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Appeal No. 23-CO-52

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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

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED BY SUBJECTING MR. JOHNSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL TO A HEIGHTENED BURDEN OF PROOF, IGNORING HIS LAWYER'S DUTY TO "KEEP APPROPRIATE RECORDS OF [MR. JOHNSON'S] WAIVER" OF THE RIGHT TO APPEAL, AND FINDING THAT HIS "PERSONAL," "EMOTIONAL" REASONS FOR WANTING AN APPEAL WERE IRRELEVANT.

In holding that Mr. Johnson had not met the "minimum evidentiary standard" for a writ of error *coram nobis*, R. 263 (Order Denying Pet. for Writ of Error *Coram Nobis* 11 [hereinafter Ord.]), the court below committed three distinct errors that warrant reversal, whether taken together or considered separately.[1] First, the court erred in holding Mr. Johnson to a heightened burden of proof on his claim that he requested a notice of appeal. Neither *Bangura v. United States*, 248 A.3d 119 (D.C. 2021), nor the "stringent" nature of *coram nobis* review, R. 263 (Ord. at 11) (quotation marks omitted), compels or supports the court's determination that in "fail[ing] to produce . . . anything more than his own testimony," Mr. Johnson "failed to produce sufficient evidence." R. 267 (Ord. at 15).

The government concedes (at 31 n.17) that the "stringent" nature of *coram*

[1] While the government asserts, in characterizing Mr. Johnson's arguments, that, "[i]nstead of challenging the trial court's factual findings," he claims the court committed "three errors," (at 26), in fact these errors infected not only the ultimate legal ruling the trial court made, but her credibility determinations as well. *See Ingram v. United States*, 885 A.2d 257, 263 (D.C. 2005) ("[F]indings of fact which result from a misapprehension of the applicable law . . . lose the insulation of the 'clearly erroneous' rule" (citation omitted)); *Murphy v. McCloud*, 650 A.2d 202, 210 (D.C. 1994) ("[F]indings induced by, or resulting from, a misapprehension of controlling substantive [legal] principles lose the insulation of F.R.Civ.P. 52(a), and a judgment based thereon cannot stand." (quotation marks and citations omitted)).

nobis review "may not necessarily translate into [a burden of] proof by clear and convincing evidence," as the trial court determined, and more generally, that *coram nobis* does not necessarily require a petitioner to produce extrinsic evidence to corroborate a claim that counsel failed to file a notice of appeal as requested. *See* Gov. Br. at 28. Nevertheless, the government maintains (at 26-27), citing dicta from a number of cases, that Mr. Johnson's burden to prove he requested a notice of appeal was "heavy"—both because he had to overcome a presumption that his proceedings were "correct" and because he brought his claim via writ of error *coram nobis*, in the posture least "friendly" to such claims. *See also* Gov. Br. at 36 (arguing that Mr. Johnson's burden was "heavy" and "particularly onerous"). But insofar as the government argues that Mr. Johnson's burden of persuasion was any "heav[ier]" than a mere preponderance, this argument is foreclosed by the Supreme Court's holding in *United States v. Morgan*, 346 U.S. 502, 512 (1954), that *coram nobis* relief is available "[u]nder the rule of *Johnson v. Zerbst*, 304 U.S. 458 [(1938)]," which, in turn, applies the "preponderance" standard. *Zerbst*, 304 U.S. at 469; *see also, e.g.*, *Holland v. Jackson*, 542 U.S. 649, 654 (2004) (holding that the "preponderance" standard supplies "the general burden of proof in post-conviction proceedings with regard to factual contentions" including those "relating to whether defense counsel's performance was deficient"); *Numer v. United States*, 170 F.2d 352, 352 (6th Cir. 1948) (per curiam) (applying the preponderance standard to a petition for writ of error *coram nobis*).[2]

[2] The cases cited by the government (at 26-27) do not suggest otherwise. Although many courts have recognized that "[t]he standard for obtaining [*coram nobis*] is

The government argues (at 31 n.17) that the trial court's error in reasoning that Mr. Johnson faced a burden of proof by clear and convincing evidence was "immaterial" because the court purported to "appl[y] the preponderance of evidence standard" to reject his claim. But the risk that the trial court subjected Mr. Johnson to a heightened burden, while paying lip service to the preponderance standard, looms especially large here because the court focused so thoroughly on Mr. Johnson's failure to provide specific forms of extrinsic corroboration for his claim,

