BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CO-52

KEITH DIMITRI JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
JOHN P. MANNARINO
ELIOT A. FOLSOM
DAVID B. GOODHAND, D.C. Bar #438844
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
david.goodhand2@usdoj.gov
(202) 252-6829

Cr. No. 2018-CF2-4233

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Other Authorities

ISSUE PRESENTED

Whether the trial court properly exercised its discretion in denying Johnson's petition for a writ of coram nobis premised on his counsel's purportedly ineffective assistance where – following an evidentiary hearing during which both Johnson and his counsel testified – the court found that Johnson had instructed his counsel *not* to file an appeal and Johnson doesn't challenge that credibility-based factual finding?

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CO-52

KEITH DIMITRI JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After appellant, Keith Dimitri Johnson, threatened Joyce and Michael Boyd and his minor daughter (NH) – whom Joyce Boyd had guardianship of – on October 24, 2018, he was charged with three counts of misdemeanor attempted threats, in violation of D.C. Code §§ 22-407, -1803 (see Record on Appeal (R.) 15 at 1). Following a March 12, 2019, bench trial, the Honorable Carol Ann Dalton convicted Johnson on all three counts and sentenced him to time served (3/12/19:152). Because

Johnson told his counsel (Marnitta King, Esq.) that he did not want to pursue an appeal, she did not file a notice of appeal (R.15 at 6, 13).[1]

Despite his no-appeal instruction, approximately six weeks after the 30-day appeal period had expired, Johnson filed a pro se D.C. Code § 23-110 motion, claiming Ms. King rendered ineffective assistance by failing to note an appeal (R.A at 31). Judge Dalton denied Johnson's motion because he was not "in custody" (see R.15 at 3). This Court, however, vacated that order and remanded for the court to consider Johnson's § 23-110 motion as a petition for writ of coram nobis (7/16/20 Order). In August 2021, Johnson's case was transferred to the Honorable Deborah J. Israel, who appointed him counsel (A.J. Amissah, Esq.) (R.A at 32). Three months later, Johnson filed a Petition for Writ of Error Coram Nobis, which the United States opposed (R.5, 9). Following an evidentiary hearing, Judge Israel denied Johnson's petition on January 12, 2023, and Johnson timely appealed (R.15, 16).

[1] Ms. King also served as Johnson's counsel in his separate felony-assault case (2017-CF2-507), which went to trial in 2018, before his misdemeanor trial (R.9 at Exh. A). A jury convicted Johnson of Assault with a Dangerous Weapon and Assault with Significant Bodily Injury (*id.*). On February 6, 2019, the Honorable Jose Lopez sentenced Johnson to a cumulative sentence of 15 years' imprisonment and Ms. King filed a notice of appeal in that case "per Mr. Johnson's request" (*id.*; see 7/25/23:31).

Johnson's 2019 Misdemeanor-Threats Trial

The Government's Case

When Johnson's and Carla Henderson's daughter (NH) was just a baby, Ms. Henderson's aunt asked Joyce Boyd – who was then married to Michael Boyd – to take custody of NH due to Ms. Henderson's present incarceration (3/12/19:13-15). Eventually, in 2005, Ms. Boyd secured legal guardianship of NH (see Def. Exh. 3), who thereafter lived with Ms. Boyd for 17 years (*id.*).[2] When Johnson learned in November 2016 that he was NH's father,[3] however, he made a custody request early the next year (see Def. Exhs. 2, 3).[4]

---

[2] Joyce and Michael Boyd divorced a few months after they took custody of NH, but Michael Boyd still considered himself her father and continued to support her, though he never formalized that relationship in court (3/12/19:72-73).

[3] NH herself did not learn Johnson was her father until Thanksgiving 2016, at which time she apparently contacted him (3/12/19:16, 127).

[4] Specifically, Johnson filed a complaint for custody on January 4, 2017, naming the Boyds and Ms. Henderson as defendants (see Def. Exh. 2). At a February 21, 2018, hearing, the Boyds "stated that they no longer wished to pursue legal or physical custody" of" NH, and, analyzing the case as "a custody matter between [NH's] biological parents" (*id.* at 2), on February 27, 2018, Judge Steven Wellner granted joint temporary legal and physical custody to Johnson and Ms. Henderson, though NH's "primary legal residence" would be Ms. Henderson's home (3/12/19:48-49, 89; see Def. Exh. 1 (docket sheet in 2017-DBR-36)). On March 13, 2018, Judge Wellner thereafter entered a Consent Permanent Custody and Visitation Order, giving Johnson and Ms. Henderson joint legal and physical custody of NH, with Ms. Henderson having primary custody (Def. Exh. at 3). Two weeks later, however, Ms. Boyd moved for reconsideration of that Order, noting that, between February 20 and March 13, 2018, NH had never stayed with her mother and that, "during the pendency of this matter," Johnson had threatened NH and "on another occasion

(continued . . .)

Roughly one year later, on March 9, 2018, the Boyds attended a fifth-floor Superior Court hearing concerning a defamation suit that Johnson had filed (3/12/18:16-17, 74). Johnson claimed the Boyds had said defamatory things during the custody-mediation proceeding and was seeking $50,000 (*id.* at 17, 88-89). At this hearing, however, the court dismissed Johnson's suit (*id.* at 20, 76). Following this dismissal, Johnson told the judge, "'[y]ou can't tell me what to do,'" and left the courtroom "in a hurry" (*id.* at 76-77, 87).

The Boyds waited before leaving so that Johnson would have time to vacate the hallway (3/12/19:77). But upon their exit, Johnson was still in the hallway and Mr. Boyd thus instructed Ms. Boyd to walk directly to the elevators (*id.*). Johnson nonetheless accosted the Boyds, accusing them of "'think[ing] you all got away with something,'" and saying, "'[Y]ou think you're so slick'" (*id.* at 78-79).[5] When Mr. Boyd then instructed Ms. Boyd to move to a "safer position" near the fifth-floor's atrium railing, Johnson threatened the Boyds, declaring he "'would throw [Ms. Boyd] over the railing'" and adding he would also throw Mr. Boyd over because Mr.

---

threaten[ed] to shoot [Ms. Boyd]" (*id.* at 5). On April 27, 2018, Judge Wellner thus awarded Ms. Boyd temporary custody of NH (Def. Exh. 1).

[5] In late 2017, Ms. Boyd had secured a year-long civil protection order (CPO) against Johnson, which forbid him from contacting either her or NH (3/12/19:27, 104). Accordingly, when Johnson approached Ms. Boyd, she tried to explain to him that he was violating the CPO (*id.* at 27). In November 2018, the court extended this CPO through November 2019 (*id.* at 104, 137).

Boyd "'couldn't handle'" Johnson (3/12/19:81-82; see also *id.* at 24 (Ms. Boyd: Johnson "threatened" her, saying he "would throw [her] over the railing")). Johnson – who was "yelling" and "ranting and raving" – further threatened the Boyds and NH, announcing that he knew where they lived and he was "'going to get his gun and shoot'" all three of them (*id.* at 83-84; see also *id.* at 24-25 (Ms. Boyd: "[h]e said that he would shoot us")).[6] The Boyds reported Johnson's threats to the police, who arrested him on March 12 (*id.* at 39-40, 85-86, 124).[7]

---

[6] As detailed in the text, both Boyds described Johnson's threats. In addition, the court admitted a video of the hallway encounter, which, the prosecutor argued, "completely corroborated" the Boyds' testimony because it showed: (a) the Boyds trying to stay away from Johnson by "stepping back" when he repeatedly "approach[ed] them"; (b) Johnson "gesturing in their face[s]" and "pointing at them"; and (c) Johnson seemingly "angry" (3/12/19:112 (closing argument)). As "support for [Johnson's] intent," the prosecutor also offered a Google photo album that Johnson had sent to Ms. Boyd's phone later that night (*id.* at 28-39, 134; see Exh. 3). The album attached a photograph of Johnson's felony-assault indictment and contained a text message: "[']This is what [I] need for both of you [to] know, that all that bullshit Joyce you and your husband pulled today, I called you all gangsta in the court today[']" (3/12/19:134; see also *id.* at 34-35 (Ms. Boyd: "He made the statement, that's what I need to know about him. And that it's – about me and my husband for pulling what we pulled in court.")). Ms. Boyd believed that Johnson had sent the Google photo album because "[the indictment] had his name on it" and the album had a "boxing dog logo" on it, which she had previously seen on Johnson's Facebook account (*id.* at 29, 33). The court admitted this exhibit over Johnson's authentication objection, concluding Ms. Boyd "says she received it. She believes it's him. So that does go to the weight." (*Id.* at 38-39.)

