether the Google photos are valid. And other issues. So, I encourage you to talk to your attorney about filing an appeal.

Id. at 142-43 (3/12/19 Trial Tr. 135-36).

Thereafter, the parties proceeded directly to sentencing, where the government sought the imposition of a stay-away order that would prevent Mr. Johnson from contacting his daughter, even after his release from prison in the felony assault case, *id.* at 145 (3/12/19 Trial Tr. 138), and Mr. Johnson expressed his "wish . . . to [remain] some part of [his] daughter's life." *Id.* at 156 (3/12/19 Trial Tr. 149). After declining the government's request, and explaining that the family court judge would determine custody, *id.* at 157 (3/12/19 Trial Tr. 150) ("That's up to Judge Wellner[.]"), Judge Dalton imposed a sentence of time served and a $150 fine, and directed Mr. Johnson to "talk to [his] attorney about appeal," adding he "ha[d] a great attorney." *Id.* at 160-61 (3/12/19 Trial Tr. 153-54).

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[3] That evidence consisted of an image of Mr. Johnson's 2017 indictment for assaulting his brother-in-law in an unrelated case, with the caption "This [is] what [I] need for both of you to know"—"that all that bullshit JOYCE you and your husband pulled today [in] court[.] [Y]ou all gangster in the court." R. 9 at 141 (3/12/19 Trial Tr. 134). This message purportedly had been sent to Joyce Boyd via Google Photos. *Id.*

B. MR. JOHNSON'S § 23-110 MOTION AND *CORAM NOBIS* PETITION

On June 10, 2019, a *pro se* § 23-110 motion to vacate or set aside Mr. Johnson's conviction was filed into the record of Mr. Johnson's attempted misdemeanor threats case. R. 15 at 3. The motion, dated May 31, 2019, listed as grounds for relief that Ms. King had failed to file his notice of appeal as requested. *Id.* at 3, 8. After the lower court denied this motion for failure to establish "custody" as required by § 23-110, this Court reversed and remanded the case for consideration as a petition for writ of error *coram nobis*. *Id.* at 3; Order, *Keith Dimitri Johnson v. United States*, No. 19-CO-980 (July 16, 2020).

On remand, the case was transferred to Judge Deborah Israel who appointed counsel to file a petition for writ of error *coram nobis* on Mr. Johnson's behalf. *See* R. A. at 32; R. 4. The counseled petition alleged trial counsel's ineffectiveness for "fail[ing] to timely file a notice of appeal," despite having been informed by Mr. Johnson that "he wanted to appeal his conviction." R. 5 at 1-2.[4] In opposition, the government submitted an affidavit from trial counsel, attesting that she had failed to note an appeal "based on [a single, post-trial] conversation" with Mr. Johnson, wherein he relayed that he "did not want to note an appeal" because "the Court had sentenced him to time served" and because "he wanted to focus on challenging his felony conviction." R. 9 at 164-65. In addition, the government submitted a letter

[4] The petition went on to allege that this exchange had taken place "on the record" at sentencing. R. 5 at 4. However, counsel explained that he had included this allegation by mistake during the evidentiary hearing. 7/25/22 Tr. 83-84 ("I should have amended my Complaint and I apologize for not doing so.").

that Mr. Johnson wrote to Ms. King on August 25, 2020, wherein he praised her representation in the felony assault case, while seeking her help to obtain certain transcripts from that case. *Id.* at 167. The government argued that when combined with Ms. King's testimony at an evidentiary hearing, these documents would foreclose the merit of Mr. Johnson's petition. *Id.* at 3-5.

C. EVIDENTIARY HEARING ON MR. JOHNSON'S *CORAM NOBIS* PETITION

1. Preclusion of Testimony Regarding Mr. Johnson's Reasons for Requesting an Appeal.

Judge Israel held an evidentiary hearing on July 25, 2022 to test the credibility of Mr. Johnson and Ms. King's competing allegations.[5] Mr. Johnson's theory of the case was that—contrary to Ms. King's assertion that he "did not care about his misdemeanor conviction because the Court had sentenced him to time served," R. 9 at 164-65—"anyone [in his position] would want to appeal this case once they were found guilty," given the "emotional" and "personal" nature of the underlying conviction. 7/25/22 Tr. 13. Mr. Johnson's attorney argued in his opening statement that Mr. Johnson's interest in pursuing an appeal would be manifest once the trial court understood the "case theory" and circumstances surrounding the underlying prosecution. *Id.* To this end, counsel sought to offer Mr. Johnson's own testimony regarding his reasons for wanting to appeal, as well as exhibits from the underlying misdemeanor case and family court proceedings, including the "Gerstein Affidavit

[5] This hearing was hybrid, insofar as Mr. Johnson appeared and testified virtually, while the remaining participants attended in person. 7/25/22 Tr. 8-12.

in support of his underlying arrest in this matter, an order denying his request for production of transcripts free of charge, an order denying his request for an emergency hearing in a domestic relations matter against the Complainants, [and] a trial notice pertaining to the aforementioned domestic relations matter against the Complainants." R. 15 at 12.

Consistent with his opening statement, Mr. Johnson's attorney began his examination of Mr. Johnson by asking him to explain how he knew the Boyds and whether he had succeeded in "obtain[ing] custody of [his] daughter" from them before the misdemeanor case began. 7/25/22 Tr. 15-16. When the government objected that this line of questioning was not relevant, counsel explained that he was "laying a foundation for why [Mr. Johnson] would ask for an appeal in the first place," adding:

> I think it's important for the Court to known a little bit of the background for why Mr. Johnson would even want to appeal the case in the first place. I'm not going to go into every detail about the case at bar, Your Honor. I just do think it's important for foundational issues.

Id. at 16. However, the judge rejected this explanation, believing the issue to be irrelevant to the question whether Mr. Johnson actually requested an appeal:

> THE COURT: So why does the Court need the case theory on that? In other words, why isn't the only issue that is before the Court according to the Court of Appeals, did or did not Mr. Johnson direct his lawyer to appeal and did she or didn't she?
>
> MR. AMISSAH: I mean that is of issue, Your Honor. I just thought it was relevant because I think the Court would know how urgent it was for him to want to file a motion to appeal. I mean yeah to file a notice of appeal in this matter.
>
> THE COURT: Alright. I'm going to sustain the objection on relevance grounds with respect to whether he did or didn't get his child

> back in the custody matter. Mr. Johnson, you won't be answering that question. And you can continue, counsel.
>
> MR. JOHNSON: Yes, ma'am.
>
> Mr. AMISSAH: Your Honor, could I make another brief argument about that? I promise it will be brief.
>
> THE COURT: I just ruled.
>
> MR. AMISSAH: All right, I'll move on, your Honor.

Id. at 16-17.

When counsel resumed his examination of Mr. Johnson by asking if he had ever spoken to Ms. King about the custody matter, the government again objected to relevance. *Id.* at 17-18. This time, counsel explained that he was "trying to establish . . . that this case . . . happened immediately after he was granted custody of his daughter," and that the theory of the case had been fabrication by the Boyds for the purpose of depriving Mr. Johnson of that custody. *Id.* at 18-19. After listening to this argument, the Court reiterated its position that such matters were irrelevant:

> The only issue before the Court is whether there is an ineffective assistance of counsel in the filing of the appeal . . . So from this Court's perspective, I don't think the domestic relations matter has anything to do with what we're talking about today.

Id. at 19. Consistent with this determination, the trial court ruled that each of the documents that Mr. Johnson had offered to explain his interest in pursuing an appeal was irrelevant to the issue of whether he requested an appeal. R. 15 at 12 ("Said exhibits are not relevant to the issue of whether Counsel King received a request from Mr. Johnson or his wife, as alleged, to file a notice of appeal.").

2. Mr. Johnson's Testimony

Mr. Johnson testified that he told Ms. King to note an appeal at counsel table, immediately after Judge Dalton advised him of his right to appeal. 7/25/22 Tr. 25.

Thereafter, he was taken back to the courtroom lockup and was not able speak to Ms. King again. *Id.*; *id.* at 32 (denying that any further conversation had occurred). At some point, having received no notice of appellate counsel's appointment from the Court of Appeals, Mr. Johnson wrote to the Clerk of the Superior Court, who advised that no notice of appeal had been filed. *Id.* at 23-24. Thereafter, according to Mr. Johnson, he and his wife tried to contact Ms. King several times by phone and letter "to find out [her] reason for . . . not filing the notice of . . . appeal." *Id.* at 20. Mr. Johnson testified that when his wife finally reached Ms. King, she said that since Mr. Johnson had "got[ten] a new lawyer," he should "[t]ell her to file the appeal." *Id.* Mr. Johnson believed this comment to be in reference to the fact that he had obtained representation for a motion to vacate or set aside his felony assault conviction under D.C. Code § 23-110, in the case where Ms. King had served as trial counsel. *Id.* at 26.[6] Eventually, he filed a *pro se* 23-110 in this case, seeking reinstatement of his appellate rights and citing Ms. King's ineffectiveness for failing to file a notice of appeal. *Id.* at 23-24, 27-28.

