Appeal No. 23-CF-195

Regular Calendar: March 26, 2025

DISTRICT OF COLUMBIA COURT OF APPEALS

M.H.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

REPLY BRIEF FOR APPELLANT

JACLYN S. FRANKFURT

MIKEL-MEREDITH WEIDMAN

* PAUL MANERI

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001

* Counsel for Oral Argument

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The critical piece of evidence at M.H.'s trial was Erianna Barbour's testimony that in March 2019, S.B. claimed to her that he and M.H. were responsible for G.W.'s December 2018 murder. The defense contended that S.B. had falsely claimed responsibility for the murder after details of the crime—including M.H.'s arrest, which the defense argued was based on unreliable eyewitness identifications—had become public. On appeal, M.H. argues that the court committed two errors that prejudicially bolstered the credibility of Ms. Barbour's testimony and S.B.'s purported confession.

First, the court admitted May 2019 text messages from S.B. to Ms. Barbour—including that he was "[c]ooling staying down," that "the feds be on me and my men ass," and "member I told you the story"—which the government used to corroborate Ms. Barbour's recollection of the March confession. But the texts themselves were not "sufficiently against [S.B.'s] penal interest 'that a reasonable person in [his] position would not have made the statement[s] unless believing [them] to be true.'" *Williamson v. United States*, 512 U.S. 594, 603–04 (1994) (quoting Fed. R. Evid. 804(b)(3)). Relying on *Williamson*, the government argues that the texts were admissible because they were clearly self-incriminating when read together with S.B.'s March statements. This position is flatly inconsistent with *Williamson*'s holding that "[t]he [trial] court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession," 512 U.S. at 601, as well as this Court's related instruction that "the trial court must assess each component remark for admissibility," *Thomas v. United States*, 978 A..2d 1211, 1229 (D.C. 2009). And the possibility that the texts could be read as showing S.B.'s

consciousness of guilt, as the government argues, is too weak and conjectural to make the texts admissible under Rule 804(b)(3).

Second, the court admitted evidence of S.B.'s prior gun possession for the impermissible purpose of proving his propensity for violence, which the government then improperly argued was proof that S.B.'s confession (including the portion inculpating M.H.) was credible. The government's sole argument in defense of the admission of this evidence is that it corroborated that S.B. was the second gunman. But "[c]orroboration . . . does not provide a separate basis for admitting evidence" under Rule 404(b). *United States v. Linares*, 367 F.3d 941, 949 (D.C. Cir. 2004). And the evidence of S.B.'s gun possession was corroborative only because it showed his criminal disposition, as the trial court explicitly found when admitting the evidence, and as the prosecutor improperly argued in closing. It was therefore plainly inadmissible.

Apart from Ms. Barbour's impermissibly bolstered testimony, the government's evidence consisted only of substantially impeached eyewitness testimony, with no physical evidence connecting M.H. to the murder. In fact, much of the eyewitness testimony was consistent with M.H.'s innocence. Accordingly, the government cannot show with fair assurance that the cumulative impact of the errors in this case did not contribute to the verdict. Reversal is required.

I. S.B.'s text messages to Ms. Barbour were inadmissible hearsay.

As M.H. argued in his opening brief (at 23), a hearsay statement must be clearly and powerfully against the declarant's penal interest in order to be admitted under Rule 804(b)(3). *See Williamson*, 512 U.S. at 603–04 ("The question under

Rule 804(b)(3) is always whether the statement was *sufficiently* against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true[.]'" (emphasis added) (quoting Fed. R. Evid. 804(b)(3)); *Thomas*, 978 A.2d at 1229 ("[A]dmission in evidence pursuant to Rule 804(b)(3) depends on a *clear* showing that [the statements] are *truly* inculpatory of the declarant." (emphases added)); *United States v. Leahy*, 464 F.3d 773, 798 (7th Cir. 2006) ("[T]he statement itself, taken as is, must basically admit to criminal behavior."). The government does not dispute that "[o]nly powerfully adverse statements qualify for admission" under Rule 804(b)(3). 30B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 6995 (2024 ed.) (explaining that this standard is apparent from the text of the Rule).