[7] As a result, Johnson was detained a few days later in his separate felony-assault case (3/12/19:149).

The Court's Guilty Verdict

The court found "beyond a reasonable doubt that threats were made [by Johnson] to Joyce Boyd, Michael Boyd, and their daughter" (3/12/19:135). Based on the Boyds' "demeanor," "their behavior," and the fact that "[t]hey basically corroborated each other," the court found them "credible," and "did not find credible that they made up these threats" to somehow "get custody" of NH (*id.* at 130-31), as Johnson's counsel had argued (*id.* at 116), The court also relied on the video, which showed that, as the Boyds tried to get to the elevator, an "already agitated" Johnson "follow[ed] them" with, as Judge Dalton described it, a "threatening" face (*id. at* 129-30).[8]

The court then informed Johnson of his 30-day appeal right (3/12/19:135). Further, Judge Dalton explained, trial courts sometimes make "wrong decisions" and, indeed, she identified at least one such possible decision that she had made in Johnson's trial: "there is an issue about whether the Google photos are valid" (*id.* at 135-36). "So," Judge Dalton concluded, "I encourage you to talk to your attorney about filing an appeal," noting Ms. King is "a very good attorney who you can talk to" (*id.* at 135).

[8] The court also reiterated its ruling on the Google photo album, noting there was a "low bar for introducing" it, which the government met by establishing its authenticity via the attached indictment – which had Johnson's name on it – and the text's reference to that day's events at the courthouse (3/12/19:133-34).

The Sentencing

Following the verdict, the court proceeded directly to sentencing. To ensure that Johnson have no contact with the Boyds or NH "for as long as humanly possible," the government asked the court to impose three consecutive 180-day sentences and to run that sentence consecutive to the 15-year, felony-assault sentence Johnson had recently received (3/12/19:138). But, the prosecutor added, the court should suspend that sentence "in its entirety and place him on the longest period of probation that the court will permit with a no-contact stay-away order starting today" (*id.*). Johnson's counsel (Ms. King) opposed this, contending NH was "staying in contact with [Johnson's] wife [and] trying to build a relationship with [Johnson], although he's in jail" (*id.* at 141). Ms. King thus asked Judge Dalton to "defer[ ]" to the CPO, noting that, if NH desired to have contact with Johnson, it would be "a lot easier" for her "to change that CPO" (*id.* at 141-43, 147; see note 5 supra).

The court agreed with Ms. King's position and declined to place Johnson on probation or impose a no-contact/stay-away order (3/12/19:152-54). Instead, the court left the terms of any such order to the CPO and sentenced Johnson to "time served" (*id.* at 152-53). Further, the court again encouraged Johnson to "talk" to Ms. King "about appeal," noting she is "a great attorney" (*id.* at 154).

The Coram Nobis Proceedings

Approximately 45 days after the appeal period expired, Johnson filed his pro se motion, claiming he had asked Ms. King to file an appeal but she had not (see R.5 at 2).

Johnson's Petition and the Government's Opposition

"[B]as[ing]" his coram nobis petition on *Fatumabahirtu v. United States*, 148 A.3d 260, 268 (D.C. 2016), Johnson claimed he had "informed his trial counsel that he wanted to appeal his conviction, but Ms. King failed to timely file a notice of appeal" (R.5 at 1-2). This, Johnson maintained, although Ms. King had "verbally on the record acknowledge[d] that she would file a notice of appeal" (*id.* at 4). Further, Johnson asserted, "his wife contacted Ms. King multiple times after trial to ensure that the notice of appeal was filed," but Ms. King "never did so" (*id.*). "Like the defendant in *Fatumabahirtu*," Johnson thus claimed, he met "all of the elements necessary for coram nobis relief" (*id.* at 2-6 (quoting *Fatumabahirtu*)).

The United States opposed (R.9). Though Johnson claimed Ms. King "verbally acknowledged" that she would file an appeal, the transcript reflected no such statement (*id.* at 4). Further, Johnson had "not presented any evidence" to support his claim, "such as his own sworn statement or that of his wife, or proof of correspondence" (*id.*). In contrast, the government provided a declaration from Ms. King, who explained that Johnson "told [her] he did not want to note an appeal":

> I recall that I spoke with Mr. Johnson after trial and asked him if he wanted to note an appeal. Mr. Johnson told me that he did not want to note an appeal. Specifically, Mr. Johnson said that he did not care about his misdemeanor conviction because the Court had sentenced him to time served. Mr. Johnson also said that he wanted to focus on challenging his felony conviction. Based on this conversation with Mr. Johnson, I did not note an appeal. (*Id.* at Exh. A.)[9]

The government thus asked the court to hold an evidentiary hearing, suggesting that Johnson would be unable to show that Ms. King's "performance was deficient" and, concomitantly, would be unable to demonstrate "an error of the most fundamental character necessary to warrant relief under a writ of error coram nobis" (*id.* at 5).

The Evidentiary Hearing

1. Johnson's Testimony

Johnson claimed that he "asked" Ms. King "to file an appeal" (7/25/22:15). Specifically, Johnson asserted, he "notified" Ms. King the day of sentencing that he "want[ed] her to file an appeal" (*id.* at 24-25; see also *id.* at 34 ("I told her before she left, . . . file an appeal")). Further, Johnson claimed, that "was the last time [he] saw or spoke[] to Ms. King" (*id.* at 25). Additionally, Johnson alleged, he "wrote [Ms. King] a few letters trying to find out what was the reason for her not filing the notice of [his] appeal" (*id.* at 20). He "had [his] wife also call" Ms. King and, when

[9] The government also produced an August 2020 letter from Johnson to Ms. King in which, among other things, he praised her work in his felony matter, noting she had done a "Damn Good job in Trial" (R.9 at Exh. C).

his wife reached Ms. King, she told his wife, "'He got a new lawyer. Tell *her* to file this appeal.'" (*Id.* (emphasis added).) Johnson also contended that he "wrote the clerk of the Court" and asked, "did they receive any notice of appeal"; the clerk purportedly wrote back and said "they had not received any notice of appeal from Ms. King" (*id.* at 23-24). Johnson "believe[d] that Ms. King never filed an appeal" because he had filed a § 23-110 motion in his felony-assault case purportedly alleging that she had performed deficiently by not raising his competency for trial (*id.* at 26, 36-38). Thus, Johnson posited, "Ms. King must have felt some kind of way about me filing that § 23-110 and she got in her feelings or whatever and didn't file the appeal in this matter" (*id.* at 26).[10]

2. Ms. King's Testimony

Ms. King testified that she has been practicing for 21 years and is "well versed" in criminal law (7/25/22:71). Following a client's trial, Ms. King always

[10] Johnson also explained how he knew the Boyds, noting that Ms. Boyd had sought custody of his daughter (7/25/22:15-16). But when counsel asked if Johnson had ultimately obtained custody of NH, the court sustained the government's relevance objection (*id.* at 16-17). Similarly, when counsel asked if there had ever been a custody hearing, the court again sustained an objection (*id.* at 18-20). The court rejected Johnson's claim that that information was relevant since his misdemeanor "case theory" had been that the Boyds fabricated the threats to get "custody back of [Johnson's] daughter" (*id.* at 18-19). As the court explained, it was unnecessary to "retr[y]" the misdemeanor "conviction" when the "only issue" raised in Johnson's coram nobis petition was whether there was "ineffective assistance of counsel in the filing of the appeal" (*id.* at 19).

inquires if he wants to file an appeal: "I'll ask that same day" because "it's fresh in everyone's mind" and they "can talk about it" (*id.* at 60). If the client indicates that he wants to appeal, Ms. King "just file[s] it and [does] not ask again" (*id.* at 61). However, even "if the answer is no, [she] may follow-up and ask again" (*id.*).