On cross-examination, Mr. Johnson admitted that Ms. King had timely filed

[6] Mr. Johnson further testified to his belief that Ms. King had withheld his notice of appeal on purpose because she "felt some kind of way about [him] filing [a] 23-110" motion in the felony assault case, 7/25/22 Tr. 26, but was impeached with the fact that Ms. King's ineffectiveness had not been alleged in the 23-110 motion that was pending in the felony assault case before the time to note an appeal expired in this case. *See id.* at 47. Ultimately, the trial court found the allegation that Ms. King had omitted Mr. Johnson's notice of appeal on purpose to be incredible. R. 15 at 5, 13. Nevertheless, it was undisputed that Mr. Johnson was appointed post-conviction counsel in the felony assault case on April 9, 2019—just a few days before the time to file a notice of appeal expired on April 11. *See, e.g.*, 7/25/22 Tr. 26.

a notice of appeal upon request in his felony assault case; *id.* at 31; that the transcript in this case did not reflect his request for an appeal at counsel table; *id.* at 35; that he had praised Ms. King's representation in the felony assault case, in his letter dated August 25, 2020; *id.* at 54; and that he had declined to mention Ms. King's failure to note his misdemeanor appeal in the same letter; *id.*

3. Ms. King's Testimony

Although Ms. King's sworn declaration attributed her decision to waive Mr. Johnson's appeal to a single "conversation with Mr. Johnson," R. 9 at 164-65, at the hearing, she claimed that it had been based on two different conversations. According to her live testimony, the first occurred in the courthouse lockup immediately after sentencing. She claimed that she had wanted to speak to Mr. Johnson as soon as possible "because the Judge [had given] him time served" and she wanted to make sure he understood "what that meant." 7/25/22 Tr. 62. Specifically, Ms. King thought that Mr. Johnson might not "need[] more explanation as to what the [time-served] sentenc[e] meant to him," so she "explained [it] to him in the context of the other [felony] case." *Id.*; *see also id.* at 69 ("[W]e talked in the context of th[e] [felony] case and the effect on the other case").

According to Ms. King, when asked whether he wanted to appeal during this initial conversation, Mr. Johnson stated that he was "not worried about" it because he had gotten time-served, and because he had managed to avoid the stay away order that would prevent contact with his daughter even after his release in the felony assault case. *Id.* at 63. Although Ms. King explained that Mr. Johnson could appeal "for other reasons[,] just so he [would not] have yet another conviction" on his

record—which Ms. King believed "would matter" if he "w[o]n the other case" and succeeded in overturning his felony assault conviction—Mr. Johnson maintained that he "did not want to." *Id.* at 70.

Ms. King testified that she "was able to confirm" Mr. Johnson's disinterest in an appeal in a phone call the week after trial. *Id.* at 64. In the call, Mr. Johnson explained that he did not want to appeal his misdemeanor convictions because he wanted Ms. King's help "on the civil side of his case" and with respect to his custody matter against the Boyds. *Id.* According to Ms. King, Mr. Johnson also "wanted [her] to focus on the appeal of" his felony conviction. *Id.* She thought that "he wanted [her] to be the appeals attorney" in that case. *Id.* Although she explained that she "wouldn't be the appeals attorney" for the felony matter, Mr. Johnson nevertheless insisted he did not want Ms. King to note an appeal in this case. *Id.*

According to Ms. King, although Mr. Johnson had sent her a number of letters after this phone call, none of them referred to the misdemeanor case. *Id.* On August 25, 2020, he wrote raising a variety of matters related to the felony assault case. *Id.* at 65. Ms. King provided that letter to the government after learning of Mr. Johnson's claim of ineffectiveness. *Id.*

Ms. King testified that if she were not able to communicate with a client or ascertain his or her wishes before a notice of appeal was due, she "typically" would note one "just to preserve their rights." *Id.* at 66. However, she did not do so in this case because Mr. Johnson "specifically didn't want [her] to file it" and "wanted to have focus on that other case." *Id.* Although Ms. King had provided her cell phone number to Mr. Johnson's wife and had spoken to her before trial in this matter, Ms.

King did not think she had spoken to her since. *Id.* at 75.

On cross-examination, Ms. King admitted that she had raised an objection to the government's evidence in the misdemeanor trial that she believed was meritorious; *id.* at 76-77; that her sworn declaration had omitted any mention of the follow-up phone call that she now claimed to recall; *id.* at 68;[7] and that she not produced any record of her communications with Mr. Johnson, other than his letter dated August 25, 2020; *id.* at 68-69. Regarding the last point, Ms. King offered no explanation for her failure to produce records of her alleged consultation with Mr. Johnson in the courthouse lockup, except to note that she typically took notes during such conversations, *id.* at 73, and that the courthouse conversation should have been recorded in her case management software, as well as the court's "billing system," because she remembered having billed for it. *Id.* at 74. On the other hand, she testified that did not "have a note of th[e] call" where Mr. Johnson allegedly confirmed his desire to waive an appeal because it had been forwarded to her cell phone and she did not bill for it:

> Q Do you regularly keep notes of your calls?
> A The ones that come to my cell phone, sometimes no. If I'm billing it, yes. If I'm billing it, generally I will always put it in my

[7] Ms. King's testimony on the subject was as follows:

> Q. In that affidavit, do you ever mention going back to speak to Mr. Johnson?
> A. I didn't say where I spoke to him.
> Q. Okay. You also never mentioned that he called your office a lot and you guys talked again, correct?
> A. No. I just said I talked of him.

7/25/22 Tr. 68.

caseload or something along those lines.

Id. at 73. Nevertheless, she admitted that the call had been made on a "recorded line" at a jail and thus could have been reproduced, had the government timely requested it. *Id.* at 72-73. For her part, Ms. King "didn't ask the government" to subpoena the phone call. *Id.* at 73. As to Mr. Johnson's letters, Ms. King testified that she withheld everything but the August 25th letter because she had been advised by bar counsel to disclose only that which was relevant to the writ of error *coram nobis*. *Id.* at 81.

4. Summations

In closing, Mr. Johnson's attorney argued that his testimony should be believed because:

- As counsel had been precluded from eliciting during Mr. Johnson's direct examination, *see id.* at 15-17, he had a clear motive to seek an appeal on "principle" alone, given his unwavering perception that he "lost his daughter . . . for something that he did not do," *id.* at 86;
- Unlike the "post-conviction cases" cited by the government, "[t]his [was] not a case [where] [Mr. Johnson] waited a significantly long period of time"; rather, he had "acted immediately because he wanted his opportunity to appeal this case," *id.*;
- Mr. Johnson testified "in great detail [about] how he . . . wr[o]te letters to the Court of Appeals and the Clerk of th[e] [Superior] [C]ourt to find out if his notice of appeal was actually filed," all "with[in] 60 days of being convicted

on his charge," which supported "that there had been some type of communication," which led him to "believ[e] that his case [w]ould be appealed," *id.* at 86-87;[8] and

- Ms. King had admitted, consistent with Mr. Johnson's testimony, that she received numerous letters and phone calls from him right after his appellate rights lapsed, *id.* at 82, 85; although she claimed that none related to this case, counsel argued that her testimony should be disregarded because she had not produced any of his correspondence, apart from the August 25th letter which did not relate to the instant case. *Id.* at 82-83.

In addition, Mr. Johnson's attorney argued that even if trial counsel had jeopardized Mr. Johnson's appellate rights by "mistake," *id.* at 82, because the "communication" with him "broke down," or "because [she] was dealing with so much for [him]" already, it still did not change that he "wanted to appeal this case." *Id.* at 87.

The government argued that Mr. Johnson had failed to meet his "burden to prove that a fundamental constitutional deprivation had taken place" given his failure to produce any relevant correspondence or any testimony from his wife or

[8] Immediately after the hearing concluded, Mr. Johnson also wrote to the Clerk of the Superior Court, *pro se*, seeking a copy of the letter that he had written in 2019, regarding the status of his appeal in this case. *See generally* R. 13. The docket does not indicate that the Clerk ever responded to this letter before the trial court ruled on Mr. Johnson's petition. *See* R.A. at 34.

"anybody else who may have been present or aware of his concerns about Ms. King's failure to note an appeal." *Id.* at 93. The government reiterated these positions in a post-hearing supplement. R. 12 at 2 ("Here, based on the testimony of Ms. King, and in the absence of any compelling evidence establishing the defendant's claim, the defendant has failed to demonstrate that counsel's performance was constitutionally deficient.").