"Rule 804(b)(3) cover[s] only those declarations or remarks within [a] confession that are individually self-inculpatory," so neutral statements that are collateral to self-inculpatory statements are inadmissible. *Williamson*, 512 U.S. at 599; *see id.* at 600 ("[T]he fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability."). And because a statement must be "individually" self-incriminating in order to be admissible, *Williamson* explained that "the [trial] court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession." *Id.* at 601. The government turns this logic on its head by arguing (at 23) that S.B.'s texts were clearly self-incriminating when interpreted "together with his face-to-face conversation with E.B. in March." Under *Williamson*, the fact that S.B. purportedly made a self-inculpatory statement in an earlier, separate

conversation does not by osmosis make his May statements admissible. And nothing about the May statements made them so individually incriminating that a reasonable person would have made them only if they were true. All that S.B. stated in the texts is that he knew about M.H.'s public prosecution, which he had discussed with Ms. Barbour before, and that he was avoiding the police.

The government's attempt to justify the admissibility of S.B.'s *May* statements based on the incriminating quality of what he said in *March* repeats the trial court's error of failing to "assess each component remark for admissibility." *Thomas*, 978 A.2d at 1229. Contrary to the government's conclusory argument on appeal (at 25), the court erroneously lumped together all of S.B.'s remarks from March and May, admitting them on the sole ground that "[S.B.] is essentially confessing to Ms. Barbour his role in the [G.W.]'s murder." 10/07/2022 Tr. at 55. That rationale could apply only to the March statements.

The government's only theory as to how any of S.B.'s May remarks were admissible is that some of them showed that he "was avoiding the police and thus reflected [S.B.'s] consciousness of guilt." Gov't Br. at 23. But courts have long recognized "the weaknesses inherent in" police-avoidance evidence. *King v. United States*, 75 A.3d 113, 118 (D.C. 2013) (citing *Alberty v. United States*, 162 U.S. 499, 511 (1896)); *see also Headspeth v. United States*, 86 A.3d 559, 564 (D.C. 2014) ("'[T]he risk is great that an innocent man would respond similarly to a guilty one when a brush with the law is threatened.'" (quoting *United States v. Vereen*, 429 F.2d 713, 715 (D.C. Cir. 1970)); *Williams v. United States*, 52 A.3d 25, 39 (D.C. 2012) (recognizing that avoiding police after a crime "may be prompted by a variety

of motives"). S.B.'s texts expressing a desire to avoid the police during his friend's murder prosecution were entirely consistent with a concern that he would be hauled into court as a suspect (or as a witness) based merely on his association with M.H.[1] Or the teenage S.B. might have wanted to avoid police based on "a natural fear or dislike of authority" or "a distaste for police officers based upon past experience." *Miles v. United States*, 181 A.3d 633, 641 (D.C. 2018) (internal quotation marks omitted).[2] Either way, the statements in the texts were susceptible to too many innocent interpretations to be so inculpatory that a reasonable person in S.B.'s shoes "would have made [them] only if the person believed [them] to be true." Fed. R. Evid. 804(b)(3)(A); *see Andrews v. United States*, 981 A.2d 571, 576 (D.C. 2009) (holding statement not admissible because it was susceptible to at least "two possible interpretations," only one of which would subject the declarant to criminal liability).

The government's attempts (at 24 & n.16) to distinguish *Andrews*, *Thomas*, *United States v. Butler*, 71 F.3d 243 (7th Cir. 1995), and *State v. Ashby*, 567 N.W.2d 21 (Minn. 1997), are unavailing. It suggests (at 24) that these cases dealt with ambiguous or vague statements, whereas S.B.'s texts were "clearly self-inculpatory." But as shown above, S.B.'s only clearly self-incriminating statements

[1] For that reason, it is far from clear that the texts would have been admissible to establish consciousness of guilt. *See Williams*, 52 A.3d at 39 ("[B]efore evidence is admissible to establish consciousness of guilt, the court must be satisfied, that the chain of inferences connecting the defendant's post-crime conduct to the crime itself would allow a reasonable jury to find that the conduct was inconsistent with that of an innocent person.")