Ms. King remembered Johnson's trial "well" (7/25/22:62). After "the Judge gave him time served," Ms. King spoke with Johnson in the back and "explained" to him what that sentence "meant" in "the context of [his] other case" (*id.* at 61-62). Specifically, Ms. King explained to Johnson that, even though the time-served sentence would have no "affect" on his 15-year felony sentence, he "could appeal it for other reasons just so he didn't have yet another conviction, because hopefully he would win [his felony appeal] and then th[e misdemeanor] case would matter" (*id.* at 70).

Consistent with her practice, Ms. King then "asked if [Johnson] wanted an appeal" (7/25/22:63; see also *id.* at 69-70 ("I asked him if he wanted to file an appeal")). "He said no" (*id.* at 70; see also *id.* ("he didn't want to"); *id.* at 69 ("[h]e didn't tell me to file an appeal")).[11] There were "many reasons" why Johnson didn't

[11] In contrast, when Ms. King "asked [Johnson] if he wanted [her] to file an appeal in [his felony] case," he "said yes" (7/25/22:60). Accordingly, Ms. King filed a notice of appeal in *that* case on February 27, 2019, which was just two weeks before Johnson instructed Ms. King *not* to file an appeal in his misdemeanor case (*id.* at 31, 60). Moreover, although Ms. King had talked with Johnson's wife before his (continued . . .)

want to appeal (*id.* at 63). First, the judge had sentenced him to time served and thus his "time would be over" at the end of his felony sentence (*id.*). Second, Johnson had "wanted [Ms. King] to fight hard" against a stay-away order because "he wanted to be able to write letters and call" his daughter, and Ms. King had succeeded in convincing Judge Dalton not to impose one (*id.*). Thus, Johnson had explained to Ms. King, he "wasn't worried about [the misdemeanor] case" and he "wanted [her] to focus on the other case" (*id.*). As Ms. King explained in a follow-up call, however, although she "was going to help him on the civil side" – *i.e.*, in his custody case – she "wasn't going to be the appeals attorney" in his felony case (*id.* at 63-64; see also *id.* at 64 ("I told him I wouldn't be the appeals attorney")). Nonetheless, in this follow-up phone call, Johnson "confirm[ed]" that he didn't want to file an appeal in his misdemeanor case (*id.* at 64).[12]

---

misdemeanor trial, Ms. King didn't think she had had any conversations with her after it had ended (*id.* at 75).

[12] Consistent with Johnson's focus on his felony case, the "bulk of th[is] conversation" was about that case (7/25/22:74). Accordingly, Ms. King did not bill this conversation (*id.*). Further, although Ms. King couldn't specifically recall if her office had forwarded Johnson's jail call to her cell phone, she sometimes didn't keep notes of the calls that came to her cell phone (*id.* at 73). But, Ms. King emphasized, that jail call "should [have] be[en] on a recorded line," which meant, for example, it could have been subpoenaed (*id.*). Similarly, although Ms. King wasn't sure if there were any witnesses to the conversation she had with Johnson in the cellblock, if the courtroom cameras were working, one could have "see[n] [her] going to the back with him" (*id.* at 71). Further, Ms. King explained, she "still had [Johnson's] file," "[e]lectronically as well as hard copies" (*id.* at 74). Johnson wrote "many letters" to

(continued . . .)

In summary, Ms. King explained, if at any time during the 30-day appeal window, Johnson had "called or written" and said he wanted her to file an appeal, she would've done so, noting it's a ministerial task because the "form's on-line" (7/25/22:66).[13] "But in this case [Johnson] specifically didn't want me to file it. He wanted to have focus on that other case." (*Id.*) In this regard, Ms. King explained, Johnson's position wasn't unusual: "[A] lot of times clients don't want me to file an appeal. They just take the time-served disposition." (*Id.* at 78.)

3. The Parties' Arguments and the Court's Ruling

Johnson argued he had met his burden because he credibly testified that he had asked Ms. King to file a notice of appeal (7/25/22:85-86). Thus, Johnson contended, his testimony established that Ms. King had performed deficiently

---

her (*id.* at 65; see also *id.* at 68, 70). Other than Johnson's August 25, 2020, letter (see note 9 supra), however, none of them were relevant: "[t]he other letters he talked about other stuff" (7/25/22:69; see also *id.* ("there were lots of others[,] ones with other subject matter")). Accordingly, Ms. King had "found the only letter where [Johnson] mentions the word [']appeal[']" and provided it to the government, noting "[t]he other letters talk[ed] about a lot of stuff that had nothing to do with that" (*id.* at 70). Ms. King's production was thus consistent with the advice she had received from the D.C. Bar, whom she had contacted because she wasn't "familiar with exactly how much of [her] attorney-client privilege [material] [she] was supposed to provide" (*id.* at 81). "[B]ased upon that conversation," Ms. King provided only "what [she] thought was relevant to [the government's] request" (*id.*).

[13] Further, Ms. King explained, if she had filed an appeal, she would have likely raised the Google-photo-album evidentiary issue (7/25/22:77-78).

because "they had a conversation and [Ms. King] told him she would [file his appeal] and she didn't do it" (*id.* at 87; see also R.14 at 2 (Johnson "underst[ood] that the burden of proof [wa]s on him to show that his counsel was ineffective")). Johnson further asserted that "he ha[d] no reason to lie" because he was already serving a 15-year sentence, adding the misdemeanor appeal was "about principle" (7/25/22:85-86).

For its part, the government contended that Ms. King's testimony "had lots of indicators of credibility" (7/25/22:92). In contrast, Johnson had not provided any "copies of his letters" to Ms. King or "submit[ted] any letters from any dockets" that had "rais[ed] complaints about [her]" (*id.* at 93). He also "didn't call in any other testimony from his wife [or] from anybody else who may have been present or been aware of his concerns about [Ms. King's] failure to note an appeal" (*id.*). "Because Ms. King had a clear and specific recollection of her advice to [Johnson], which was not effectively contradicted by any evidence" from Johnson, the government asked the court to credit Ms. King's testimony and find he "ha[d] not met the extraordinarily high threshold to merit a writ of error coram nobis" (R.12 at 2).

In finding that Johnson "specifically and expressly said he did not want to appeal the case" (R.15 at 6, 13), the court credited Ms. King's testimony for several reasons. "[E]ven under the cross-examination, [Ms.] King's testimony was generally consistent with her written declaration" (*id.* at 13). Further, Ms. King "did file the

notice of appeal on behalf of Mr. Johnson in another matter just a few days before Mr. Johnson's trial in this matter" (*id.*). Additionally, Ms. King had explained that she believed Johnson would've had a "chance to prevail" if he had appealed (*id.* at 13-14). Finally, although Johnson "accused the trial judge in the other criminal matter, as well as other court-appointed counsel in that matter, of bias and prejudice," he told Ms. King in a post-trial letter that "'you did a Damn Good job in trial'" (*id.* at 14; see note 9 supra).

In contrast, the trial court discredited Johnson's testimony (R.15 at 15). In particular, the court did "not credit" Johnson's claim that Ms. King was so angered by his § 23-110 motion that she "chose not to file an appeal in this matter" (*id.* at 13). "Despite Mr. Johnson's repeated assertion," the "[c]ourt's record" showed that his § 23-110 motion "was neither 'granted by a judge' nor did it mention" Ms. King's purported failure to raise the competency issue at his felony trial (*id.*). "In fact," Judge Lopez had *granted* Ms. King's request (made on Johnson's behalf) and entered an Order finding Johnson incompetent and directing his restoration (*id.*).