5. Colloquy Regarding the Applicable Burden of Proof and Standard of Review

Amid these arguments, the trial court asked the parties for additional information regarding "the burden" on Mr. Johnson and the "lens" through which to evaluate his claim of ineffectiveness. 7/25/22 Tr. 87-88. Implicit in this inquiry was a belief that the normal standards that apply to a claim of ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984), may not apply by virtue of the *coram nobis* posture in which Mr. Johnson's claim had been brought. The court's concerns in this regard were two-fold. First, the court wanted to know the overall burden of persuasion on Mr. Johnson and whether he had to prove his claim by a "preponderance" of the evidence or by "clear and convincing" evidence. *Id.* at 87. Second, the judge wanted to know whether Mr. Johnson faced a specific burden of "production," *id.* at 88 ("[W]hat's the production level that has to occur?"), which, in her mind, seemed to translate to a requirement that he come forward with evidence beyond his own testimony, *see id.* at 85 ("[W]here is . . . there anything corroborating

[Mr. Johnson's] statements that he requested an appeal?"). With respect to both sets of questions, the court and the government seemed to agree that Mr. Johnson might face a more onerous burden by virtue of the fact that he had brought his claim in a *coram nobis* petition rather than a "regular § 23-110":

> MS. FOLSOM: Well, Your Honor, I still do just want to point out that for the ineffectiveness claim, you know, there is the -- I mean I guess --
>
> THE COURT: It's interesting because it intersects though with the Coram Nobis.
>
> MS. FOLSOM: -- it intersects. And it's slightly different because the question about whether an attorney noted an appeal --
>
> THE COURT: It's not a regular § 23-110.
>
> MS. FOLSOM: It's not a regular § 23-110.
>
> THE COURT: Right. So[,] it loads in, in the form of a Coram Nobis. And so[,] we thought okay. So[,] then what is our -- what is our review lens? So[,] I don't know the answer. . . .

Id. at 89.

As to the former question, Mr. Johnson's attorney argued that the "preponderance" standard was appropriate. *Id.* at 87-88. As to the latter, he argued that extrinsic corroboration should be unnecessary, given the promptness and internal consistency of Mr. Johnson's claim, *id.* at 86-87, given that the relief sought (reinstatement of the right to appeal) was not so tempting as to warrant knowing fabrication, *id.* at 85-86, and given the difficulty of maintaining correspondence and producing witnesses as an incarcerated person. *Id.* at 83, 85, 94. Counsel argued that, by contrast, Ms. King's failure to corroborate the alleged conversations where Mr. Johnson purportedly waived his right to appeal should weigh against her credibility

because, although Mr. Johnson was "not in a position where he [could] . . . photocopy the letters [he sent] or save [them] on a flash drive or a computer, . . . Ms. King [was]." *Id.* at 83. He argued that unlike Mr. Johnson, Ms. King was "an attorney," who was "supposed to keep her client's file," and that it strained credulity that the August 25th letter was the one that had any bearing on this case: "[W]e're supposed to sit here and believe that that one letter is the only letter she could have provided[.]" *Id.* at 94. The trial court rejected the argument that these circumstances were relevant to Ms. King's credibility however, reasoning that although counsel had "focused on Ms. King and whether [she] did everything she could today," it was "not actually her burden." *Id.* at 85.

While confessing a certain ignorance about the "standard of review," the government maintained the position articulated in its written opposition that the case was generally controlled by *Bangura v. United States*, 248 A.3d 119 (D.C. 2021), 7/25/22 Tr. 88-89; *see also* R. 9 at 2 (citing *Bangura*, 248 A.3d 119); R. 12 at 2-3 (same)—a case which had involved an unexplained, "nearly 22-year delay" before the petitioner alleged counsel's ineffectiveness for failing to file a notice of appeal, where this Court declined to overturn the lower court's factual finding that the petitioner's allegation, in an affidavit unsupported by testimonial evidence, was not credible. *Bangura*, 248 A.3d at 125.

D. DENIAL OF MR. JOHNSON'S *CORAM NOBIS* PETITION

In a written order dated January 12, 2023, the trial court denied Mr. Johnson's petition, finding that relief had been foreclosed by Mr. Johnson's "fail[ure] to produce any evidence, other than his own testimony" to support his claim. R. 15 at 11; *see also id.* at 14 (". . . Mr. Johnson has failed to produce any relevant corroborating evidence, relying solely on his own testimony."); *id.* at 14-15 ("Having the burden of proving the allegations in his Petition, Mr. Johnson failed to produce sufficient evidence – anything more than his own testimony – corroborating that he requested Counsel King to file a notice of appeal."). En route to this determination, the trial court observed that *coram nobis* review is "much more stringent" than review under 23-110. *Id.* at 10 (quoting *Stevens v. United States*, 944 A.2d 466, 467 (D.C. 2008) (internal quotation marks omitted)); *accord id.* at 11.[9] Moreover, and consistent with the government's arguments, the court reasoned that *Bangura*, 248 A.3d 119, was "on point," given the "glaring absence" of corroboration in both cases. R. 15 at 12. In this regard, the court noted that support for Bangura's nearly-twenty-two-year-old claim of ineffectiveness had "'consisted solely of [an] affidavit,'" which the trial court deemed merely "'perfunctory' when weighed against the trial attorney's testimony." *Id.* (citation omitted). Although Mr.

[9] For this reason, and because it believed the matter to be unsettled under this Court's precedents, the trial court reasoned, *sua sponte*, that a *coram nobis* petitioner like Mr. Johnson must show counsel's ineffectiveness "by clear and convincing evidence at a minimum," rather than by a mere preponderance of the evidence, as would be true for someone pursuing such a claim under D.C. Code § 23-110. R. 15 at 11. Even so, the trial court denied Mr. Johnson's petition because it believed he had not satisfied the more lenient "preponderance" standard. *Id.*

Johnson had waited a much shorter period of time to seek relief—"just over a month," *id.* at 8—and had testified, rather than merely submitting a "perfunctory" affidavit, the trial court reasoned that Mr. Johnson's case was indistinguishable from *Bangura* because, just as *Bangura* had come down to the petitioner's affidavit, so too had "the only pertinent evidence presented by Mr. Johnson . . . [been] his own testimony." *Id.* at 12 (internal quotation marks and citation omitted).

In the court's view, although Mr. Johnson had offered numerous records from the underlying misdemeanor and family court cases to illustrate his strong "personal" and "emotional" interest in an appeal, 7/25/22 Tr. 13, and his unwavering belief that he "lost his daughter . . . for something that he did not do," *id.* at 86,[10] these "exhibits [were] not relevant to the issue of whether Counsel King received a request . . . from Mr. Johnson or his wife to file a notice of appeal." R. 15 at 12. Moreover, while Mr. Johnson alleged that his wife had called Ms. King about the appeal multiple times,[11] he neither offered her as a witness nor produced her sworn affidavit. *Id.* Finally, although Mr. Johnson filed his petition "prompt[ly]" after the time to note an appeal expired, the court reasoned that this factor could not supply

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[10] As noted *supra*, these documents included the "Gerstein Affidavit in support of his underlying arrest in this matter, an order denying his request for production of transcripts, an order denying his request for an emergency hearing in a domestic relations matter against the Complainants, [and] a trial notice pertaining to the aforementioned domestic relations matter against the Complainants." R. 15 at 12.

[11] The trial court misapprehended Mr. Johnson's testimony in this regard, believing he had "testified that his wife made multiple calls to Counsel King instructing her, on his behalf to file the appeal." *Id.* at 12. In reality, Mr. Johnson testified that his wife had called *after* the time to file a notice had expired in order to "find out [Ms. King's] reason for . . . not filing the notice of . . . appeal." 7/25/22 Tr. 20.

the requisite corroboration because it was "simply indicia of his [current] eagerness to challenge the conviction" and "not evidence that he actually [asked counsel to] challenge[] the conviction within the timeframe to file an appeal." *Id.* at 13.

The court went on to reason that, even assuming Mr. Johnson's "promptness [did] allow his testimony to have more probative value than the petitioner's affidavit had in *Bangura*," relief still would not be warranted because, in the court's view, Ms. King's testimony was "more credible" than Mr. Johnson's. *Id.* In this regard, the court found that Ms. King's live testimony was "generally consistent with her written declaration," *id.*, despite the declaration's omission of at least one of the "conversation[s]" that counsel had referred to on the witness stand. *Compare* R. 9 at 164-65 (referring to a single "conversation") *with* 7/25/22 Tr. 63-64 (describing two conversations). The court further found Ms. King credible because she had filed a notice of appeal upon request in the felony assault case; because, contrary to Mr. Johnson's suggestion, there was no evidence that she had withheld a notice of appeal to retaliate against him filing a § 23-110 in his felony assault case;[12] and because, in his letter dated August 25, 2020, Mr. Johnson had "demonstrate[d] nothing but . . . praise for [Ms. King's] work." R. 15 at 13-14. The court rejected the argument that

[12] The court found that Mr. Johnson's credibility had been "undermined" by his belief that Ms. King withheld his notice of appeal on purpose, *id.* at 13, because that belief had been based on the idea that she wanted to retaliate against him for succeeding on a claim of ineffectiveness against her in the felony assault case, *see* 7/25/22 Tr. 26, when, in reality, no such claim had been filed until after Mr. Johnson's right to appeal had expired in this case. R. 15 at 13. However, it was undisputed that Mr. Johnson was appointed post-conviction counsel in his felony assault case on April 9, 2019—only a few days before his window to file a notice of appeal expired. *See, e.g.*, 7/25/22 Tr. 26; *see supra* note 3.

this letter had been "taken out of context" because it was the only available "proof of communication between [Ms.] King and Mr. Johnson." *Id.* at 14.