[2] One officer testified at trial that he had seen S.B. "well over 50 times" in 2017 and 2018 alone and had occasionally exchanged words with him. 10/25/2022 Tr. at 22.

occurred in March. And the inadmissible statements in *Thomas* and *Ashby* were far more incriminating than S.B.'s relatively innocuous text messages. The Court described Mr. Thomas's statement that he "was going to finish that shit with Slush" as "cryptic" despite the context that he made the statement *while grabbing a gun* shortly after his friend Slush was killed, and shortly before he killed someone else as vengeance for Slush's death. *Thomas*, 978 A.2d at 1231.[3] And while Mr. Ashby stood accused of murder, a third party responded to the question "[w]hy are you letting [Ashby] go to jail for what you did" by stating that "the police don't know so I'm not going to tell them." 567 N.W.2d at 25 n.1. Even that relatively direct admission of guilt was not sufficiently incriminating to admit the statement. *See id.* at 26. Similarly, in *Butler*, the declarant's statement that he was one of two people in a room where only two guns were found was not vague or ambiguous. But it was inadmissible because it did not expose him to "a risk sufficient to provide the guarantee of reliability or truthfulness the 804(b)(3) exception is based on." *Butler*, 71 F.3d at 253. Because the same is true about S.B.'s texts to Ms. Barbour, the trial court erred by admitting the texts under Rule 804(b)(3).

II. The evidence of S.B.'s prior gun possession was inadmissible propensity evidence, and the government used it to improperly argue propensity.

The government concedes (at 33 n.18) that prosecutors misstated the law when they argued below that prior bad acts may be admitted to prove the propensity

[3] The fact that Mr. Thomas said this before the murder, whereas S.B.'s statements came after, is a distinction without a difference. *See* Gov't Br. at 24. Regardless of their timing, S.B.'s statements—like Mr. Thomas's—were too open to interpretation to "clearly expose him to criminal liability." *Thomas*, 978 A.2d at 1232.

of someone other than the accused. It does not dispute that it waived reliance on *Johnson v. United States*, 683 A.2d 1087 (D.C. 1996) (en banc), or that S.B.'s prior possession of guns would have been inadmissible under *Johnson* even if it had argued that theory below. *See* M.H. Br. at 39–40. Nor does the government claim that S.B.'s prior gun possession was admissible under any of the non-propensity purposes for other-crimes evidence recognized in *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964). The government's sole claim (at 31, 34–35) is that the evidence of S.B.'s possession of guns was admissible to corroborate Ms. Barbour's testimony (and S.B.'s out-of-court confession) that S.B. was involved in G.W.'s murder.[4]

Contrary to the government's argument, however, "[c]orroboration . . . does not provide a separate basis for admitting evidence" under Rule 404(b). *Linares*, 367 F.3d at 949; *United States v. Bailey*, 319 F.3d 514, 520 (D.C. Cir. 2003). If it did, "then propensity evidence would always be admissible. As long as the government had a single piece of non-propensity evidence tending to prove the defendant's guilt—a single eyewitness, one fingerprint, anything at all—the propensity evidence would be admissible to corroborate it." *Linares*, 367 F.3d at 949. The rules of evidence do not so easily allow for the introduction of other bad acts. Rather, as the D.C. Circuit explained in *Bailey*, "[t]o decide if Rule 404(b) evidence is admissible

[4] In addition to introducing several photographs of S.B. with guns, the government elicited testimony from Ms. Barbour that she saw S.B. with a gun, but she could not remember anything about what the gun looked like. 10/27/2022 Tr. at 231. The same cases that establish that that it was error to admit the photographs similarly establish that it was plain error to allow Ms. Barbour to testify that she saw S.B. with an unspecified gun that had no apparent connection to the case.

for corroboration, the court must determine what is being corroborated and how. If similar past acts were corroborative *only* because they showed the defendant's character and the likelihood of 'action in conformity therewith,' plainly the rule would call for exclusion." *Bailey*, 319 F.3d at 520 (emphasis in original); *see also Linares*, 367 F.3d at 949 ("As government counsel forthrightly acknowledged at oral argument, prior-acts evidence must corroborate other evidence by proving a proper element, such as intent or identity.").