Based on its detailed credibility findings, the court thus found that Ms. King spoke with Johnson "'in the back' about the sentence and the appeal" (R.15 at 6). During that conversation, Johnson told Ms. King that "he was not worried about the conviction in this misdemeanor case, as he was sentenced to time served, and wanted her to 'focus on the other case,' namely 2017 CF2 507" (*id.*). Further, Johnson called

Ms. King's office on "many occasions" and, "during one of those calls, she was able to confirm again that Mr. Johnson did not wish to file an appeal in the misdemeanor case" (*id.*). "Overall," the court found, "Johnson never expressed any wish to file an appeal in the misdemeanor case" and, indeed, if Johnson had "asked [Ms. King] to file an appeal, she would have done it," just as she had in his felony case (*id.*).

"Even reviewing the evidence through the lens of the preponderance of evidence standard,"[14] the trial court thus determined, Johnson's "petition for writ of error coram nobis still fail[ed] to rebut 'the presumption that the proceeding in question was without error'" (R.15 at 11 (quoting *United States v. Higdon*, 496 A.2d 618, 619 (D.C. 1985)). "[A]s in" *Bangura v. United States*, 248 A.3d 119 (D.C. 2021), the court "s[aw] a glaring absence of evidence tending to support Mr. Johnson's position" (*id.* at 12). "[T]he only pertinent evidence presented by Mr. Johnson in this proceeding [wa]s his own testimony," which the court did not credit (*id.*). Though Johnson claimed that his wife made "multiple calls" to Ms. King

[14] Because this Court has said the "standard for a writ of error coram nobis 'is much more stringent than for vacating a conviction on § 23-110 grounds'" and because "[m]ultiple" states "have adopted the view that the petitioner must satisfy the *Strickland* test by clear and convincing evidence," the trial court "conclude[d] that applying the standard of clear and convincing evidence, if not a higher burden, would be appropriate" (R.15 at 10-11 (citations omitted); *see Strickland v. Washington*, 466 U.S. 668 (1984)). Nonetheless, as detailed in the text, the court applied only the preponderance-of-the-evidence standard and found Johnson had failed to meet even that "minimum evidentiary standard" (*id.* at 11).

instructing her to file an appeal on Johnson's behalf, he provided "no evidence at all" from his wife (*id.*). Further, although 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 (*id.* at 14). Moreover, Johnson had not contended that Ms. King or the government had "failed to produce" any materials he may have informally requested (*id.*). "After weighing Mr. Johnson's testimony against the Court's records, the opposing witness' testimony and the other evidence presented," the trial court found Johnson's testimony "not sufficiently credible" and he had "failed to demonstrate that his appellate rights were lost as a result of ineffective assistance of counsel" (*id.* at 15). Accordingly, the court denied his coram nobis petition.

SUMMARY OF ARGUMENT

Johnson does not challenge the trial court's factual finding that he expressly told Ms. King he didn't want to pursue an appeal in his misdemeanor case. This uncontested finding demonstrates the correctness of the court's coram nobis ruling, because "a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). The court thus correctly concluded that Johnson failed to demonstrate a fundamental error amounting to a miscarriage of justice.

Instead of contesting any of the trial court's post-hearing findings, Johnson claims the court committed three legal errors which mandate reversal. None of these claims has merit, however. Additionally, Johnson now proffers a new theory of Ms. King's ineffectiveness, asserting that, even if he *had* instructed her not to file an appeal, he did so because she had inadequately consulted with him about it. But even assuming Ms. King had such a duty given Johnson's unequivocal no-appeal instruction, she properly discharged it. Certainly, Johnson has not shown her consultation amounted to clear or obvious error, which is his plain-error burden.

ARGUMENT

The Trial Court Properly Exercised its Discretion in Denying Johnson's Coram Nobis Petition Because He Failed to Establish an Error of the Most Fundamental Character.

Johnson claims (at 22, 24-40) that, in denying his petition, the "trial judge committed three errors which mandate reversal." This is not accurate. The court adhered to the applicable coram nobis standards and properly concluded Johnson had failed to prove *any* error, let alone one constituting a miscarriage of justice.

A. Legal Principles and Standard of Review

The "availability" of the writ of coram nobis – which continues litigation "*after* final judgment and exhaustion or waiver of any statutory right of review," *United States v. Morgan*, 346 U.S. 502, 511 (1954) (emphasis added) – is confined

to "'extraordinary' cases presenting circumstances compelling its use 'to achieve justice.'" *United States v. Denedo*, 556 U.S. 904, 911 (2009) (quoting *Morgan*, 346 U.S. at 511). "[J]udgment finality is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of coram nobis issues only in extreme cases." *Id.* at 916. "In short, the writ may not issue unless the petitioner demonstrates 'error amounting to a miscarriage of justice.'" *Douglas v. United States*, 703 A.2d 1235, 1236 (D.C. 1997) (citation omitted); *see also Magnus v. United States*, 11 A.3d 237, 245 (D.C. 2011) (writ available only "to correct a miscarriage of justice resulting from errors of the most fundamental character").

"In reviewing a petition for such a writ, there is a presumption that the proceeding in question was without error, and the petitioner bears the burden of showing otherwise." *Higdon*, 496 A.2d at 619-20; *see also Morgan*, 346 U.S. at 512 ("presumed the proceedings were correct"); *United States v. George*, 676 F.3d 249, 255 (1st Cir. 2012) ("[t]he devoir of persuasion is on the petitioner"). To obtain coram nobis relief, a petitioner must "demonstrate that (1) the trial court [was] unaware of the facts giving rise to the petition; (2) the omitted information [is] such that it would have prevented the sentence or judgment; (3) petitioner [is] able to justify the failure to provide the information; (4) the error [is] extrinsic to the record; and (5) the error [is] of the most fundamental character.'" *Butler v. United States*, 884 A.2d 1099, 1104-05 (D.C. 2005); *see also Bangura*, 248 A.3d at 121 (same).

"The standard for determining whether an error is fundamental is not precisely defined, but because coram nobis 'lies at the far end of [the] continuum' of methods for challenging a judgment, it is a high standard." *Murray v. United States*, 704 F.3d 23, 29 (1st Cir. 2013) (citation omitted).

Where, as here, a defendant is not in custody and a § 23-110 motion is thus unavailable, a coram nobis petition is "the proper vehicle to advance [his] ineffectiveness claim." *Fatumabahirtu*, 148 A.3d at 268. But "coram nobis relief is not just another stop on a continuum of opportunities for a defendant to seek appellate relief." *People v. Rosario*, 26 N.Y.S.3d 490, 492 (N.Y. 2015). "Rather, it is extraordinary relief only to be provided in 'rare case[s]' when 'a right to appeal was extinguished due solely to the unconstitutionally deficient performance of counsel.'" *Id.* (citation omitted). "Judicial scrutiny of counsel's performance must be highly deferential," and a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. "[A] lawyer who disregards specific instructions to file a notice of appeal acts in a manner that is professionally unreasonable." *Flores-Ortega*, 528 U.S. at 477; *see also Hines v. United States*, 237 A.2d 827, 829 (D.C. 1968) (same). "At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Flores-Ortega*, 528 U.S. at 477.