More generally, the court rejected Mr. Johnson's argument that the absence of corroboration for Ms. King's testimony should weigh against her credibility because Mr. Johnson alone bore the burden of proof with respect to his *coram nobis* petition and "could have [either] produced the [missing] materials" himself or "made a discovery request for copies of any materials he wanted." *Id.*; *accord id.* ("Mr. Johnson did not argue that Counsel King or the [g]overnment [had] failed to produce materials he requested."); *id.* ("[T]he [g]overnment did not bear the burden of proof in this matter. That Counsel King – or the [g]overnment – could have produced more evidence does not offset the lack of evidence on Mr. Johnson's part, particularly when he is the one who bears the burden of proof."). For these reasons, the trial court ruled that Mr. Johnson had "failed to demonstrate that his appellate rights were lost as a result of ineffective assistance of counsel," and that "coram nobis relief [was] [therefore] unavailable to [him]." *Id.* at 14-15.

SUMMARY OF ARGUMENT

In denying Mr. Johnson's petition for writ of error *coram nobis*, the trial judge committed three errors which mandate reversal. First, the judge erred in holding Mr. Johnson to a heightened burden of proof or production, with respect to his claim that he requested a notice of appeal. Contrary to the trial court's reasoning, neither *Bangura v. United States*, 248 A.3d 119 (D.C. 2021), nor the "stringent" nature of *coram nobis* review, R. 15 at 11 (internal quotation marks omitted), compels or even supports the trial judge's determination that, in "fail[ing] to produce . . . anything more than his own testimony," Mr. Johnson "failed to produce sufficient evidence . . . that he requested Counsel King to file a notice of appeal." *Id.* at 15.

Second, the judge erred in determining that the absence of corroboration for Ms. King's claim that Mr. Johnson waived his right to appeal was irrelevant, given that neither she nor the government bore a specific "burden of proof" with respect to that testimony. *Id.* at 14. As this Court has held, the absence of evidence tending to corroborate a witness's testimony is relevant to that witness's credibility, regardless of whether the offering party faces a burden of proof with respect to the testimony at issue. *See, e.g.*, *Harris v. United States*, 602 A.2d 154, 165 (D.C. 1992).

Third, the trial judge erred in precluding Mr. Johnson's testimony regarding his ongoing custody litigation against the Boyds, based on its impression that it "ha[d] [no]thing to do with" the credibility of his claim that he requested a notice of appeal. 7/25/22 Tr. 19. Mr. Johnson's subjective belief that his conviction in this case had caused (or would cause) him to "los[e] his daughter . . . for something that he did not do," *id.* at 86, was relevant to whether he requested an appeal, as it tended

to show, at a minimum, that he had a "personal" and "emotional" interest in pursuing one, *id.* at 13, notwithstanding his time-served sentence.

Even setting these errors aside, and taking Ms. King's testimony as true, relief is warranted because the record shows that any purported waiver of the right to appeal was infected by her failure to address Mr. Johnson's mistaken impression that an appeal in this case would somehow prevent one or both of them from "focus[ing] on the appeal of" his felony assault conviction or his ongoing custody litigation. 7/25/22 Tr. 66; *see Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (noting counsel's duty to advise regarding the "advantages and disadvantages of taking an appeal"). In light of the foregoing and given the nature of the relief requested, this court should reverse and remand with directions to vacate and reenter the order of judgment and commitment to allow Mr. Johnson to note an appeal. *See* D.C. Code § 17-306; *cf. McCormick v. United States*, 635 A.2d 347, 351 (D.C. 1993); *Thompson v. Thompson*, 559 A.2d 311, 315 n.8 (D.C. 1989).

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED BY SUBJECTING MR. JOHNSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL TO A HEIGHTENED BURDEN OF PROOF.

The trial court erred in holding Mr. Johnson to a heightened burden of proof and production, with respect to his claim that counsel performed deficiently by failing to file a notice of appeal after he specifically requested that she do so. The record shows that after questioning whether Mr. Johnson faced a heightened burden of "production" with respect to this claim because it had been brought via petition for writ of error *coram nobis* and not "a regular § 23-110," 7/25/22 Tr. 88-89 ("[W]hat's the production level that has to occur?"), and expressing doubt that Mr. Johnson had been able to satisfy that burden because he had not advanced enough corroboration, *see id.* at 85 ("[W]here is . . . there anything corroborating [Mr. Johnson's] statements that he requested an appeal?"), the trial court denied Mr. Johnson's petition because he "failed to produce any evidence, other than his own testimony." R. 15 at 11; *see also id.* at 14 (". . . Mr. Johnson has failed to produce any relevant corroborating evidence, relying solely on his own testimony."); *id.* at 14-15 ("Having the burden of proving the allegations in his Petition, Mr. Johnson failed to produce sufficient evidence – anything more than his own testimony – corroborating that he requested Counsel King to file a notice of appeal."). The court reasoned that Mr. Johnson needed some "evidence, other than his own testimony," in light of *Bangura*, 248 A.3d 119, where this Court affirmed the denial of a coram nobis petition that was based solely on the defendant's affidavit alleging counsel's deficient failure to file a notice of appeal nearly twenty-two years before. R. 15 at

11-12. The court further reasoned, more generally, that a heightened burden of proof should apply, given this Court's prior indications that *coram nobis* review is "'much more stringent'" than ordinary habeas corpus. *Id.* at 10 (quoting *Stevens v. United States*, 944 A.2d 466, 467 (D.C. 2008) (internal quotation marks omitted)); *accord id.* at 11. Because, contrary to the trial court's reasoning, *Bangura* is not "on point" in any way, *id.* at 12, and *coram nobis* review imposes no greater burden of proof on Mr. Johnson than if his claim had been brought in "a regular § 23-110," 7/25/22 Tr. 89, the court's denial of Mr. Johnson's petition should be reversed.

To begin with, *Bangura* is not in any sense "on point" with respect to Mr. Johnson's need, *vel non*, to provide specific forms of corroboration for the allegations of his petition. *See Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944) (admonishing that "words of [the Court's] opinions are to be read in the light of the facts of the case under discussion"). *Bangura* is inapposite first, because it involved an unexplained near-twenty-two-year delay that this case does not. Bangura had been sentenced to two concurrent two-year terms of probation, in connection with a controlled substances offense, and had waited "more than two decades" to attempt to challenge trial counsel's failure to file a notice of appeal on his behalf. *Bangura*, 248 A.3d at 120. Thereafter, the trial court held an evidentiary hearing at which trial counsel testified for the government, and Bangura "chose not to testify or present any witnesses," opting instead to rely exclusively on the allegations of an affidavit he had prepared. *Id.* at 121. Against this backdrop, the trial court denied relief, finding Bangura's proof to be "insufficient" and his claim to be "perfunctory," "conclusory," and "palpably incredible." *Id.* at 124 (internal

quotation marks omitted).

Contrary to the trial court's reasoning in this case, the basis for the *Bangura* court's determination was not simply the fact that Bangura had adduced no "support for his contention" other than his own affidavit, which came to naught, "when weighed against the trial attorney's testimony." R. 15 at 12 (internal quotation marks and citations omitted). Rather, it was Bangura's *near-twenty-two-year* "*delay* in asserting his claim that substantially diminished [his] credibility" in the eyes of the trial court. *Bangura*, 248 A.3d at 124 (emphasis added). Although this delay was exacerbated by Bangura's "'fail[ure] to . . . present 'corroborative evidence,'" it was also exacerbated by his failure to testify or "provide an explanation that justified his delay in presenting his claim '(e.g., duress, fear, or other sufficient cause).'" *Id.* at 124-25. Thus, *Bangura* offers no basis to conclude that "corroborative evidence" is necessary to obtaining *coram nobis* relief—least of all in a case like this one, where Mr. Johnson subjected himself to the rigors of cross-examination on the witness stand, and had far less to explain in the first place, having come forward with his claim of ineffectiveness only a month and-a-half after he lost his right to appeal.