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more stringent," *Ragbir v. United States*, 950 F.3d 54, 62 (3d Cir. 2020); *accord Stevens v. United States*, 944 A.2d 466, 467 (D.C. 2008), research reveals no case suggesting that *coram nobis* petitioners face a steeper *burden of proof* than those who seek relief by other means. Rather, what courts characterize as more stringent about *coram nobis* review is simply the need, under *Morgan*, 346 U.S. at 512, to demonstrate "error of sufficient magnitude to justify the extraordinary relief," *United States v. Drobny*, 955 F.2d 990, 996 (5th Cir. 1992) (citation omitted)—error of "the most fundamental character." *Ragbir*, 950 F.3d at 62; *see also United States v. George*, 676 F.3d 249, 258 (1st Cir. 2012) ("[A]n error 'of the most fundamental character,' must denote something more than an error simpliciter." (citation omitted)); *Kaminski v. United States*, 339 F.3d 84, 90 (2d Cir. 2003) ("[C]oram nobis is an extraordinary remedy which operates under rules that are generally more stringent than those applicable to habeas. Thus, we have pointed out that coram nobis can relieve an individual . . . only when *fundamental* errors were made in obtaining [a] conviction."). Because a successful claim of ineffective assistance of counsel *necessarily* establishes an error "of the most fundamental character," *Fatumabahirtu v. United States*, 148 A.3d 260, 269 (D.C. 2016) (citations omitted), these cases have no bearing on this one.

Stevens had no occasion to consider whether *coram nobis* implies a more stringent burden of proof than other forms of post-conviction relief because the appellant there alleged counsel's ineffectiveness via a hybrid motion that the lower court "treated" as a 23-110. *Stevens*, 944 A.2d at 467 (noting that the court "did not rule on the coram nobis petition"). Nor does *United States v. Rutigliano*, 887 F.3d 98, 109 (2d Cir. 2018), contradict *Morgan*'s holding that the preponderance standard applies, as the proof of the purported error in that case was "speculati[ve]" at best.

see R. 266 (Ord. at 14), while dismissing as irrelevant all circumstantial indicia of reliability—that he requested relief only sixty days after his appeal lapsed and had strong reason to appeal, given his desire to regain custody of his daughter, and the deeply personal and emotional nature of the conviction itself. *Id.* at 265 (Ord. at 13) ("The fact that Mr. Johnson promptly filed the Petition is simply indicia of his eagerness to challenge the conviction; it is not evidence that he actually challenged the conviction within the timeframe to file an appeal."). As the Second Circuit noted in *United States ex rel. Brennan v. Fay*, 353 F.2d 56, 59 (2d Cir. 1965), such myopic emphasis on extrinsic corroboration is incompatible with a straightforward application of the preponderance standard, unless, as in *Bangura*, testimony is "proffered by an interested party as to occurrences of long ago," or the testimony is contradicted by "probative documentary evidence."

The government argues (at 28-29) that the trial court did not "t[ake] from *Bangura* a legal test that corroborative evidence *must* be presented to support [Mr. Johnson's] testimony" or "impose a 'legal requirement for corroborative evidence,'" but rather "properly considered the absence of any corroborating evidence when assessing Mr. Johnson's credibility." This argument ignores that the trial court invoked *Bangura* and Mr. Johnson's supposed lack of corroboration as a basis for denying relief, even before it purported to "weigh" the credibility of his testimony against Ms. King's. *See* R. 263-64 (Ord. at 11-12). It further ignores the trial court's statements that Mr. Johnson's evidence did not 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." R. 263 (Ord. at 11); *see also* R. 266-67

(Ord. 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."). Indeed, the court denied Mr. Johnson's petition by reasoning that even if Ms. King's testimony was not entitled to as much weight as the court was inclined to give it (because it lacked expected corroboration), this factor was irrelevant because it would not "offset the lack of evidence on [his] part." R. 266 (Ord. at 14).