Because the facts concerning Johnson's instructions to Ms. King were "contested," Judge Israel properly held an evidentiary hearing "to ascertain the truth of [the] allegations." *Hines*, 237 A.2d at 829 n.6. Following such a hearing, this Court "may set aside the trial court's findings only if the trial court's findings are plainly wrong or without evidence to support them." *United States v. Hamid*, 531 A.2d 628, 646 (D.C. 1987). This Court thus reviews "a trial court's denial of a petition for writ of error coram nobis for an abuse of discretion, which will occur when a trial court bases its decision on an incorrect legal standard or renders a decision that is not based on a 'firm factual foundation.'" *Bangura*, 248 A.3d at 121-22 (citations omitted); *see also State v. Rich*, 164 A.3d 355, 368-69 (Md. Ct. App. 2017) ("Because of the 'extraordinary' nature of this remedy, we deem it appropriate for appellate courts to review the *coram nobis* court's decision to grant or deny the petition for abuse of discretion. However, in determining whether the ultimate disposition of the *coram nobis* court constitutes an abuse of discretion, appellate courts should not disturb the *coram nobis* court's factual findings unless they are clearly erroneous, while legal determinations shall be reviewed *de novo*.").

B. The Trial Court Correctly Found Johnson Failed to Demonstrate that Ms. King Provided Ineffective Assistance.

The sole basis for Johnson's claim of ineffective assistance in the trial court was his allegation that Ms. King failed to file a notice of appeal after he specifically

requested that she do so (see R.5 at 5-6; R.14 at 2). But, the trial court correctly recognized, Johnson's only support for this claim was "his own testimony," which the court permissibly discredited (R.15 at 14-15). In contrast, the trial court credited Ms. King's testimony that Johnson told her he "did not wish to file an appeal in the misdemeanor case" (*id.* at 6, 13). The court's credibility findings – which Johnson does not challenge – are supported by the record and confirm the court's conclusion that he "failed to demonstrate that his appellate rights were lost as a result of ineffective assistance of counsel" (*id.* at 15).

Though Johnson testified that he "asked [his] attorney to file an appeal" (7/25/22:15), the court properly found this testimony "not sufficiently credible" (R.15 at 15). Johnson's testimony, the court explained, "was frequently digressive and veered off-topic" (*id.* at 3). Further, although he claimed Ms. King had a motive to ignore his purported request due to his § 23-110 motion accusing her of deficient performance, the court found that the "sole" § 23-110 motion "filed at the time" did "not mention" Ms. King or raise such a claim (*id.* at 5). To the contrary, in a post-trial letter, Johnson praised Ms. King, noting she had done "'a Damn Good job'" in his felony trial (*id.* at 4). Finally, Johnson himself "acknowledged" that, just two weeks before his misdemeanor trial, Ms. King had filed a notice of appeal in his *felony* matter "after he asked her to do so" (*id.*). The trial court's determination that Johnson did not testify credibly is thus supported by the record and not clearly

erroneous. *See Stringer v. United States*, 301 A.3d 1218, 1228 (D.C. 2023) ("Credibility findings based on first-hand observation warrant substantial deference not only because the trial court had the opportunity to assess the witness's demeanor but also because '[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.'") (citation omitted). *In re S.G.*, 581 A.2d 771, 775 (D.C.1990) ("This court may not usurp the prerogative of the judge, as the trier of fact, to determine credibility[.]"); *see also McCormick v. United States*, 72 F.4th 130, 132 (6th Cir. 2023) ("[T]he district court found that McCormick hadn't instructed counsel to file an appeal. We review that factual finding for clear error.").

In addition to testifying that he had orally requested Ms. King appeal his misdemeanor conviction, Johnson testified that he made "requests to [her], by letters, to file a notice of appeal" and, further, that his wife had called Ms. King "several times," asking her to file such an appeal (R.15 at 4). Despite these claims, however, Johnson made no effort to "bear[]" his burden of overcoming the "presumption that the proceeding in question was without error." *Higdon*, 496 A.2d at 620. As the trial court correctly recognized, Johnson "could have presented his wife as a witness, or at least produced her sworn affidavit as an exhibit," but he offered nothing at all from [his] wife (R.15 at 12). Similarly, although Johnson called out *Ms. King* for having "produced only one letter" (*id.* at 14; see R.14 at 2), "the burden rest[ed] on

[Johnson]," *Morgan*, 346 U.S. at 512, and he "tendered no proof to support [his] allegations" about multiple pieces of correspondence recording his appeal request, *see Watwood v. District of Columbia*, 162 A.2d 486, 488 (D.C. 1960) (denying coram nobis petition).

In contrast to Johnson's incredible testimony and the dearth of other evidence supporting his claim, Ms. King credibly testified that she had had two post-sentencing conversations with Johnson about a potential appeal and, in each, he told her that he didn't want to appeal. Ms. King's testimony, the court explained, was "generally consistent" with her declaration (R.15 at 13). Further, just a "few days before" Johnson's misdemeanor trial, Ms. King had adhered to Johnson's request that she file a notice of appeal in his felony case (*id.* at 13-14). Moreover, although Johnson accused his *other* court-appointed lawyer of "bias and prejudice," the record indicated he had nothing but praise for Ms. King's work (*id.* at 14). Finally, Johnson's reasons for not wanting to appeal in his misdemeanor case – *e.g.*, he received no prison time; Ms. King had staved off the stay-away order; and he wanted to focus on his more consequential felony-assault conviction – were reasonable. The trial court thus correctly credited Ms. King's testimony, a finding that Johnson does not challenge.[15]

[15] The trial court appropriately rejected Johnson's suggestion that it should not credit Ms. King because, despite "acknowledging" he had sent her "numerous letters," she (continued . . .)

Because the record supports the trial court's determination that Johnson's ineffective-assistance claim rested solely on his incredible testimony, the court did not abuse its discretion in denying his coram nobis petition. *See Bangura*, 248 A.3d at 125 ("Based on the record support for the trial court's finding that Bangura never requested counsel to file a notice of appeal, as well as Bangura's inability to provide 'sound reasons' for his 'failure to seek earlier appropriate relief,' we hold that the trial court did not abuse its discretion in denying Bangura's petition for a writ of coram nobis." (citation omitted));[16] *cf. Hines*, 237 A.2d at 829-30 & n.6 (where

---

had "produced only one letter" (R.15 at 14). Johnson – not Ms. King – had the weighty burden of showing a fundamental error, and he never contended that Ms. King or the government had failed "to produce materials *he* [had] requested" (*id.* (emphasis added)). Further, he never "made a discovery request for copies of any materials he wanted" (*id.*). Johnson did not take these actions even though his ineffectiveness claim had been pending before the trial court for three years and the attorney-client privilege "belongs to the client," 3 *Wharton's Criminal Evidence* § 11:30 (15th ed.).

[16] *See also Holmes v. United States*, 2022 WL 3641209 *1 (11th Cir. July 26, 2022) (reasonable jurists could not debate propriety of district court's denial of defendant's § 2255 motion where, "after holding an evidentiary hearing," court "credited post-plea counsel's testimony that, after consulting with Mr. Holmes following sentencing, Mr. Holmes expressly told him that he would not be appealing"); *Stephen v. United States*, 706 F. App'x 954, 955-56 (11th Cir. 2017) (affirming district court's denial of defendant's § 2255 motion where "'counsel had testified at the evidentiary hearing that [defendant] had instructed him not to appeal'"; "district court did not err in assessing [defendant's] ineffective-assistance claim based on its factual finding [defendant] directed counsel not to appeal") (citation omitted); *United States v. Henson*, 632 F. App'x 924, 926 (10th Cir. 2015) (affirming district court's denial of defendant's § 2255 motion where, among other things, "court convened an evidentiary hearing and took testimony from [defendant] and her lawyer" and "found that [defendant] had never instructed counsel to file an appeal").

government did "not contest the reasons given by defense counsel for the late filing of the notices of appeal" – namely, counsel "carelessly miscount[ed] the ten-day filing period" – coram nobis petitioner "established that he was deprived of his Sixth Amendment right to effective representation").

C. Johnson's Legal Attacks on the Court's Ruling Fail.

Instead of challenging the trial court's factual findings, Johnson claims (at 22-40) the court committed "three errors": (1) the court improperly held him to a "heightened burden of proof or production"; (2) the court "erred in determining that the absence of corroboration for Ms. King's claim that Johnson waived his right to appeal was irrelevant"; and (3) the court "erred in precluding [his] testimony regarding his ongoing custody litigation." None of these claims has merit.