This Court's decision in *Jones v. United States*, 27 A.3d 1130 (D.C. 2011), which approvingly cites *Bailey* and upon which the government now relies (at 34–35), does not help the government. The Court held in *Jones* that evidence related to a robbery could be admitted in Mr. Jones's murder trial because firearms examiners determined that the .45-caliber pistol used in the robbery was the same pistol used in the murder, DNA evidence linked Mr. Jones to the robbery, and testimony established that the robber with the .45-caliber pistol fit the physical description of the murderer. *Id.* at 1143–45. Those links between the two crimes made the robbery evidence admissible under *Drew* to prove Mr. Jones's identity as the murderer, and admissible under *Johnson* "to demonstrate that [Mr. Jones] possessed the murder weapon." *Id.* at 1145–46. Separately, despite the fact that the government did not argue this theory on appeal,[5] the Court mentioned that the robbery evidence "had probative value not only as independent evidence of identity, but also because it corroborated other identity evidence"—namely, Mr. Jones's confession to a jail

[5] *See Jones*, 27 A.3d at 1162 (Ruiz, J., dissenting).

cellmate that he killed a man with the same .45-caliber pistol that he used in committing a robbery. *Id.* at 1146; *see also id.* at 1134–35 (describing confession). In short, the other-crimes evidence in *Jones* corroborated other evidence by proving Mr. Jones's identity independently of any improper propensity inference.

Jones thus shows that when evidence of prior bad acts has a legitimate non-propensity purpose, its tendency to corroborate other legitimate evidence may add to its probative value. It does not, as the government suggests, allow parties to circumvent the propensity rule under the guise of "corroboration." The government relies in particular (at 34) on *Jones*'s quotation of the D.C. Circuit's statement in *United States v. Bowie*, 232 F.3d 923 (D.C. Cir. 2000), that "'evidence of other crimes or acts is admissible to corroborate evidence that itself has a legitimate non-propensity purpose.'" *Jones*, 27 A.3d at 1146 (quoting *Bowie*, 232 F.3d at 933). But as the D.C. Circuit has repeatedly explained, "*Bowie* does not stand for the proposition that otherwise-inadmissible propensity evidence can be introduced under Rule 404 to corroborate non-propensity evidence." *Linares*, 367 F.3d at 948–49; *see also id.* at 949 ("We pointed this out last year in *United States v. Bailey*."). Indeed, immediately following the *Bowie* quotation, *Jones* approvingly cites *Bailey* for the proposition that "'[other crimes] evidence might corroborate a witness's testimony *by showing plan, purpose, intent, etc.* and therefore be admissible.'" *Jones*, 27 A.3d at 1146 (quoting *Bailey*, 319 F.3d at 520) (emphasis added).[6]

[6] The government's reliance on *Minick v. United States*, 506 A.2d 1115 (D.C. 1986), is similarly misplaced. There, like in *Jones*, the probative value of the other crimes evidence did not depend on an impermissible propensity inference: police found a wallet near the crime scene, and parole papers in the wallet helped to establish that

Here, the record demonstrates that the government sought to, and did, corroborate S.B.'s purported confession by showing his bad character, as evidenced by his prior gun possession. The intent to use S.B.'s prior gun possession as propensity evidence was plain from the government's concededly mistaken argument that *Drew* and *Johnson* were inapplicable. *See* 10/18/22 Tr. at 20. Accepting that incorrect premise, the court ruled that the photographs of S.B. with guns were admissible for a blatantly impermissible purpose: to "support[] part of the government's story . . ." about "the type of individual that [S.B.] may have become." *Id.* at 22. Then, the government erased any glimmer of a doubt as to whether that purpose would be realized when it argued in rebuttal that this evidence "backs up that [S.B.] could easily be a killer." 10/31/22 Tr. at 159.

The government characterizes the evidence of S.B.'s gun possession as showing his "access to firearms," Gov't Br. at 35, but that is just "propensity to carry firearms" by a different name. Unless the evidence shows that a person previously possessed the *same* weapon used in the charged offense,[7] the only logical relevance of a person's prior gun possession is to prove his criminal disposition or propensity to possess other guns. *See, e.g.*, *United States v. Moore*, 709 F.3d 287, 295–96 (4th Cir. 2013) (holding that evidence of prior gun possession was not admissible to demonstrate "that Moore had the 'opportunity' to possess and access firearms," and

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the wallet was Mr. Minick's (and thus helped to establish his identity as the perpetrator of the crime). *Minick*, 506 A.2d at 1119.