The government next argues (at 30) that the trial court's reliance on *Bangura*, was not erroneous because "the trial court expressly recognized the two facts distinguishing *Bangura* from [Mr.] Johnson's case": (1) that he waited a much shorter period of time than Mr. Bangura to seek relief and (2) that "whereas [Mr.] Johnson testified at the hearing, [Mr.] Bangura "'presented nothing other than his own affidavit.'" But it is apparent from the trial court's order that, although *Bangura* attached significance to the fact that "Bangura himself did not testify," choosing instead to rely on the "'conclusory'" allegations of an affidavit, *Bangura*, 248 A.3d at 124; *see also id.* at 121 ("Bangura chose not to testify or present any witnesses."), the court below accorded no weight to the fact that Mr. Johnson testified "in great detail" about his request, subjecting himself to the rigors of cross-examination. 7/25/22 Tr. 86-87.[3] Rather, the court reasoned that Mr. Johnson's live testimony was "[j]ust like" the "'perfunctory'" affidavit in *Bangura*. R. 264 (Ord. at 12) (citation

[3] Indeed, counsel even attempted to elicit Mr. Johnson's reason for wanting to appeal but was precluded from doing so by the trial court's erroneous rulings, as addressed separately *infra*. *See* 7/25/22 Tr. 15-16.

omitted) ("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."). The government doubles down on this error by asserting, incorrectly (at 30), that "*Bangura* was an authoritative precedent because, although Bangura's trial attorney (like Ms. King) 'testified for the Government,' Bangura only 'presented an affidavit' and (like [Mr.] Johnson) relied solely on his own assertions, presenting '[n]o other witness or evidence.'" [4]

Mr. Johnson was entitled to have his credibility determined by a factfinder unburdened by any mistaken impression that *Bangura* "was an authoritative precedent." Because the government raises no argument that the court's misconception in this regard was harmless, reversal is required. *See Bailey v. United States*, 251 A.3d 724, 730 (D.C. 2021) ("The government has not asked us to find any error on this score harmless and so we vacate the trial court's order and remand the case for reconsideration.").

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[4] The government further claims (at 30) that the trial court was justified in likening this case to *Bangura* because, although "Mr. Johnson referred to voluminous [corroborating] evidence in his testimony," he neither requested nor produced it in all three years that this case was pending. *See* Gov. Br. at 29 ("[T]he trial court properly considered the *absence* of any corroborating evidence when assessing Mr. Johnson's credibility[.]"); *id.* at 17 n.15 ("[A]lthough Johnson's coram nobis claim had by then been pending for three years, he never 'made a discovery request for copies of any materials he wanted' from Ms. King's files." (quoting R. 266 (Ord. at 14))); *accord id.* at 24-25 n.15. But the record shows while Mr. Johnson wrote to the Clerk of the Superior Court immediately after his hearing, asking for a copy of the correspondence that he referred to in his testimony, which inquired as to the status of his appeal, R. 244; 7/25/22 Tr. 25, the Clerk's Office issued no response. The trial court clearly erred insofar as it attributed to Mr. Johnson an evidentiary vacuum that the court itself had a role in creating.

Second, the judge erred in determining that the absence of corroboration for Ms. King's testimony was irrelevant to her credibility because the government bore no burden of proof with respect to her claim of appellate waiver and because Mr. Johnson "could have [either] produced the [missing] materials" himself or "made a discovery request for copies of any materials he wanted." R. 266 (Ord. at 14). Contrary to the trial court's assessment, the absence of evidence tending to corroborate a witness's testimony is relevant to the credibility of that witness's testimony; such is particularly the case here, because Ms. King had a specific obligation "keep appropriate records of [appellate] waiver" (preferably, in the form of a client's signed statement acknowledging "the appeal right, advice of counsel on possible successful issues to be raised, if any, attendant remedies, if any, and a freely given waiver"), *(Lorin) Johnson v. United States*, 513 A.2d 798, 803 & n.2 (D.C. 1986), and to furnish copies of client case files to the client upon the termination of her representation. D.C. Bar Ethics Op. 333 (Dec. 20, 2005), https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-333; *see also* D.C. Bar Ethics Op. 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 duty to "surrender[] papers and property to which the client is entitled" at the end of the representation). The government does not dispute Ms. King's dereliction in these duties.[5]

[5] Insofar as the government seeks (at 33) to defend Ms. King's failure to timely surrender Mr. Johnson's file to him based on her testimony that "no one asked [her] for" it, 7/25/22 Tr. 75, the government reads this testimony out of context, as it came in response to a specific question about her failure to turn over a copy of Mr.