1. Consistent with *Bangura*, the Trial Court Required Johnson to Rebut the Presumption of an Error-Free Proceeding.

To succeed, a coram nobis petitioner must "show[] that there were fundamental flaws in the proceedings." *Denedo*, 556 U.S. at 916. "The burden is a heavy one because a court reviewing a petition for coram nobis relief 'must presume that the proceedings were correct.'" *United States v. Rutigliano*, 887 F.3d 98, 108 (2d Cir. 2018) (citation omitted). Moreover, the "further a case progresses through the remedial steps available to a criminal defendant, the stiffer the requirements for

vacating a final judgment." *George*, 676 F.3d at 258. "[D]irect review is more defendant-friendly than post-judgment review, and an initial habeas petition is easier for a criminal defendant to litigate than a successive one." *Id.* Because "coram nobis lies at the far end of this continuum," *id.*, the standard for such a petition "'is much more stringent than that for vacating a conviction on § 23-110 grounds,'" *Stevens v. United States*, 944 A.2d 466, 467 (D.C. 2008) (citation omitted); *see also United States v. Ragbir*, 950 F.3d 54, 62 (3d Cir. 2020) ("'[T]he standard for obtaining [coram nobis] is more stringent than that applicable on direct appeal or in habeas corpus' in recognition of judicial interests in finality and efficiency.") (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."); *United States v. Drobny*, 955 F.2d 990, 996 (5th Cir. 1992) ("The § 2255 standard is stringent but not as demanding as coram nobis.").

Consistent with these principles, the trial court explained it was Johnson's burden, among other things, to "prove that the alleged error of law or fact occurred" (R.15 at 8 (citing *Bangura*, 248 A.3d at 124)). This burden stemmed from the "'presumption that the proceeding in question was without error,'" which Johnson had "to rebut" (*id.* at 11 (quoting *Higdon*, 496 A.2d at 619)). Moreover, the court correctly recognized, this presumption also meant "the Government did not bear the

burden of proof in this matter" (*id.* at 14). Rather, Johnson "ha[d] the burden of proving the allegations" in his petition and the court rightly concluded that he had "failed to produce sufficient evidence – anything more than his own testimony – corroborating that he requested [Ms.] King to file a notice of appeal" (*id.* at 14-15).

As in *Bangura*, the trial court thus properly "rejected [Johnson's] ineffectiveness claim for insufficient proof." 248 A.3d at 124. "Other than his pleadings, [Johnson's] support for his petition consisted solely of his [discredited testimony], in which he claimed that his attorney had failed to file a notice of appeal after being specifically requested to do so." *Id.* And the trial court properly "weighed this evidence against the [credited] testimony of [Johnson's] attorney [Ms. King]," *id.*, who explained that she had twice asked Johnson if he wanted to appeal and he twice said he did not.

Johnson nonetheless claims (at 24-25) the trial court applied "a heightened burden of proof," wrongly concluding, "in light of *Bangura*," that he "needed some 'evidence, *other than his own testimony*'" (quoting R.15 at 11; emphasis added). But the court did not – as Johnson alleges (at 26) – "t[ake] from *Bangura* a legal test that corroborative evidence *must* be presented to support [his] testimony, or that testimony lacks value" (emphasis added). Instead, in discrediting Johnson's testimony that he had asked Ms. King to file an appeal, the court simply noted, among other things, that he "failed to produce any relevant corroborating evidence"

(R.15 at 14). In lieu of such evidence, Johnson merely "highlight[ed] his sincerity in filing" his petition and repeatedly "emphasize[d]" that he had filed his petition soon after expiration of the 30-day appeal period (*id.* at 12-13). Additionally, the court noted, although it was Johnson's burden to rebut the presumption of an error-free proceeding, he produced no "communications" between Ms. King and himself or even a declaration from his wife (*id.* at 14). Finally, the trial court explained, Johnson's "exhibits otherwise consist[ed] of extraneous materials," including the *Gerstein* affidavit and an order denying him free transcripts (*id.* at 12). In short, the trial court correctly concluded, "the only pertinent evidence presented by Mr. Johnson in this proceeding [wa]s his own testimony," which the court deemed "not sufficiently credible" (*id.* at 12, 15). The trial court thus did not – as Johnson claims (at 27) – impose a "legal requirement for corroborative evidence." Instead, the court properly considered the *absence* of any corroborating evidence when assessing Johnson's credibility, a vacuum that Johnson himself concedes (at 31-32) is "relevant" to a credibility assessment (citing Redbook Instruction 2.200); *see also Sell v. United States*, 525 A.2d 1017, 1026 (D.C. 1987) ("Although the government disputes the importance of this witness, and we share some of these doubts, in view of the fact that the government's case pitted the credibility of Frontuto against that of appellant, any credible evidence from another source which tended to corroborate one side or the other was not insignificant.").

Johnson is also mistaken when he asserts (at 25) that *Bangura* is "not in any sense 'on point'" (quoting R.15 at 11). Although there are undoubtedly distinguishing facts, *Bangura* is certainly a relevant precedent. Indeed, the trial court expressly recognized the two facts distinguishing *Bangura* from Johnson's case: whereas Johnson "promptly filed" his coram nobis petition, Bangura waited 22 years before raising his ineffectiveness claim; and, whereas Johnson testified at the hearing, Bangura "presented nothing other than his own affidavit" (*id.* at 12-13). Nonetheless, the trial court properly recognized, *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 Johnson) relied solely on his own assertions, presenting "[n]o other witness or evidence" (*id.* at 11; *see* 248 A.3d at 121). As described supra, Johnson referred to voluminous evidence in his testimony – *e.g.*, letters and at least one witness (his wife) – that, he claimed, corroborated his alleged request of Ms. King but, "as in *Bangura*," there was a "glaring absence of evidence tending to support [his] position" (R.15 at 12).

In sum, the trial court properly exercised its discretion in concluding that, viewing "the evidence through the lens of the preponderance of evidence standard," Johnson "fail[ed] to rebut 'the presumption that the proceeding in question was

without error'" (R.15 at 11).[17] At a minimum, Johnson thus failed to satisfy the fifth prong of this Court's coram nobis test and prove a legal error "'of the most fundamental character'" (*id.* at 8 (quoting *Bangura*, 248 A.3d at 121)).

2. The Trial Court Properly Considered the Corroborating Circumstances that Bolstered Ms. King's Credibility.

Johnson also contends (at 31-37) 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." Again, he is mistaken.

As an initial matter, there was no "absence of corroboration." In finding Ms. King credible, the trial court cited several corroborating circumstances. First, Ms. King's testimony was "generally consistent" with her written declaration (R.15 at 13). Second, the "court's records" showed Ms. King had filed a notice of appeal in

[17] Johnson claims (at 28-30) "the judge's erroneous application of *Bangura* was compounded by her erroneous belief that coram nobis review impose[d] a greater burden of proof on [him] than if his claim had been brought via a 'regular § 23-110'" (quoting 7/25/22:89). But, as explained at pp. 26-27 supra, the federal courts agree with *Stevens*' conclusion that the standard for a coram nobis petition "'is much more stringent than that for vacating a conviction on § 23-110 grounds.'" 944 A.2d at 467. And, although this "more stringent" standard may not necessarily translate into proof by clear and convincing evidence, this discrepancy is immaterial because the trial court applied the preponderance of evidence standard in concluding Johnson had failed to rebut the presumption of an error-free proceeding (see R.15 at 11). This conclusion is unassailable given, among other things, Johnson's testimony was his *only* proof that he instructed Ms. King to file an appeal and the trial court discredited that testimony, a finding Johnson does not challenge on appeal.