The trial court clearly took from *Bangura* a legal test that corroborative evidence must be presented to support Mr. Johnson's testimony, or that testimony lacks value. The court reasoned that although Mr. Johnson had waited a much shorter period of time to seek relief—"just over a month," compared to the two decades at issue in *Bangura*, R. 15 at 8—and had testified, rather than merely resting on a "perfunctory" affidavit, the two cases were indistinguishable given Mr. Johnson's failure to produce any evidence, other than "his own testimony" to support his claim.

Id. at 12 (citation and internal quotation marks omitted); *accord id.* at 12 ("Just like the petitioner in *Bangura* presented nothing other than his own affidavit, the only pertinent evidence presented by Mr. Johnson in this proceeding is his own testimony."); *id.* at 11 (reasoning that Mr. Johnson failed to meet the "minimum evidentiary standard" given his "[u]ltimate[] . . . fail[ure] to produce any evidence, other than his own testimony, in support of his claim."); *id.* at 14 (". . . Mr. Johnson has failed to produce any relevant corroborating evidence, relying solely on his own testimony."); *id.* at 15 (". . . Mr. Johnson failed to produce sufficient evidence – anything more than his own testimony – corroborating that he requested Counsel King to file a notice of appeal"). No such legal requirement for corroborative evidence exists. Because the trial court's ruling on Mr. Johnson's petition was infected by a misunderstanding of the governing law, it must be reversed. *See In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991) ("Judicial discretion must, however, be founded upon correct legal principles, . . . and a trial court abuses its discretion when it rests its conclusions on incorrect legal standards.") (citations omitted); *see also Johnson v. United States*, 398 A.2d 354, 368 (D.C. 1979) (reversing in light of the trial court's "fail[ure] to apply the proper legal principles to its discretionary choice.").

Insofar as caselaw sheds any light on the credibility of Mr. Johnson's claims, it suggests that the trial court set the bar for threshold sufficiency and credibility much too high. Courts tend to approach testimony with the kind of skepticism that the court brought to this case only when, as in *Bangura*, the testimony is "proffered by an interested party as to occurrences of long ago," or when the opposing party counter's the testimony with "probative documentary evidence." *U.S. ex rel.*

Brennan v. Fay, 353 F.2d 56, 59 (2d Cir. 1965). Neither circumstance was applicable here. And "[c]ommon sense" allows that even in these circumstances, "the strongest contrary oral testimony" may yet "prevail." *Id.* ("[T]he quantum of proof which a petitioner must put in his pan in order to make it preponderate necessarily depends on what the state has put in its.").

The judge's erroneous application of *Bangura* was compounded by her erroneous belief that *coram nobis* review imposes a greater burden of proof on Mr. Johnson than if his claim had been brought via "a regular § 23-110." 7/25/22 Tr. 89. Although the trial court believed there to be some judicial "disagreement . . . over what level of evidentiary burden the petitioner must bear to meet the *Strickland* prongs," and further believed this issue to be undecided in the District of Columbia, R. 15 at 10, it is well settled that "the general burden of proof in postconviction proceedings with regard to factual contentions—for example, those relating to whether defense counsel's performance was deficient"—is the "preponderance" standard. *Holland v. Jackson*, 542 U.S. 649, 654 (2004); *see also, e.g.*, *Bellinger v. United States*, 294 A.3d 1094, 1103 (D.C. 2023) ("While it is true that Bellinger did not have ironclad proof that [trial counsel] knew of the [exculpatory evidence] before trial, he needed to prove the facts underlying his ineffective assistance claim only by a preponderance of the evidence." (citing *Benitez v. United States*, 60 A.3d 1230, 1235 (D.C. 2013)). The Supreme Court has never suggested that any other standard applies to petitions for writs of error *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a). Notably, in *United States v. Morgan,* 346 U.S. 502, 512 (1954), the Court held that such relief should be available "[u]nder the rule of" *Johnson v. Zerbst*, 304

U.S. 458 (1938), which, in turn, allows for collateral relief whenever the defendant shows "by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel." *Zerbst*, 304 U.S. at 469.

Consistent with *Morgan*, federal authorities have been unanimous that petitions for writs of error *coram nobis* impose no greater burden of proof on the petitioner than the preponderance standard. *See, e.g.*, *Numer v. United States*, 170 F.2d 352, 352 (6th Cir. 1948); *Kramer v. United States*, 579 F. Supp. 314, 315 (D. Md. 1984); *Hayes v. United States*, 468 F. Supp. 179, 185 (S.D. Tex. 1979) (same). And this Court has joined numerous federal circuit courts of appeal in holding that a "successful claim of ineffective assistance of counsel" suffices in and of itself to warrant *coram nobis* relief, so long as it is based on information extrinsic to the record and unknown to the trial judge, which the defendant was justified in failing to bring forward previously. *Fatumabahirtu v. United States*, 148 A.3d 260, 268 (D.C. 2016); *accord id.* at 268 n.13 (noting that Federal courts, applying the same statute, have found it appropriate to grant coram nobis relief for Strickland claims) (citing *United States v. Akinsade*, 686 F.3d 248, 256 (4th Cir. 2012); *United States v. Castro*, 26 F.3d 557, 559 & n.5 (5th Cir. 1994); *United States v. Rad–O–Lite of Phila., Inc.*, 612 F.2d 740, 744 (3d Cir. 1979)); *see also, e.g.*, *United States v. Drobny*, 955 F.2d 990, 996 (5th Cir. 1992) ("Under *Morgan*, if Drobny could prevail on his ineffective assistance of counsel claim, he would be entitled to relief even under the rigorous standards of *coram nobis*."). Therefore, Mr. Johnson faced no heightened burden of persuasion or production with respect to the first prong of the *Strickland* inquiry. His only burden was to come forward with some evidence, direct

or circumstantial, that would support a finding of counsel's deficiency by a preponderance of the evidence.

The trial court's erroneous application of *Bangura* and erroneous determination of the standard of review clearly infected her ruling. Although the trial court purported to find Mr. Johnson's evidence insufficient even "through the lens of the preponderance of evidence standard," despite determining that clear and convincing evidence was required, R. 15 at 11, the strict corroboration requirement that the court imposed was fundamentally inconsistent with a preponderance standard. Pursuant to that standard, it should have been enough for Mr. Johnson to come forward with "evidence . . . that would permit the trial court to infer that" he asked for an appeal. *See, e.g.*, *Pereida-Alba v. Coursey*, 342 P.3d 70, 80 (Or. 2015) (holding that the defendant had met his "burden of production" with respect to *Strickland's* first prong where circumstantial "evidence in the record would permit the trial court to infer that petitioner's counsel did not make a conscious choice to forego asking for an instruction on [lesser and included offense]"). And although the trial judge purported to rest her ruling on a finding that Ms. King's testimony was "more credible" than Mr. Johnson's, R. 15 at 13, the trial court pointed repeatedly to Mr. Johnson's "burden" and the "sufficiency" of his showing in reaching this determination. *See id.* at 14-15 ("Having the burden of proving the allegations in his Petition, Mr. Johnson failed to produce sufficient evidence – anything more than his own testimony – corroborating that he requested Counsel King to file a notice of appeal."); *id.* at 14 (noting the "lack of evidence on Mr. Johnson's part"). Given her misunderstanding of the governing legal standards, the trial judge's ruling cannot

stand. *See, e.g.*, *Bailey v. United States*, 251 A.3d 724, 730 (D.C. 2021) (reversing and remanding where the trial court's "articulations [were] in serious tension with a preponderance standard").

II. THE TRIAL COURT REVERSIBLY ERRED BY IGNORING TRIAL COUNSEL'S DUTY TO "KEEP APPROPRIATE RECORDS OF [MR. JOHNSON'S] WAIVER" OF THE RIGHT TO APPEAL.

The trial court further erred in insisting that the absence of corroboration for Ms. King's testimony was irrelevant to the appraisal of her credibility, based solely on the fact that, unlike Mr. Johnson, neither Ms. King nor the government bore any burden of proof with respect to the *coram nobis* petition. R. 15 at 14 ("[T]he Government did not bear the burden of proof in this matter. That Counsel King – or the Government – could have produced more evidence does not offset the lack of evidence on Mr. Johnson's part, particularly when he is the one who bears the burden of proof."); *see also* 7/25/22 Tr. 85 (noting that although counsel had "focused on Ms. King and whether [she] did everything she could today," it was "not actually her burden"). Contrary to the trial court's determination, the absence of evidence tending to corroborate a witness's testimony is relevant to the credibility that witness's testimony, even where, as here, the offering party faces no burden of proof with respect to the testimony in question.