In a footnote (at 34 n.19), the government argues that *(Lorin) Johnson*, 513 A.2d 798, is of no moment because the court there purported not to "decide anything respecting the failure to timely note an appeal" except to suggest counsel "should keep appropriate records of the waiver." *Id.* at 803 n.2; *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."); *Walking Eagle v. United States*, 742 F.3d 1079, 1083 (8th Cir. 2014) (noting the "importance of attorneys documenting their conversations they have with their clients about the possibility of appeal"). But a statement uttered by this Court, regarding what it views, "of course," as an obligation of counsel, should have no less bearing on counsel's practice than a legal ethics opinion. *See, e.g.*, *In re Fay*, 111 A.3d 1025, 1029 (D.C. 2015) (noting counsel's fiduciary duty to abide by the rules of practice set by this Court); *In re Public Defender Serv.*, 831 A.2d 890, 901 (D.C. 2003) (citing ethics opinions to interpret the scope of the attorney-client privilege); *Adams v. Franklin*, 924 A.2d 993, 998 (D.C. 2007) (same). Indeed, the obligation to secure a written waiver of appellate rights from a client flows naturally from the holding of *Johnson* itself, and should have guided counsel's practice for that reason alone.

Johnson's file to the *government*. *Id.* at 74-75 ("Q And none of that was provided to the Government. A No one asked me for it."). In any case, even assuming Mr. Johnson made no request, Ms. King had a duty to "make a reasonable and good-faith effort to notify [him] of the existence and contents of [his] files and follow [his] instructions whether to hold, return or destroy the files." D.C. Bar Ethics Op. 283, *supra*. "At a minimum, [such] attempt . . . should include sending a letter to the client's last known address and wait[ing] a suitable period of time (perhaps six months) for a response." *Id.* n.12 (citation omitted).

Citing the principle that "[j]udges are presumed to know the law," *In re D.N.*, 65 A.3d 88, 95-96 (D.C. 2013) (citation omitted), the government argues (at 31-32) that the court "plainly understood that . . . the absence of evidence tending to corroborate a witness's testimony is relevant to that witness's credibility," pointing to the fact that the trial court referred to certain evidence as corroboration for Ms. King's testimony—that it was "'generally consistent'" with her written declaration; that she filed a notice of appeal upon request in his other case; and that Mr. Johnson had praised her felony trial work in his letter dated August 2020. However, the trial court's understanding that the *presence* of corroboration could *bolster* Ms. King's credibility does not imply an equivalent understanding that its *absence* could (and should) *undermine* the same.

Moreover, the presumption that a judge correctly understood "the law's requirements" must yield when, as here, the record "indicates" otherwise. *D.N.*, 65 A.3d at 96 (citation omitted). The trial court steadfastly refused to accord significance to Ms. King's failure to produce documentation 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." R. 266 (Ord. at 14); *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."); 7/25/22 Tr. 84-85 (reasoning

that although counsel had "focused on Ms. King and whether [she] did everything she could today," it was "not actually her burden.").[6] Because the government has declined to argue harmlessness as to this error, if this Court agrees the trial court erred, it must reverse.

Third, the trial judge reversibly erred in deeming irrelevant any evidence regarding Mr. Johnson's 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. Specifically, when counsel tried to elicit that Mr. Johnson's reason for "want[ing] to appeal the [misdemeanor] case in the first place" stemmed from his desire to regain custody of his daughter, and his deep indignation over having lost it in the first place, the trial court "sustain[ed] the [government's] objection on relevance grounds with respect to whether he did or didn't get his child back in the custody matter." *Id.* at 16-17.

In response to this argument, the government concedes that it would be error to deem Mr. Johnson's reasons for seeking an appeal irrelevant but argues (at 35) that no such error occurred because the court "did not forbid [Mr.] Johnson from explaining *why* he wanted to appeal," only "from answering two [specific] questions

[6] The government further argues (at 32-33) that the trial court "undoubtedly considered" Ms. King's unethical omissions in evaluating her credibility "since [Mr.] Johnson made these precise arguments below." *See also* Gov. Br. at 33-34 (arguing that the trial court "certainly understood that [Mr.] Johnson's primary attack on Ms. King's credibility stemmed from this missing evidence and unquestionably considered it."). Again, however, this argument is conclusively undermined by the record which demonstrates that the trial court disregarded as irrelevant the entirety of Mr. Johnson's argument below resting on lack of corroboration.