Johnson's felony matter "just a few days" before his misdemeanor trial (*id.*), thus confirming – as she had testified – that her practice was to ask her clients about appeal the same day as sentencing and, "[i]f the answer is yes," she files one (7/25/22:60-61). Finally, although Johnson's August 2020 letter to Ms. King post-dated the 30-day appeal period applicable to his 2019 misdemeanor conviction, he praised Ms. King's felony-trial work in that letter and said nothing about the missing notice of appeal in his misdemeanor case (R.15 at 14). Thus, the trial court *did* consider the corroborating evidence that supported Ms. King's testimony, explaining, "That [Ms.] 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" (*id.*). The trial court thus plainly understood that – as Johnson notes (at 22) – "the absence of evidence tending to corroborate a witness's testimony is relevant to that witness's credibility," which is why the court catalogued the abundant evidence in fact corroborating Ms. King's testimony. *See generally In re D.N.*, 65 A.3d 88, 95-96 (D.C. 2013) ("Judges are presumed to know the law, and trial court judgments, which come to us with a presumption of correctness, should be upheld when there is no indication in the record that the trial court was unaware of the law's requirements.") (cleaned up).

Moreover, Johnson claims (at 33-34), items that might have further corroborated Ms. King's testimony – *e.g.*, documentation of their "initial

consultation" and "any record" of their follow-up phone call – were missing but, he further contends, the court didn't "factor[ ]" these omissions into "how much weight to give her testimony." But the trial court undoubtedly considered these facts since Johnson made these precise arguments below, noting there was "no evidence" to support Ms. King's assertion that she had spoken with Johnson in the "lock up" and she had "failed to provide any notes or documents" of this conversation (R.14 at 1; see also 7/25/22:94 (defense counsel: "[a]nd we're supposed to . . . believe that that one letter is the only letter she could have provided")). Indeed, as a result of Johnson's arguments about this missing evidence, Ms. King carefully explained that she had looked but couldn't "find a note" of her follow-up phone call with Johnson (7/25/22:73).[18] Further, although Ms. King explained that she had "billed" her meeting with Johnson in the lock up "as a part of [her] time for that day," "*[n]o one* asked [her] for" such records, including Johnson (*id.* at 74-75 (emphasis added)). Finally, Ms. King explained, Johnson wrote her "lots of letters" and she had found the only one "where he mentioned the word ['']appeal['']" (*id.* at 70; see note 9 supra). Thus, the trial court certainly understood that Johnson's primary attack on Ms. King's credibility stemmed from this missing evidence and unquestionably

[18] This was likely because Ms. King had "[p]robably not" billed that call since she and Johnson had "talked about a lot of things," the bulk of which were "associated with [his] other case" (7/25/22:74).

considered it. As the court correctly explained, however, it was Johnson's burden "to rebut 'the presumption that the proceeding in question was without error,'" not Ms. King's or the government's (R.15 at 11).[19]

3. The Trial Court Properly Exercised Its Discretion in Limiting Johnson's Testimony to the Relevant Issues.

Finally, Johnson claims (at 22, 37-40), the court erred in "precluding [his] testimony regarding his ongoing custody dispute 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" (quoting 7/25/22:19). But, Johnson asserts (at 22-23), his "subjective belief that his conviction in this case had caused (or would cause) him to 'los[e] his daughter . . . for something he did not do, 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, notwithstanding his time-served sentence" (quoting 7/25/22:13, 86). Again, Johnson is mistaken.

[19] Johnson cites (at 35-36) *Johnson v. United States*, 513 A.2d 798 (D.C. 1986), but that decision addressed "the question of the adequacy of a criminal appellant's waiver of his right to appeal *when the appellant moves to dismiss or withdraw an appeal*" that is already pending. *Id.* at 800 (emphasis added). It "did not 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.

"A trial court has broad discretion to make evidentiary rulings because of its familiarity with the details of the case and expertise in evidentiary matters, and [this Court] review[s] that ruling for abuse of discretion." *Richardson v. United States*, 98 A.3d 178, 186 (D.C. 2014). Moreover, "'the trial court enjoys particularly broad discretion in determining the relevance of a piece of evidence because the inquiry is fact-specific and proceeds under a flexible standard.'" *Wilson v. United States*, 266 A.3d 228, 243 (D.C. 2022) (citation omitted). The trial court correctly exercised its discretion by limiting Johnson's testimony about the facts of his separate "domestic relations matter" (7/25/22:19). Specifically, the court precluded Johnson from answering two questions about his civil matter: "did you obtain custody of your daughter"; and "did you ever have a DRB hearing, a custody hearing" (*id.* at 16, 18; see note 10 supra). As the court rightly explained, the "only issue" before it was "whether there [wa]s an ineffective assistance of counsel in the filing of the appeal" (7/25/22:19). Critically, 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 (see *id.* at 14-29, 55-56).

In any event, any error was "harmless." *Riddick v. United States*, 995 A.2d 212, 220 (D.C. 2010) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *see also Earl v. United States*, 932 A.2d 1122, 1130 (D.C. 2007). The "extraordinary

remedy of coram nobis issues only in extreme cases." *Denedo*, 556 U.S. at 916. Indeed, the Supreme Court has opined, "it is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate." *Carlisle v. United States*, 517 U.S. 416, 429 (1996); *see also George*, 676 F.3d at 254 ("Justices have stressed that there will rarely be situations warranting the deployment of the writ"). In premising his petition on Ms. King's purportedly ineffective assistance, Johnson's burden was particularly onerous. To show an error "'of the most fundamental character,'" Johnson had to overcome the "presum[ption that] the proceedings were correct," *Morgan*, 346 U.S. at 512, and the "strong presumption" that Ms. King's conduct fell "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689. As the trial court's decision makes clear, it believed Johnson came nowhere close to satisfying his heavy burden. Simply hearing Johnson testify that he had "deeply 'personal' and 'emotional' reasons for pursuing an appeal" thus would've made little – or no – difference.

The trial court denied Johnson's coram nobis petition because there was a "glaring absence of evidence tending to support [his] position" (R.15 at 12). Johnson, for example, claimed his wife had "got in contact" with Ms. King about his appeal (7/25/222:20-21; see also *id.* at 26). As the court noted, however, it "received no evidence at all from Mr. Johnson's wife" (R.15 at 12). Similarly, Johnson claimed he had sent Ms. King a "few letters" asking her "the reason for her not filing an

appeal" (7/25/22:20; see also *id.* at 25 ("several letters")). But, again, the court noted, Johnson "failed to produce any relevant corroborating evidence" (R.15 at 14). Additionally, the court caught Johnson in an important lie. Johnson asserted he had filed a "§ 23-110" motion in his felony case that accused Ms. King of "ineffective assistance" for not raising his "mental health issues" with that court (7/25/22:25-26, 37-38). And, he further claimed, Ms. King had taken offense at this accusation and expressed her "feelings" by not "fil[ing] the appeal" in his misdemeanor case (*id.* at 26; see also *id.* at 45 ("That's what made her not to file the appeal in the case that's at bar."")). But, the trial court explained, the "[c]ourt's record" revealed no such § 23-110 motion (R.15 at 13). To the contrary, it revealed that Ms. King had successfully raised the issue of Johnson's competency in his felony case.

In sum, 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. *See Moghalu v. United States*, 263 A.3d 462, 472 (D.C. 2021) (in assessing error, this Court must consider, inter alia, "centrality of the issue affected by the error" and "closeness of the case"). In contrast to Ms. King's testimony – which was supported by, among other things, her sworn declaration, the notice of appeal she had filed in Johnson's felony case, and the "praise" Johnson had lavished on her in his August 2020 letter (R.15 at 13-14) – Johnson's testimony was "frequently digressive" and prominently featured a demonstrable falsehood (*id.* at 3, 13).

Moreover, although Johnson had a heavy burden to rebut the presumption that Ms. King provided effective assistance by adhering to his request "*not* to file an appeal," *Flores-Ortega*, 528 U.S. at 477, he produced nothing other than his own self-serving testimony. In such circumstances, this Court can be confident any error as to the two precluded questions did not affect the outcome of Johnson's coram nobis proceeding.