[7] That sort of evidence may be admissible as direct evidence of the charged crime, but the government has made no proffer that any of S.B.'s previously possessed guns were used in G.W.'s murder, and has instead repeatedly waived such an argument.

emphasizing that this evidence "served only to establish Moore's criminal disposition"); *United States v. Miller*, 673 F.3d 688, 695 (7th Cir. 2012) ("If the prior possession was of a different gun, then its value as direct or circumstantial evidence of the charged possession drops and the likelihood that it is being used to show propensity to possess guns rises considerably."); *United States v. Williams*, 458 F.3d 312, 318–19 (3d Cir. 2006) (noting that "[t]he mere prior possession of a firearm, without more, is not by any means a distinctive act," and holding that where "[t]here was no evidence that Urlin's prior conviction involved the same gun," the "conviction was only probative inasmuch as it showed that he had a propensity to carry a weapon"). The government does not cite any contrary authority from this Court, and we are aware of none.[8]

In any event, the government did not tell the jury that S.B.'s prior possession of guns proved his "access to firearms"—instead, it argued that his possession of guns showed that he could be a killer. As M.H. argued in his opening brief, this "explicit propensity argument in rebuttal was a separate error unto itself." M.H. Br. at 35; *see also id.* at 41–42. The government does not respond to this independent claim of error, thereby waiving the point entirely. *Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993) ("It is a basic principle of appellate jurisprudence that points

[8] Indeed, the government has waived the point by failing to muster *any* argument that "access to firearms" is a non-propensity purpose for evidence of prior gun possession. *See Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 n.9 (D.C. 2001) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)).

not urged on appeal are deemed to be waived. . . . Parties, prosecutors included, should select the arguments they do and don't make with great care." (internal quotation marks omitted)). And regardless of waiver, the prosecutor's argument that S.B. "could easily be a killer" was plainly an improper argument that further exacerbated the already harmful admission of propensity evidence.

III. The government concedes that the trial court erroneously admitted a reference to M.H.'s prior arrest as substantive evidence.

The government acknowledges that S.B.'s text exchange with Ms. Barbour contained an improper reference to M.H.'s criminal record. Although it argues that the Court must review the admission of this evidence only for plain error,[9] it does not contest the first two prongs of plain error review: "(1) that there was error; [and] (2) that the error was 'plain.'" *Eady v. United States*, 44 A.3d 257, 265 (D.C. 2012). We address prejudice below.

IV. These errors were not harmless, especially when considered in combination.

In general, an error requires reversal if this Court is unable to "say with fair assurance" that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Similarly, "[t]he standard for reversal where more than one error is asserted on appeal is whether the cumulative impact of the errors substantially influenced the jury's verdict." *Smith v. United States*, 26 A.3d 248, 264 (D.C. 2011) (internal quotation marks omitted). "[W]hen reviewing the cumulative impact of multiple errors, including unpreserved ones, the standard is

[9] As M.H. argued in his opening brief (at 47), trial counsel preserved the issue by objecting that the text message was substantially more prejudicial than probative.

Kotteakos, not plain error." *Sims v. United States*, 213 A.3d 1260, 1272 (D.C. 2019); *see also Smith*, 26 A.3d at 265 n.12.

Alone and in combination, the errors in this case require reversal. Both S.B.'s hearsay statements and the evidence that he possessed guns artificially propped up the government's most crucial piece of evidence at trial: Ms. Barbour's testimony that S.B. told her that it was he and M.H. who killed G.W. If the jury believed that S.B. made such a confession and that the confession was credible, it was by far the government's most damning evidence against M.H. But there were serious reasons to doubt Ms. Barbour's recollection of her conversations with S.B. as well as the veracity of S.B.'s purported statement. First, Ms. Barbour—who did not contemporaneously report or record her March conversation with S.B.—gave contradictory testimony about when S.B. first told her about what happened.[10] Second, Ms. Barbour herself admitted that she "didn't really buy" S.B.'s confession, 10/27/2022 Tr. at 245, and there was no other evidence to corroborate S.B.'s role in the offense, which left the veracity of his confession even further in doubt.