about his civil matter"—"'did you obtain custody of your daughter'; and 'did you ever have . . . a custody hearing.'" But the court's ruling extended not just to the question whether Mr. Johnson had obtained custody in the first place, but also to whether he ever "g[o]t his child *back*" either. 7/25/22 Tr. 17 (emphasis added). And, after counsel tried in vain to explain that this information was relevant to Mr. Johnson's reasons for wanting an appeal, the trial court ruled unequivocally that "the domestic relations matter ha[d] [no]thing to do with what we're talking about today." *Id.* at 19. Thereafter, in its written order, the trial court doubled down on this ruling by rejecting as irrelevant those documents that Mr. Johnson had offered to show his continuing involvement in the underlying custody matter after he had been convicted in this case. Thus, the record refutes the government's suggestion (at 35) that "the court did not forbid Johnson from explaining *why* he wanted to appeal his criminal conviction, a question Johnson's counsel never asked but which plainly fell within the court's definition of the 'only' pertinent issue."

As to this error, the government argues (at 35-37) that "any error was 'harmless'" because "this case was not close and certainly didn't turn on whether Johnson had an opportunity to explain how his custody battle may have informed his appeal decision." But its harm arguments are laced with the same problematic presumptions that underlie Mr. Johnson's first two claims of error. The government argues (at 36) that Mr. Johnson faced a "heavy" and "particularly onerous" burden "to overcome the 'presum[ption that] the proceedings were correct'" and that "Ms. King's conduct fell 'within the wide range of reasonable professional assistance.'" But as noted *supra*, Mr. Johnson's only burden was to overcome the presumption of

correctness in his proceedings by a preponderance of the evidence. The government further argues (at 36-37) that any error must be deemed harmless given Mr. Johnson's failure to produce the letters he wrote to Ms. King about this appeal or any evidence of his wife's attempts to contact Ms. King, as noted in the trial court's order. This argument merely replicates the trial court's two-fold error in giving dispositive significance to his failure to come forward with specific forms of corroboration, while failing to accord any significance to Ms. King's failure to produce documentary evidence to support her claims. Because the trial court ignored an entire category of highly relevant evidence, which necessarily would impact any fact-finder's assessment whether someone "rational" in Mr. Johnson's position "would want to appeal," *Roe v. Flores-Ortega*, 528 U.S. 470, 471 (2000), the government has failed to demonstrate harmlessness and reversal is required. *See Dawkins v. United States*, 41 A.3d 1265, 1272 (D.C. 2012) (erroneous exclusion of relevant bias evidence not harmless when suppression ruling rested solely on trial court's credibility determination); *see also Gay v. United States*, 12 A.3d 643, 647 (D.C. 2011) (recognizing trial court may have been more likely to credit the witness's testimony, had it not erroneously excluded relevant evidence that supported it); *cf. McDonald v. United States*, 904 A.2d 377, 382 (D.C. 2006) (holding that exclusion of evidence that could have affected the trial judge's credibility determination was not harmless beyond a reasonable doubt).

II. 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."

Even setting these errors aside, relief is further warranted because the record shows that any purported waiver of the right to appeal by Mr. Johnson was infected by Ms. King's failure to address his 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. 64; *see Flores-Ortega*, 528 U.S. at 478 (noting counsel's duty to advise regarding the "advantages and disadvantages of taking an appeal"). In this regard, the government does not dispute, and therefore has conceded, that Ms. King failed to inform Mr. Johnson that he "was guaranteed to get a new lawyer for the sole and exclusive purpose of filing the misdemeanor appeal." Gov. Br. at 43 (citation omitted); *see Wood v. Milyard*, 566 U.S. 463, 474 (2012) (finding waiver based on the government's knowing decision to forgo specific arguments). Nor does the government contest that although Mr. Johnson's (alleged) waiver was based on Ms. King's agreement "to help him on the civil side" with his "custody case," 7/25/22 Tr. 64, she never explained to Mr. Johnson that his goal of regaining custody would be substantially furthered by an appellate reversal of his criminal threats conviction. Indeed, the government concedes (at 3-4 n.4) that Ms. Boyd's initial report of the (alleged) threat was what caused him to lose temporary custody in the first place. Despite these concessions, the government argues (at 40-44) that, for various reasons, Ms. King had no duty to provide this information to Mr. Johnson before

allowing his appeal to lapse. None of these arguments has merit.