As this Court and the Supreme Court have held, the failure to produce corroborative evidence can undermine the strength of a party's case. *See Greer v. United States*, 697 A.2d 1207, 1210 (D.C. 1997) (noting that "it is the absence of evidence upon [material] matters that may provide the reasonable doubt that moves

a jury to acquit" (internal quotation marks and citations omitted)); *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (noting that commentary on the absence of evidence may properly "discredit the caliber" of the government's case (internal quotation marks and citations omitted)). This doctrine does not apply solely to the party bearing the burden of proof. Rather, it is rooted in the inferences that arise whenever a party or witness declines to produce evidence that he or she "might reasonably be expected to present." *Greer*, 697 A.2d at 1210; 2 McCormick on Evid. § 264(d) (8th ed.) ("When it would be natural under the circumstances for a party to call a particular witness, or to take the stand as a witness in a civil case, or to produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference." (footnotes omitted)). It is for this reason that the government "ha[s] the right" to comment on the relative lack of corroboration for a defense witness's testimony in a criminal case. *See Harris v. United States*, 602 A.2d 154, 165 (D.C. 1992) (holding that such argument did not improperly shift the burden). And it is for the same reason that the jury may consider lack of corroboration in evaluating witness credibility in a criminal trial, regardless of whether the witness has been offered by the prosecution or defense. Criminal Jury Instructions for the District of Columbia, No. 2.200 (5th ed. 2023) ("You may consider whether the witness has been contradicted or supported by other evidence that you credit."); *accord Greer*, 697 A.2d at 1210 n.5 (noting a previous instruction that the jury "*may consider whether the witness has been contradicted or corroborated by other credible evidence*." (quoting Criminal Jury Instructions for the District of Columbia, No. 2.11

(4th ed. 1993)).

Ms. King's failure to produce documentation of Mr. Johnson's waiver of his right to appeal was highly relevant to the credibility of her account that he had, in fact, waived that right because it tended to support his theory that she fabricated the waiver to justify her failure to file a notice of appeal as instructed. Significantly, Ms. King offered no explanation for failing to produce documentation of her initial consultation with Mr. Johnson in courthouse lockup, except to note that such documentation should exist given her general practice of taking notes during client conversations, *id.* at 73, and her assertion that she had billed for this conversation in particular. *Id.* at 74.

Moreover, although Ms. King testified that she did not have any record of the phone call where Mr. Johnson allegedly confirmed his desire to waive his appeal because it had been forwarded to her cell phone and because she declined to bill for it, *id.* at 73, it was just as possible that she did not actually answer any of Mr. Johnson's phone calls, as Mr. Johnson has contended all along. *See, e.g.*, *id.* at 25 (denying any further conversation with Ms. King after the trial). Notably, Ms. King's declaration failed to specifically mention any phone call, stating instead that the decision to waive Mr. Johnson's appeal had been "[b]ased on [a single] conversation with him." R. 9 at 165; *see also* 7/25/22 Tr. 68 ("Q. Okay. You also never mentioned that he called your office a lot and you guys talked again, correct? A. No. I just said I talked to him."). And she admitted that any post-trial call from Mr. Johnson would have come from a "recorded line[]" such that it could have been reproduced, had the government timely requested it. *Id.* at 72-73. However, she made no attempt to

facilitate the government's acquisition of this evidence. *Id.* at 73. Especially given the circumstances suggesting that Mr. Johnson did want to appeal this conviction—e.g., the promptness of his request for reinstatement of his right to appeal, his apparently nonfrivolous ground for appeal, his financial interest in avoiding the $150 fine associated with the conviction, and his "personal" and "emotional" interest in challenging the conviction, 7/25/22 Tr. 13, as discussed further below—Ms. King's failure to provide the kind of corroboration that one "might reasonably . . . expect[]," *Greer*, 697 A.2d at 1210, should have factored into the court's assessment of how much weight to give her testimony. [13]

Rather than grappling with the implications of Ms. King's failure to corroborate for her assertion of waiver, the trial court viewed the lack of corroboration as legally irrelevant, simply because the government did not bear

[13] Moreover, while Ms. King explained her failure to provide more of Mr. Johnson's correspondence to the government by pointing to bar counsel's advice that she should disclose only that which was relevant to the writ of error *coram nobis*, 7/25/22 Tr. 75, this did not explain her failure to furnish the correspondence to Mr. Johnson when the case was over. Ms. King had a duty to preserve and deliver the "entire contents of [Mr. Johnson's] file" upon the termination of representation, including "all notes, memoranda and correspondence constituting 'work product.'" D.C. Bar Ethics Opinion 333 (Dec. 20, 2005), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-333 (internal quotation marks and citation omitted); *see also* D.C. Bar Ethics Opinion 283 & n.3 (July 15, 1998), https://www.dcbar.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-283; D.C. R. Prof. Responsibility 1.16(d) (providing for counsel's duty to "surrender[] [the] papers and property to which the client is entitled" at the end of the representation). However, she did not even bring the correspondence with her to the evidentiary hearing, where Mr. Johnson's attorney could review and take possession of it on his behalf. *See* 7/25/22 Tr. 69 (noting that she did not have the file in her possession).

burden of proof, and compounded this error, by blaming Mr. Johnson for either failing to "produce[] the [missing] materials" himself or "ma[ke] a discovery request for the materials he wanted." R. 15 at 14. However, as Mr. Johnson's attorney noted at the evidentiary hearing below, the incarcerated Mr. Johnson was "not in a position" to provide copies of the letters he wrote to Ms. King, 7/25/22 Tr. 83; *accord id.* at 94, and there is no reason that Mr. Johnson should have thought to request evidence of a phone call that Ms. King did not allege until the evidentiary hearing itself.[14]

Moreover, this line of reasoning cannot be squared with the obligation this Court has placed on trial counsel to "keep appropriate records of [appellate] waiver[s]." *(Lorin) Johnson v. United States*, 513 A.2d 798, 803 n.2 (D.C. 1986). In *(Lorin) Johnson*, this Court held that the knowing, voluntary, and intelligent waiver standard under *Johnson v. Zerbst*, 304 U.S. 458, governs "the adequacy of a criminal appellant's waiver of his right to appeal when the appellant moves to dismiss or withdraw an appeal," *(Lorin) Johnson*, 513 A.2d at 800, and that such waivers must

[14] The trial court was wrong as a factual matter when she reasoned that any gaps in the record with respect to Mr. Johnson's correspondence with Ms. King were solely attributable to him as the petitioner because he "could have produced the same materials [as Ms. King] [since] they were communications between" the two of them. R. 15 at 14. Although there is much evidence in the record to support that Mr. Johnson wrote to Ms. King "a lot" after he was transferred from the jail to the BOP, 7/25/22 Tr. 64, there is no evidence at all to suggest that she ever wrote him back. Indeed, Mr. Johnson's testimony that Ms. King never responded to his letters was unrebutted. *See* 7/25/22 Tr. 25, 32. As Mr. Johnson's attorney noted during the evidentiary hearing, Mr. Johnson was "not in a position where he [could] . . . photocopy the letters [he sent] or save [them] on a flash drive or a computer" because he was "locked up." *Id.* at 83.

be documented "by a statement signed by the appellant" revealing "knowledge of the appeal right, advice of counsel on possible successful issues to be raised, if any, attendant remedies, if any, and a freely given waiver" of the aforementioned right, issues, and remedies. *Id.* at 803.[15] The Court went on to recognize that the same principles must inform counsel's decision to waive an appeal by failing to note it, *id.* at 803 n.2, and imposed on counsel a duty to secure and maintain written documentation of any waiver underlying such a decision: "Of course, waiver of appeal by a decision not to file a notice of appeal should be guided by this decision, and *in such an event counsel should keep appropriate records of the waiver*." *Id.* (emphasis added); *see also id.* at 803 n.3 ("Of course, counsel is expected to keep records of the nature and scope of the advice given to inform the waiver."). Given trial counsel's court-imposed obligation to "keep appropriate records" of any waiver of appellate rights, *id.*, the trial judge erred by holding the lack of such documentation against Mr. Johnson in her credibility analysis. Because the trial court erred in determining that the absence of corroboration for Ms. King's claim that Mr. Johnson told her not to file a notice of appeal was irrelevant, the ruling below should be reversed.

[15] The Court deemed such signed statements a necessity for providing "assurance that the defendant ha[d] made an intelligent, knowing and voluntary decision to waive his appeal," given that the Court could not perform its own contemporaneous waiver inquiry like that which occurs under Rule 11, when a defendant elects to plead guilty. *Id.* at 803.

III. THE TRIAL COURT REVERSIBLY ERRED IN FINDING THAT MR. JOHNSON'S "PERSONAL," "EMOTIONAL" REASONS FOR WANTING AN APPEAL WERE IRRELEVANT.