The inadmissible hearsay from S.B.'s text messages addressed the first reason to doubt, reducing what jurors might have otherwise viewed as a significant problem into one that was easily dismissed. Had the texts been properly excluded, Ms. Barbour could have testified to having at most two face-to-face conversations with

[10] *Compare* 10/27/2022 Tr. at 216 ("Q. When was the first time you heard about – you heard from [S.B.] that he and his friend, [M.H.], killed [G.W.]? A. The first time when I went to go see him around January."), *with id.* at 217 ("Q. All right. And did he describe what happened there or what – anything – any descriptions on that time and only in January about what he and his friend, [M.H.], did? A. No.").

S.B. about G.W.'s murder: the January conversation about which she gave conflicting testimony, and the March conversation in which S.B. purportedly confessed and incriminated M.H. Were that the testimony, defense counsel could have powerfully argued that Ms. Barbour's inconsistent testimony about the January conversation cast doubt on her recollection of the March conversation. But the hearsay texts significantly undermined the force of that potential argument. Indeed, the government expressly used the hearsay to anchor Ms. Barbour's testimony that an incriminating conversation had actually taken place, emphasizing in closing that "this is very important, this is very important, ladies and gentlemen, because we don't want you to rely entirely on what Erianna says about a conversation she has. We know it from [S.B.]'s phone." 10/31/22 Tr. at 115; *see also id.* at 159 ("What else backs her up? Not that she just comes in here remembers a conversation. The text messages.").[11]

Even if the jury fully credited Ms. Barbour's testimony, there was ample reason to doubt the veracity of S.B.'s out-of-court confession. *See Watkins v. United States*, 846 A.2d 293, 298 (D.C. 2004) ("[H]earsay declarants are, in essence, witnesses, and should be treated as such for credibility purposes[.])".[12] Ms. Barbour

[11] Prosecutors also referred to the texts in opening as "key communications," 10/20/2022 Tr. at 37–38, and oriented Ms. Barbour's direct examination around them, 10/27/2022 Tr. at 211–15. This "repeated highlighting" of the texts "during the course of the trial" is far more "persuasive evidence of [their] centrality and prejudicial character" than the government's current attempt (at 29–30) to downplay their significance. *Andrews v. United States*, 922 A.2d 449, 460 (D.C. 2007).

[12] The government entirely ignores the distinction between Ms. Barbour's credibility as a witness and S.B.'s credibility as a declarant when it asserts (at 37) that the

herself admitted that she "didn't really buy" it. 10/27/2022 Tr. at 245. And the prosecutors recognized that they "ha[d] to corroborate" S.B.'s story that he was "the second gunman", 10/18/2022 Tr. at 11, but that no other evidence would serve that function, *id.* at 20. Encouraging the jury to credit S.B.'s confession based on evidence of his bad character and propensity to carry guns filled this critical gap, making the propensity evidence a major part of the prosecution despite the government's argument to the contrary (at 37). Moreover, defense counsel's closing argument that S.B. was lying to "creat[e] an image for himself," 10/31/2022 Tr. at 155–56, would have been much more potent if the jury did not learn that he *actually* possessed guns. Indeed, as the government improperly (but convincingly) argued in rebuttal, that propensity evidence showed that S.B. not only talked the talk, but walked the walk. *See* 10/31/22 Tr. at 159 (arguing that his gun possession "backs up that [S.B.] could easily be a killer").

While either the hearsay error or the propensity error would merit reversal on its own, together their harm is greater than the sum of its parts. Showing S.B. with guns and arguing that he could easily be a killer also bolstered Ms. Barbour's credibility, because it distracted the jury from the inconsistencies in her testimony and made it seem more likely that S.B. was the type of person who would commit a crime and then tell his friend about it. *See* 10/18/2022 Tr. at 11 (prosecutor arguing that Gov't Ex. 454.13, a photo of S.B. holding a gun, should be admitted because "[Ms. Barbour] was impeached. She was cross-examined. This shows that she is

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erroneous admission of S.B.'s prior gun possession was harmless because *Ms. Barbour*'s testimony was "highly credible even without this evidence."

telling the truth."). Likewise, though S.B.'s texts were not sufficiently self-incriminating to be admissible under Rule 804(b)(3), they were *potentially* susceptible to the "consciousness of guilt" interpretation that the government now attributes to them. Introducing evidence of S.B.'s gun possession and arguing that it demonstrated his criminal disposition made it more likely that the jury would view S.B.'s texts as reflecting neither teenage bluster nor an innocent desire to avoid the police, but rather as evidence of the March confession's veracity.