First, as to the applicable standard of review, the government argues (at 43) that because Mr. Johnson failed to raise this claim below, he must "show that Ms. King's consultation was" not merely deficient, but "so clearly or obviously deficient as to constitute plain error." *See* Gov. Br. at 39 (arguing that this this claim is subject to review for "plain error"). However, the government cites no authority for its contention that "clear or obvious" deficiency is required in this context. On the contrary, this Court has held that it will review a claim of ineffectiveness raised for the first time on appeal from denial of a post-conviction petition, so long as the record permits sound adjudication, *see, e.g.*, *Thomas v. United States*, 586 A.2d 1228, 1231 (D.C. 1991), and counsel's deficiency is "'so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the [proceeding at issue],'" *Hall v. United States*, 559 A.2d 1321, 1322 (D.C. 1989) (citation omitted)). *See Smith v. United States*, 686 A.2d 537, 550 (D.C. 1996) ("We will review claims of ineffective assistance of counsel never made in a § 23-110 motion on the basis of the trial record alone." (citation omitted)); *Gorbey v. United States*, 54 A.3d 668, 700 n.53 (D.C. 2012) (deciding a claim of ineffective assistance of counsel raised for the first time on appeal, without purporting to apply plain error). Here, the government does not dispute that the record suffices to permit sound adjudication of this claim and therefore has waived any argument to the contrary. *Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993) ("[P]oints not urged on appeal are deemed to be waived. That principle applies to the government no less than to the defendant in a criminal case." (footnote omitted)). Moreover, there is no question

that failing to properly advise regarding an appeal is "so clearly prejudicial to substantial [appellate] rights as to jeopardize the very fairness and integrity" of the appellate process altogether. *Hall*, 559 A.2d at 1322 (citation omitted). Indeed, "ineffective assistance is an error 'of the most fundamental character,'" even without taking into account whether counsel's deficiency was clear and obvious within the meaning of the plain error doctrine. *Fatumabahirtu*, 148 A.3d at 269 (citation omitted). Thus, plain error does not constrain the Court's consideration of this claim.

On the merits, the government argues (at 40) that Ms. King "had no duty to consult further with [Mr.] Johnson" because he "expressly instructed [her] not to appeal," thereby negating any duty to consult she otherwise might have faced under *Flores-Ortega*, 528 U.S. at 578. But even assuming Mr. Johnson "explicitly t[old]" or "ask[ed]" Ms. King "*not* to file his appeal," *Flores-Ortega*, 528 U.S. at 477-78,[7] courts have been duly "skeptical" of the government's argument that such a statement necessarily bars any subsequent claim of ineffectiveness under *Flores-Ortega*. *Neill v. United States*, 937 F.3d 671, 677 (6th Cir. 2019). "[A]ccepting [such an] argument would mean licensing attorneys to give unreasonable advice at a critical stage in the proceedings, leaving the defendant with no recourse." *Id.*

[7] Ms. King was inconsistent about the nature of the statements that led her to conclude that Mr. Johnson "specifically didn't want [her] to file" a notice of appeal in this case. 7/25/22 Tr. 70; *compare* R. 229 (Ex. B, Gov. Opp. to Pet. for Writ of Error *Coram Nobis* 1, ¶ 4) ("[He] told me he did not want to note an appeal."); *with* 7/25/22 Tr. 63 ("He said, 'I'm not worried about it because . . .' I mean there were many reasons."); *and id.* at 69-70 ("I asked him if he wanted me to file an appeal in this case. He said no."). Nevertheless, and for the sake of this argument, Mr. Johnson concedes that the described statements, if properly credited, were sufficient to convey to Ms. King a desire that she refrain from filing a notice of appeal.

Moreover, a "bright-line rule" categorically insulating counsel's advice from Sixth Amendment scrutiny would run afoul of the principle that ineffective assistance of counsel claims are to be judged "'on the facts of the particular case.'" *Id.* at 676 (quoting *Flores-Ortega*, 528 U.S. at 477 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984))). Although "a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, *by following his instructions*, counsel performed deficiently," *Flores-Ortega*, 528 U.S. at 477 (second emphasis added), such a defendant may still "complain that . . . counsel performed deficiently" by failing to properly consult with or advise him. Where such claims arise, a defendant's statements purporting to disavow his appeal do not preclude relief.[8] In short, nothing in *Flores-Ortega* purports to authorize counsel to turn a blind eye where, as here, a client reveals that his desire to forgo an appeal is based on a fundamental misconception regarding the appellate process.[9]

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[8] Assuming arguendo such statements may be relevant to prejudice—i.e., whether "there is a reasonable probability that, but for counsel's deficient failure to consult . . . , he would have timely appealed," *Flores-Ortega*, 528 U.S. at 484—the government has waived that argument by failing to raise it.