Reversal of the judgment below is further warranted in light of the trial court's error in determining that Mr. Johnson's "personal," "emotional" reasons for wanting to appeal his conviction, despite the time-served sentence he received, 7/25/22 Tr. 13, were irrelevant to the question whether he in fact asked counsel to file a notice of appeal on his behalf. Mr. Johnson's attorney argued that—contrary to Ms. King's assertion that he "did not care about his misdemeanor conviction because the Court had sentenced him to time served," R. 9 at 164-65—"anyone [in Mr. Johnson's position] would want to appeal this case once they were found guilty," given the nature of the underlying conviction, 7/25/22 Tr. 13, which constituted a judicial finding that he had threatened to murder his daughter, R. 9 at 140 (3/12/19 Trial Tr. 133). Mr. Johnson was keenly aware that this finding would jeopardize the limited custody and parental rights he had previously obtained through litigation, as he mentioned to Judge Dalton at sentencing. *Id.* at 156 (3/12/19 Trial Tr. 149-50).

Mr. Johnson sought to demonstrate his deeply "personal" and "emotional" reasons for pursuing an appeal in two different ways, 7/25/22 Tr. 13—through his own testimony about the stakes of the appeal, as well as through records demonstrating the positions he had taken in the underlying family court litigation around the time that his appellate rights expired. R. 15 at 12 (noting Mr. Johnson's submission of the "Gerstein Affidavit in support of his underlying arrest in this matter, an order denying his request for production of transcripts free of charge, an order denying his request for an emergency hearing in a domestic relations matter

against the Complainants, [and] a trial notice pertaining to the aforementioned domestic relations matter against the Complainants"). The trial court rejected both of these offers of proof because it did not "think the [underlying] domestic relations matter ha[d] anything to do with" the matter to be resolved at the hearing. 7/25/22 Tr. 19; *see also id.* at 17 ("I'm going to sustain the objection on relevance grounds with respect to whether he did or didn't get his child back in the custody matter."); R. 15 at 12 (ruling that Mr. Johnson's documentary "exhibits [were] not relevant to the issue of whether Counsel King received a request . . . from Mr. Johnson or his wife to file a notice of appeal," as Mr. Johnson had alleged). In so doing, the trial court committed reversible error.

Contrary to the trial court's reasoning, Mr. Johnson's "case theory" that the Boyd's had fabricated their claim of threats against him in order to deprive him of the custody he recently obtained was highly relevant to whether he requested a notice of appeal, as he claimed, or whether, as Ms. King claimed, he specifically told her not to file one. 7/25/22 Tr. 17. It tended to show "why Mr. Johnson would even want to appeal the case in the first place," *id.* at 16—to seek a measure of validation for his belief that he had "lost his daughter . . . for something that he did not do." *Id.* at 86. As counsel argued below, "anyone [in Mr. Johnson's position] would want to appeal" such a conviction, *id.* at 13, based on sheer "principle" alone, *id.* at 86. Moreover, the underlying facts and circumstances of Mr. Johnson's "domestic relations matter," *id.* at 17, gave him an obvious motive to pursue an appeal to give him the possibility of obtaining custody of his daughter in the future, if he succeeded in overturning his felony assault conviction. Ms. King expressly acknowledged that

Mr. Johnson "could appeal [his misdemeanor conviction] . . . just so . . . hopefully he would win the other [felony] case and then this case . . . would matter." *Id.* at 70.

That Mr. Johnson's conviction fell into a category that "anyone [in his position] would want to appeal," *id.* at 13, was highly relevant because it increased the plausibility or likelihood of Mr. Johnson testimony that he requested a notice of appeal, while simultaneously decreasing the plausibility or likelihood of Ms. King's contrary testimony that he specifically directed her not to file one. *Cf., e.g.*, *Bassil v. United States*, 147 A.3d 303, 315 (D.C. 2016) (observing that the "objective[] [un]reasonable[ness]" of a belief is "*ipso facto* also . . . some evidence" that a person "did not actually" hold the belief). Such assessments of the plausibility and probability are always relevant to the factfinder's determination of whether to accept a particular piece of testimony as "true and accurate." *See* Criminal Jury Instructions for the District of Columbia, No. 2.200 (5th ed. 2023) ("You may consider the reasonableness or unreasonableness, the probability or improbability, of the testimony of a witness in determining whether to accept it as true and accurate.").

The government cannot demonstrate that it is "*highly probable* that [this] error did not contribute" to the outcome in this case, as would be needed to forestall reversal on this ground of the appeal. *Ellis v. United Sta*tes, 941 A.2d 1042, 1048 (D.C. 2008) (internal quotation marks and citations omitted). The case came down to a credibility contest between Mr. Johnson and Ms. King, where Mr. Johnson had reasons for wanting to appeal and Ms. King's testimony to the contrary lacked even the most basic form of corroboration, like handwritten notes corresponding to the conversations where Mr. Johnson allegedly told her that he did not want an appeal.

More generally, the lower court's opinion reflects no attempt to grapple with the relative plausibility of Mr. Johnson and Ms. King's competing claims. Had the trial court understood that a sound assessment of credibility also requires at least some consideration of the relative plausibility of the competing allegations, and considered the evidence Mr. Johnson sought to introduce in support, there is every reason to believe that a different result would have obtained.

IV. MR. JOHNSON IS ENTITLED TO RELIEF BECAUSE ANY PURPORTED WAIVER OF HIS RIGHT TO APPEAL WAS INFECTED BY COUNSEL'S FAILURE TO ADVISE HIM REGARDING THE "ADVANTAGES AND DISADVANTAGES OF TAKING AN APPEAL."

The trial court's denial of Mr. Johnson's petition for writ of error *coram nobis* should also be reversed because even taking Ms. King's testimony at face value, as the trial court did, it shows that she failed to adequately advise Mr. Johnson regarding the decision whether to waive his appellate rights. Ms. King testified that Mr. Johnson elected to forego his appeal based in part on a persistent misunderstanding that appealing the misdemeanor case would somehow prevent one or both of them from "focus[ing] on the appeal of" his felony assault conviction and/or would prevent her from "help[ing] him on the civil side of his case," to secure "custody" of his daughter. 7/25/22 Tr. 64. However, appealing the misdemeanor convictions should not have compromised their ability to "focus" in any way, as Mr. Johnson was guaranteed a new lawyer for the exclusive purpose of filing the misdemeanor appeal. Although Ms. King explained that she "wouldn't be the appeals attorney" for his *felony matter*, *id.*, this explanation did not get to the heart of Mr. Johnson's apparent misunderstanding—that an appeal in this case would

deprive them of the "focus" needed to appeal the felony conviction or to win (back) custody of his daughter. In failing to clear away Mr. Johnson's confusion, Ms. King rendered deficient performance as a matter of law. Moreover, because there is every reason to believe that Mr. Johnson would have gone forward with his appeal, had Ms. King simply explained the process to him, Mr. Johnson is entitled to reinstatement of his right to appeal.

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). For these purposes, "consultation" means more than just notifying a client of his right to appeal or asking a client whether he would like to exercise that right. *See Frazer v. South Carolina*, 430 F.3d 696, 711 (4th Cir. 2005) ("Simply demonstrating that the defendant was actually or constructively aware of his right to appeal is insufficient to relieve defense counsel of his obligations under *Flores–Ortega*."); *see also id.* at 707 ("Counsel's obligation to consult . . . is distinct from the duty to inform."). To provide the kind of "consult[ation]" that *Flores-Ortega* contemplates, an attorney must "advis[e] the [client] about the advantages and disadvantages of taking an appeal, and mak[e] a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478; *see, e.g.*, *Hudson v. Hunt*, 235 F.3d 892, 896 (4th Cir. 2000) (finding that counsel rendered deficient performance where their consultation included "no discussion of the costs and benefits of an appeal"). The

purpose of this requirement is "to assure that any waiver of the right to appeal is knowing and voluntary." *Thompson v. United States*, 504 F.3d 1203, 1206 (11th Cir. 2007).

Indeed, this Court has embraced the need for knowing and voluntary waivers of the right to appeal since well before the Supreme Court decided *Flores-Ortega*. *See (Lorin) Johnson*, 513 A.2d 798. In *(Lorin) Johnson*, this Court held that the *Zerbst* standard governs "the adequacy of a criminal appellant's waiver of his right to appeal when the appellant moves to dismiss or withdraw an appeal," *id.* at 800, and further "should . . . guide" counsel's "waiver of appeal by a decision not to file a notice of appeal," *id.* at 803 n.2. Pursuant to this standard, a criminal defendant must "be made generally aware of his right to appeal and the potential remedies." *Id.* at 803. Moreover, "it is important that the appellant have a practical understanding of the appellate process." *Id.* "For example, [the client] should be informed that he need not withdraw his appeal in order to pursue various relief in the trial court" and "should be instructed that if he is successful on his appeal, this may result in a dismissal of the charges, an acquittal, or a new trial, a hearing or resentencing," "depend[ing] on the nature of the issues" to be raised on appeal. *Id.* Ultimately, this standard "requires that [the client] be informed of his rights by counsel, [and] that he understands the rights being waived and decides deliberately of his own free will to waive them." *Id.* "Trial attorneys cannot outsource their constitutional obligation to advise their clients about filing an appeal nor their duty to make a reasonable effort to discover their clients' wishes." *United States v. Herring*, 935 F.3d 1102, 1109 (10th Cir. 2019).