The erroneously admitted evidence of M.H.'s prior arrest further compounded the prejudice of the first two errors. Such evidence "is always prejudicial," *Eady*, 44 A.3d at 265 (cleaned up), but it was especially so here. Although the nature of M.H.'s prior arrest was not specified, *see* Gov't Br. at 43, the evidence of his friend's prior gun possession—which included a photo of S.B. holding a gun while next to M.H., *see* Gov't Ex. 454.13—naturally invited the jury to speculate that M.H.'s previous arrest was for a dangerous or serious offense, rather than something trivial. Similarly, given the undisputed evidence that S.B. and M.H. were friends, telling the jury that one teenager possessed guns and the other had an arrest record strongly suggested that they were both part of a bad crowd.[13] That mutually reinforcing

[13] As the trial court emphasized while excluding another photograph of S.B. holding a gun next to M.H., "[a]nybody seeing that is going to think, guns, drugs, gang. Highly prejudicial[.]" 10/18/2022 Tr. at 16 (discussing Gov't Ex. 454.19). The government is therefore wrong when it claims (at 38) that "it was highly unlikely that the jury would conclude that M.H. was involved in 'guns, drugs, gangs'" after seeing the improperly admitted Gov't Ex. 454.13.

character evidence exponentially increased the risk of jurors making the impermissible inference that where there is smoke, there must be fire.

Contrary to the government's main argument on harm, *see* Gov't Br. at 26–29, the eyewitness evidence in this case was weak—indeed, much of it actually pointed toward M.H.'s innocence. For instance, as the government admitted in closing, B.L.'s testimony about the timing of M.H.'s appearance in her apartment was not consistent with him being the shooter. 10/31/2022 Tr. at 169. The government now stresses (at 27) the implausibility that B.L. would misidentify M.H. as the person who ran into her apartment. But a reasonable jury could easily credit that identification without finding that M.H. was involved in the G.W. shooting. Given the prevalence of gunfire in that neighborhood (both on that day and in general), 10/31/2022 Tr. at 169, the jury could have found that M.H. ran into B.L.'s apartment after firing gunshots that were unrelated to G.W.'s murder. Or it was possible that M.H. had not fired any shots and was simply armed for self-defense. Crucially, those possibilities were further supported by the evidence that M.H. ran into B.L.'s apartment with a black *and silver* gun, 10/27/2022 Tr. at 89, while both Mr. Phelps and Mr. Tribble described the shooter's gun as simply "black." 10/20/2022 Tr. at 194; 10/26/2022 Tr. at 145.

Other evidence also undermined B.L.'s identification of M.H. as the person in black on the surveillance footage. She claimed to recognize M.H. in the videos based on his black Helly Hansen jacket, 10/27/22 Tr. at 125, but she also acknowledged that Helly Hansen jackets were common in the neighborhood, *id.* at 140. In fact, police did recover a black Helly Hansen jacket from M.H.'s family's

apartment—but the government conceded that it was not the same style of jacket worn by G.W.'s shooter. 10/31/2022 Tr. at 108. That suggested the distinct possibility that B.L. was mistaken in her belief that the person in black was M.H., rather than any of the other unidentified young Black men wearing black who were seen arguing shortly before the shooting. *See* 10/27/2022 Tr. at 44–48, 66.[14]

The identifications from Mr. Phelps and Mr. Tribble were also weak. Neither witness could identify M.H. in court and both testified that the person in black wore a mask covering everything but his eyes. Mr. Tribble was also impeached with his grand jury testimony that M.H. was *not* one of the people in the surveillance clips, casting further doubt on his identification. 10/28/2022 Tr. at 62. And almost all of Mr. Phelps's inculpatory testimony was admitted through impeachments with his sworn grand-jury testimony, *see* Gov't Br. at 6 n.7, diminishing the impact of his already-suspect identification.