[9] "[I]t was [*especially*] important" for Ms. King to ensure Mr. Johnson's "practical understanding of the appellate process," *(Lorin) Johnson*, 513 A.2d at 803, because she knew that he had been found incompetent to stand trial just three months before allegedly stating he did not want to appeal. *See* R. 265 (Ord. at 13); R. 213 (3/12/19 Tr. 141) (by Ms. King, acknowledging Mr. Johnson's incompetency). Given that Mr. Johnson was found to have lost competency on the heels of his felony conviction, and regained it after weeks of inpatient psychiatric treatment, there was a particular risk that he might experience sudden decline in mental health after the judge found him guilty of threatening to kill his daughter, thereby jeopardizing any future parental relationship. *See* R. 213 (3/12/19 Tr. 141) (by Ms. King, arguing the importance of Mr. Johnson's relationship to his daughter to his mental health); *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981) (noting the significance

The government argues (at 41-42) that Ms. King fulfilled her duty to consult by explaining that although an appeal would not affect the timing of his release, "he could still appeal 'for other reasons,'" including to avoid "hav[ing] yet another conviction'" and that "she 'wouldn't be the appeals attorney' in his felony case." But such consultation did not address Mr. Johnson's unfounded concern that appealing his *misdemeanor* conviction would necessarily keep one or both of them from focusing on the felony case and Mr. Johnson's ongoing custody litigation. Nor did it address Mr. Johnson's apparent misconception that forgoing his misdemeanor appeal would somehow enhance the possibility that Ms. King could "help him on the civil side," in his "custody case," 7/25/22 Tr. 64.

In the government's view (at 42-43), Ms. King had no duty to address Mr. Johnson's concern that appealing his misdemeanor conviction would distract from the necessary focus on his felony conviction and custody case because that concern was justified and in no way "mistaken." Specifically, the government argues (at 42-43) that Mr. Johnson was "right to be concerned that a misdemeanor appeal would[] dilute[] his focus on the cases that mattered the most" because he had shown himself incapable of allowing a case to proceed without his "intimate[] involve[ment]." *See* Gov. Br. at 42 ("[A]s Ms. King undoubtedly understood, even if [Mr.] Johnson had been appointed new counsel for such an appeal, he still would have been intimately

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of prior recent findings of incompetency, for purposes of assessing present competency). Against this backdrop, counsel's duty to "mak[e] a reasonable effort to discover [Mr. Johnson's] wishes," *Flores-Ortega*, 528 U.S. at 478, necessarily entailed a duty to ensure that any waiver was based on a "rational . . . understanding of the proceedings." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

involved in it."). This argument recasts Mr. Johnson's articulated concern—which was clearly not only that he, but that *his lawyer*, would be distracted from the matters he deemed important—and ignores a litany of statements by Mr. Johnson suggesting unmistakably that he was confused about whether *his lawyer* would be adequately focused if he pursued the misdemeanor appeal. *See* 7/25/22 Tr. 63 ("He wanted me to focus on the other case."); *id.* at 64 ("[H]e wanted me to focus on the appeal of the other case.").[10] At the risk of stating the obvious, however involved Mr. Johnson liked to be in his cases, it would have been *the lawyer* who would need to do the legal work, and make the strategic decisions, given that Mr. Johnson was represented by counsel. Ms. King failed in her obligation because she did not make clear to Mr. Johnson that he would be appointed an attorney for the misdemeanor appeal who would be able (and required) to give the necessary attention to that case without compromising any of his other matters. Moreover, even if there were some merit to the government's argument about "focus"—and there is not—it still would not absolve Ms. King for failing to explain that even if Mr. Johnson's priority was