The record below shows definitively that Ms. King fell short in her duty to "consult" with Mr. Johnson regarding an appeal in this case, as *Flores-Ortega* requires. To begin with, there is no question that Ms. King had such a duty, given the existence of strong reason to believe that "a rational defendant [in Mr. Johnson's position] would want to appeal" the conviction he received. *Flores-Ortega*, 528 U.S. at 480. The Supreme Court has emphasized that such a duty should be found in "the vast majority of cases," *id.* at 481, especially those like this one that present "nonfrivolous grounds for appeal," *id.* at 480. Here, Ms. King had raised what she believed to be a meritorious objection to a particularly incriminating piece of evidence at trial, 7/25/22 Tr. 76-77, and the trial court had underscored the potential merit of this objection by "encourag[ing] [Mr. Johnson] to talk to [Ms. King] about filing an appeal" because "[t]he Court makes wrong decisions and the Court of Appeals finds those decisions to be wrong," and because "there is an issue about whether the" exhibit was admissible. R. 9 at 142-43 (3/12/19 Trial Tr. 135-36). Ms. King further knew that although Mr. Johnson had received a time-served sentence and had avoided the imposition of a stay-away order that would prevent contact with his daughter after his release from prison in the felony assault case, he might want to "appeal . . . for other reasons," for instance, to avoid his $150 fine or "just so he didn't have yet another conviction" on his record. 7/25/22 Tr. 70. Moreover, Ms. King had every reason to know that for Mr. Johnson, this was not just "another conviction" because it involved a judicial finding that he threatened to harm his daughter. As counsel argued below, "anyone [in Mr. Johnson's position] would want to appeal" such a conviction, *id.* at 13, based on sheer "principle" alone, *id.* at 86.

Against this backdrop, Ms. King claims, in testimony credited by the trial court, that Mr. Johnson told her that he did not want to pursue an appeal because he believed that an appeal would prevent him or counsel from "focus[ing]" on challenging his felony assault conviction and/or pursuing custody of his daughter in civil court. *See* 7/25/22 Tr. 62-63 (testifying that Mr. Johnson "wanted her to focus on [his] other [felony assault] case"); *id.* at 64 (testifying that she was "able to confirm . . . about not doing an appeal" in a phone call with Mr. Johnson because "she was going to help him on the civil side of his case," with his "custody" issue, and because he wanted her "to focus on the appeal of the other [felony] case"); *id.* at 66 (testifying that Mr. Johnson "specifically didn't want me to file it" and "wanted to have focus on that other case"). But an appeal in this case would not have compromised either of their ability to "focus" on his other cases in any way, as Mr. Johnson was guaranteed to get a new lawyer for the sole and exclusive purpose of filing the misdemeanor appeal. More to the point, challenging Mr. Johnson's conviction for threatening his daughter and her legal guardians was arguably a necessary step in the process of "help[ing] [Mr. Johnson] on the civil side of his case," with his "custody" issue, *id.* at 64, as the dangerousness inferable from this conviction would arguably prevent any favorable outcome in the custody case, even had Mr. Johnson been able to overturn his felony conviction.

In light of Mr. Johnson's apparent misunderstanding, it was especially "important" that Ms. King make a reasonable effort to impart "a practical understanding of the appellate process" on Mr. Johnson before he elected to forgo the right to appeal in this case. *(Lorin) Johnson*, 513 A.2d at 803. However, the

record reflects that she failed to do so. While counsel testified that she "told [Mr. Johnson] [she] wasn't going to be the appeals attorney," in his felony assault case, 7/25/22 Tr. 64, this did not get to the heart of Mr. Johnson's concern, that the misdemeanor appeal would be all-consuming for the both of them and undermine his interest in his other cases. Given this record, "there is no legally sufficient evidentiary basis for a reasonable [fact-finder] to find" that Ms. King adequately consulted with Mr. Johnson regarding his appellate rights. *Washington Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1072 (D.C. 2008) (internal quotation marks and citations omitted). Any purported waiver obtained under these circumstances cannot be deemed knowing, voluntary, and intelligent.

The record further establishes that Mr. Johnson suffered prejudice as a result of counsel's deficient performance. "[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. Here, the record amply suggests that Mr. Johnson would have pursued an appeal in this case, had he been properly advised that it would not undermine either his or Ms. King's ability to focus on challenging his felony assault conviction or to pursue custody of his daughter. Although not dispositive, it is noteworthy that Mr. Johnson had every reason to think that he had nonfrivolous grounds for appeal based on the statements by Judge Dalton before sentencing. *See id.* at 486 ("[S]howing nonfrivolous grounds for appeal may give weight to the contention that the defendant would have appealed[.]").

Moreover, the record amply supports that Mr. Johnson thought that his

conviction might impair his relationship with his daughter, a matter of significant concern to him. 7/25/22 Tr. 86; R. 9 at 156 (3/12/19 Trial Tr. 149). And Mr. Johnson acted swiftly to restore his appellate rights, after learning that they had been waived. On this record, prejudice has been established. Even had the trial court's credibility determination not infected by an erroneous understanding of the law, *coram nobis* relief should have been granted.

V. THIS COURT SHOULD REMAND WITH DIRECTION TO VACATE AND REENTER THE JUDGMENT AND COMMITMENT ORDER TO ALLOW AN APPEAL.

In light of the trial court's many errors in adjudicating this petition, and the absence of any indication that Mr. Johnson made a knowing, voluntary, and intelligent waiver of his right to appeal, this Court should reverse the decision below and remand for reentry of the judgment to allow Mr. Johnson to note an appeal of his conviction in this matter. Notably, had counsel filed a notice of appeal in this case, and subsequently filed a motion to dismiss the appeal without a supporting written waiver from Mr. Johnson, this Court would deny that motion pursuant to *Johnson*, because it would have no evidence that the *Zerbst* standard had been met. The same result should obtain here, given the indisputable absence of a written waiver from Mr. Johnson. *See (Lorin) Johnson*, 513 A.2d at 803 n.2.[16]

[16] Indeed, in holding that the *Zerbst* standard governs the dismissal of a pending criminal appeal, this Court relied on "state cases" holding that the same principles apply to cases like this one, where the time to file a notice of appeal has expired. *See, e.g.*, *Commonwealth v. Maloy*, 264 A.2d 697, 699 (Pa. 1970) (remanding for entry of an order to restart the appellate timeline because the record did "not support the lower court's conclusion that Maloy was fully aware of all of his rights incident to appeal, more specifically, his right to have his appeal perfected and prosecuted

For all of these reasons, this Court should reverse the trial court's denial of Mr. Johnson's *coram nobis* petition and remand the case with instruction to vacate and reenter the judgment and commitment order to allow Mr. Johnson to note an appeal. *See* D.C. Code § 17-306 ("The District of Columbia Court of Appeals may affirm, modify, vacate, set aside or reverse any order or judgment of a court or any division or branch thereof, or any administrative order or decision, lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate order, judgment, or decision, or require such further proceedings to be had, as is just in the circumstances."); *cf. McCormick v. United States*, 635 A.2d 347, 351 (D.C. 1993) ("Furthermore, although we could remand to the trial court for a Rule 42(b) proceeding, we conclude that it is 'just in the circumstances' to order dismissal of the case because appellant already has served his 90[-]day sentence." (citations omitted)); *Thompson v. Thompson*, 559 A.2d 311, 315 n.8 (D.C. 1989) (where the trial court "considered an improper factor in denying [a] continuance" in a criminal contempt case, holding that it was "'just in the circumstances' to put a final end to this matter," because appellant had "long since served his fifteen-day sentence," even though "a permissible alternative disposition of this appeal would be a remand for a renewed exercise of trial court discretion considering only proper factors" (citations omitted)).

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without expense to him"); *Commonwealth v. Martin*, 499 A.2d 344, 348 (Pa. Super. 1985) (same, where the court could not "conclude from [the record presented] that appellant was adequately informed of the necessity of filing a notice of appeal within thirty days of the effective date of sentence").

CONCLUSION

This Court should reverse the denial of Mr. Johnson's petition for writ of error coram nobis and remand with direction to vacate and reenter the judgment and commitment order to allow Mr. Johnson to note an appeal.

Respectfully submitted,

/s/
Samia Fam
Bar No. 394 445

/s/
Jaclyn S. Frankfurt
Bar No.415 252

/s/
*William Collins
Bar No.1029604

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20226
(202) 628-1200
Fax: (202) 824-2784
*Counsel for Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served, by the Court's electronic filing system, upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney, this 15th day of April, 2024.

/s/
William Collins

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed April 3, 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, filed April 3, 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;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

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

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

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

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

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

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23-CO-52

Case Number(s)

William Collins

Name

4/15/2024

Date

WCollins@PDSDC.ORG

Email Address