As this Court has repeatedly held, these sorts of credibility issues weigh significantly in favor of finding harm. *See, e.g.*, *Kinney v. United States*, 286 A.3d 1027, 1042 (D.C. 2022) (error not harmless where government's case was not "overwhelming" in light of "substantial credibility issues with respect to the complaining witnesses' testimony"); *In re J.W.*, 258 A.3d 195, 207 (D.C. 2021) (holding that "[t]he evidence against J.W. was far from overwhelming" in part because "the defense raised substantial credibility issues with respect to the District's witnesses"); *Anthony v. United States*, 935 A.2d 275, 285 (D.C. 2007)

[14] In general, B.L. was "quite impeachable," as the prosecutors recognized below. 10/13/2022 Tr. at 35.

(reversing under *Kotteakos* in part because "[t]he strength of the prosecution's case . . . turned largely on the credibility of the witnesses" (quoting *Lee v. United States*, 668 A.2d 822, 832 (D.C. 1995))). The government's suggestion (at 28–29) that the Court may overlook the government witnesses' credibility issues cannot be squared with this line of cases, much less with *Kotteakos*, which directs courts to consider "*all* that happened" at trial when assessing harm. 328 U.S. at 765 (emphasis added).

In sum, the errors below bolstered the only incriminating evidence that did not depend on shaky and at times exculpatory eyewitness testimony. These errors also unfairly mitigated the inconsistencies within and across the eyewitness accounts, because the introduction of prior bad acts—in this case, the prior bad acts of *both* S.B. *and* M.H.—"diverts the attention of the jury" from factual guilt to criminal disposition, *Eady*, 44 A.3d at 265, tempting the jury "to overlook weaknesses in the government's case," *Bishop v. United States*, 983 A.2d 1029, 1040 (D.C. 2009). Because the government cannot show that it is "highly probable" that the cumulative impact of these errors did not contribute to the verdict, reversal is required. *Odemns v. United States*, 901 A.2d 770, 782 (D.C. 2006).

V. M.H.'s sentence must be vacated.

The government does not dispute that the trial court plainly erred when it failed to recognize that it could sentence M.H. to "less than the minimum term otherwise required by law." D.C. Code § 24-403.01(c)(2). It argues only that the error was not prejudicial in light of the judge's comment that she would not have

issued a lesser sentence anyway.[15] This fails to respond to M.H.'s argument that even in the face of such commentary, "[i]t is . . . impossible for appellate courts to determine how a [trial] court sentencing under a mandatory minimum might have exercised its sentencing discretion had it not been so constrained." M.H. Br. at 49 (quoting *United States v. Mejia-Pimental*, 477 F.3d 1100, 1109 (9th Cir. 2007)).[16] Thus, even if this Court affirms M.H.'s convictions, it must vacate the judgment and remand for resentencing.

[15] Contrary to the government's assertion (at 46), trial counsel's argument that the court had discretion to sentence below the mandatory minimum sufficed to apprise the court of M.H.'s position, and thus preserved the issue for appeal. *Cf. Evans v. United States*, 304 A.3d 211, 219 (D.C. 2023) ("An objection is preserved even if the defense's own requested instruction was arguably inaccurate in some particulars, so long as it directed the mind of the court to the [correct] legal principle." (internal quotation marks omitted)). Regardless of the standard of review, however, the court's failure to recognize its discretion requires that the sentence be vacated.

[16] *Williams v. United States*, 503 U.S. 193 (1992) (cited at Gov't Br. 47) had nothing to do with determining how a court's sentence would differ if it recognized that it was unconstrained by mandatory minima. The issue there was whether a remand was required where a district court departed upwards from the sentencing guidelines based on both valid and invalid factors. 503 U.S. at 198. And here, unlike in *Briscoe v. United States*, 181 A.3d 651 (D.C. 2018) (cited at Gov't Br. 47), there is no concurrent sentence to obviate the need for resentencing.

Respectfully submitted,

Jaclyn S. Frankfurt /s/
Jaclyn S. Frankfurt, Bar No. 415252

Mikel-Meredith Weidman /s/
Mikel-Meredith Weidman, Bar No. 503023

Paul Maneri /s/
Paul Maneri, Bar No. 1722079

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
(202) 628-1200

Counsel for M.H.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been served electronically via the Appellate E-Filing System upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney, and Anne Park, Esq., Office of the United States Attorney, on this 6th day of March, 2025.

Paul Maneri /s/
Paul Maneri, Bar No. 1722079