[10] It further assumes incorrectly that, based on Ms. King's testimony, Mr. Johnson remained "*very* involved" in his misdemeanor case—by "'constant[ly]' phoning [Ms. King] and writing [her] 'lots of letters,'" Gov. Br. at 42-43 & n.21—even despite his lack of interest in its consequences. On the contrary, Ms. King testified that Mr. Johnson's written correspondence "only talked about [his] felony case." 7/25/22 Tr. 64; *see also id.* at 65 (by Ms. King, in response to a question about Mr. Johnson's letter of August 25, 2020, noting that "again [Mr. Johnson] was focused on the [felony] case."). Likewise, Ms. King claimed that "the bulk of [their telephone] conversation[s]" were "associated with [his] other case." 7/25/22 Tr. 74. *But see id.* at 66 (by Ms. King, testifying that she did not "do a lot of talking [to Mr. Johnson] over the phone because" he called on "recorded lines, but [that] he would talk to staff because he was familiar with [them] from the community").

obtaining "help . . . on the civil side" with his "custody case," *id.* at 64, that goal would be furthered by an appellate reversal of his criminal threats conviction.

Citing *Flores-Ortega*, 528 U.S. at 480, the government contends (at 43) that "Ms. King had [no] duty to tell [Mr. Johnson] that he 'was guaranteed a new lawyer for the exclusive purpose of filing the misdemeanor appeal'" because "'[d]etailed rules for counsel's conduct' . . . have no place in a *Strickland* inquiry." But requiring counsel to address a client's unfounded concerns about the disadvantages of taking an appeal is not the kind of *bright-line*, "detailed" rule that *Strickland* disfavors. *See Strickland*, 466 U.S. at 689; *cf. Flores-Ortega*, 528 U.S. at 480 (rejecting Justice Souter's proposal to "hold that counsel 'almost always' has a duty to consult with a defendant about an appeal" as too "detailed" (citations omitted)). Rather, it is a contextual obligation, the existence of which is predicated on "'on the facts of th[is] particular case.'" *Flores-Ortega*, 528 U.S. at 477 (quoting *Strickland*, 466 U.S. at 690). It is part and parcel of the duty to "advis[e] the [client] about the advantages and disadvantages of taking an appeal." *Id.* at 478.[11] Here, where Mr. Johnson

[11] Contrary to the government's contentions (at 42, 44), neither *Bednarski v. United States*, 481 F.3d 530 (7th Cir. 2007), nor *Walking Eagle*, 742 F.3d 1079, suggests otherwise. Neither of these cases addressed the question presented here: whether counsel had a duty to correct a misconception that a client revealed in expressing the desire to forgo an appeal. Rather, although both involved *allegations* that counsel's appellate advice had either omitted or misrepresented certain material information, courts in both cases found these allegations incredible. *See Bednarski*, 481 F.3d at 533, 535-36 (noting that the trial court had credited counsel's testimony that Bednarski did not actually ask him "Don't you think we should [appeal]?" after sentencing, as Bednarski had claimed; finding that counsel had consulted with him adequately regarding the subject of appeal in advising him about the government's plea offer); *Walking Eagle*, 742 F.3d at 1082-83 (noting that Walking Eagle was found "not credible" and did not dispute counsel's testimony). And whereas Ms.

expressly articulated his reasons for wanting not to pursue an appeal, and those reasons were not founded on accurate information about the appellate process, his lawyer had a duty not to utter any particular words, but to correct his misconceptions as part of her constitutional obligation to consult and advise him on the issue.

Finally, the government argues (at 44) that Ms. King's "'fail[ure]' to inform [Mr. Johnson] of his right to new appointed counsel . . . was [not] clearly unreasonable in the circumstances of this case." But as explained *supra*, Mr. Johnson does not need to establish "clear and obvious" deficiency, only deficient performance within the meaning of *Flores-Ortega*, and the government fails to identify any particular "circumstances" that would justify Ms. King's decision to turn a blind eye to Mr. Johnson's apparent confusion. *See Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 (D.C. 2001) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (citation omitted)).

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.

King left Mr. Johnson alone to sort out whether he would have new counsel on appeal and whether it made sense to forgo an appeal given his desire to regain custody, Walking Eagle's attorney not only "answered his questions" regarding his appellate rights before sentencing, but also "ma[de] herself available after the sentencing hearing to answer any of [appellant's] questions." *Walking Eagle*, 742 F.3d at 1083. Thus, the government's reliance on these cases is misplaced.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been served, by the Court's electronic filing system, upon all counsel of record, this 16th day of January, 2025.

/s/
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