D. The Trial Court Did Not Plainly Err in Failing to Find Deficient Representation Sua Sponte Due to Ms. King's Purportedly Inadequate Consultation with Johnson.

At every stage below, Johnson made only one ineffectiveness claim: "Mr. Johnson informed his trial counsel that he wanted to appeal his conviction, but Ms. King failed to timely file a notice of appeal on his behalf" (R.5 at 1-2 (coram nobis petition)).[20] Now, however, Johnson proffers a new – alternative – ineffectiveness theory. In his new claim Johnson *relies* on Ms. King's testimony and contends (at 40, 43) that, "even taking" it "at face value," she "fell short in her duty to 'consult'

[20] Johnson repeated this claim at the conclusion of the evidentiary hearing: "[H]e's saying it's ineffective because they had a conversation and she told him she would do so [*i.e.*, file an appeal] and she didn't do it." (7/25/22:87 (closing argument); see also *id.* at 12-13 (opening statement); *id.* at 95 (closing argument).) Further, Johnson reiterated this in his final post-hearing pleading: "Mr. Johnson explained to the Court that Ms. King was deficient because she failed to file his notice of appeal and because of this failure to file the notice of appeal, Mr. Johnson was prejudice[d] because he is now unable to appeal his conviction" (R.14 at 2).

with [him] regarding an appeal in this case, as *Flores-Ortega* requires." Specifically, Johnson newly asserts (at 40-41), Ms. King had a duty to "clear away" his "confusion" 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" (quoting 7/25/22:64). Johnson thus claims for the first time (at 41) that in "failing" to do so, Ms. King "rendered deficient performance as a matter of law." Johnson has not demonstrated any error, let alone plain error.

When applying the *Strickland* standard to cases involving an attorney's failure to file a notice of appeal, resolution is straightforward when the defendant has given his attorney express instructions. If the defendant has instructed his attorney to appeal, and the attorney disregards those instructions, the attorney has performed deficiently. *See Flores-Ortega*, 528 U.S. at 477. By contrast, "a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* When the defendant has not given his attorney express instructions regarding an appeal, *Strickland*'s performance prong turns on whether the attorney consulted with his client about the decision to appeal. "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* If counsel did not consult, the

question becomes whether counsel had an obligation to do so under the facts of the case. Taken together, then, *Flores-Ortega* teaches that counsel cannot be found to have performed deficiently if either (1) the defendant expressly instructed him not to appeal, or (2) counsel consulted with the defendant about the advantages and disadvantages of taking an appeal, made a reasonable effort to discover the defendant's wishes, and did not fail to follow the defendant's express instructions.

Here, Johnson has not challenged the trial court's factual finding that he expressly instructed Ms. King not to appeal. Indeed, in the only deficiency claim that he now raises, he asks this Court to assume that Ms. King testified credibly when she said he twice told her not to appeal. In such circumstances, Ms. King thus had no duty to consult further with Johnson. *See Flores-Ortega*, 528 U.S. at 478 ("In those cases where the defendant *neither* instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing an appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal." (emphasis added)); *see also Stephen*, 706 Fed. App'x at 956 (consultation "inquiry was not required in Stephen's case, as the district court found that he affirmatively instructed counsel not to appeal, and that finding was not clearly erroneous").

Even assuming Ms. King had a duty to consult with Johnson, she did. The term "consult" has "a specific meaning – advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Flores-Ortega*, 528 U.S. at 478; *see also United States v. Van Pham*, 722 F.3d 320, 323 (5th Cir. 2013) ("'[c]onsulting' is a term of art"); *In re Sealed Case*, 527 F.3d 174, 175 (D.C. Cir. 2008) ("'consult' has a particular meaning"). Following Johnson's misdemeanor sentencing, Ms. King first explained to him what the court's time-served sentence meant in the context of his 15-year felony sentence (7/25/22:62). Specifically, Ms. King explained, "even though [the misdemeanor sentence] had no timing affect," Johnson could still appeal "for other reasons just so he didn't have yet another conviction" (*id.* at 70). And, Ms. King understood, Johnson knew one such "reason[ ]" was the trial court's evidentiary ruling about the Google photo album (see notes 6 & 8 supra). On the very same day that Johnson and Ms. King discussed his appeal, Judge Dalton herself informed Johnson that that ruling presented a potential appellate issue (3/12/19:136). *See Flores-Ortega*, 528 U.S. at 479-80 (in some cases, "sentencing court's instructions to a defendant about his appeal rights" might be "so clear and informative" as to altogether "substitute for counsel's duty to consult"). Further, Ms. King clarified for Johnson that, although she would help him with his custody case, she "wouldn't be the appeals attorney" in his felony case (7/25/22:64). But for

"many" reasons, Johnson told Ms. King that he did not want her to file an appeal in his misdemeanor case, including that he had been sentenced only to "time served," Judge Dalton had not imposed a stay-away order, and he "wanted to have focus on that other case," *i.e.*, his 15-year, felony-assault conviction (*id.* at 63, 66; see also R.9 at Exh. A (King declaration: "Mr. Johnson also said that he wanted to focus on challenging his felony conviction")). In sum, the "'advice [Ms. King] provided h[er] client throughout h[er] representation was sufficient to fulfill h[er] obligations to h[er] client under *Flores-Ortega*.'" *Bednarski v. United States*, 481 F.3d 530, 536 (7th Cir. 2007) (citation omitted).

Johnson nonetheless complains (at 40-41) that Ms. King "failed" to advise him that "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." Thus, Johnson maintains (at 40-41), an appeal in the misdemeanor case would not have "deprive[d] them of the 'focus' needed to appeal the felony conviction or to win (back) custody of his daughter." This argument fails because it assumes that once counsel had been appointed for his misdemeanor appeal, Johnson would have devoted himself solely to his other litigation. But, as Ms. King undoubtedly understood, even if Johnson had been appointed new counsel for such an appeal, he still would have been intimately involved in it. When Ms. King represented Johnson, he was *very* involved

in his cases, "constant[ly]" phoning her and writing "lots of letters" (7/25/22:70, 75).[21] Accordingly, Johnson is mistaken when he suggests (at 43-44) that – even assuming Ms. King had a duty to consult with Johnson – she "fell short" in that duty by failing to inform Johnson he "was guaranteed to get a new lawyer for the sole and exclusive purpose of filing the misdemeanor appeal." More than anyone, Ms. King understood, new lawyer or not, Johnson was right to be concerned that a misdemeanor appeal would've diluted his focus on the cases that mattered the most – his felony appeal (with a 15-year sentence) and his civil custody case (involving his daughter). There was thus no "mistaken impression" on Johnson's part that needed to be "clear[ed] away" by Ms. King, as Johnson posits (at 23, 41).

Johnson thus fails to show that Ms. King's consultation was so clearly or obviously deficient as to constitute plain error. "'[D]etailed rules for counsel's conduct'" – such as Johnson's suggestion (at 40) that Ms. King had a duty to tell him that he "was guaranteed a new lawyer for the exclusive purpose of filing the misdemeanor appeal" – "have no place in a *Strickland* inquiry." *Flores-Ortega*, 528 U.S. at 480 (citation omitted). There are "countless ways to provide effective

[21] See 7/25/22:75 ("[w]hen he was here in D.C., it was constant telephone calls or in person. When he went away, he started writing letters, just general letters, lots of letters."); see also *id.* at 64 ("He called our office a lot."); *id.* ("When he left the jurisdiction, he started writing me a lot."); *id.* at 65 (Johnson communicated "[a] lot" with her); *id.* at 70 ("[H]e wrote me lots of letters."); *id.* at 78 (Johnson "called a lot").

assistance." *Strickland*, 466 U.S. at 689. Though Johnson criticizes (at 40) Ms. King's "fail[ure]" to inform him of his right to new appointed counsel, he has not shown this omission was clearly unreasonable in the circumstances of this case. *See*, *e.g.*, *Walking Eagle v. United States*, 742 F.3d 1079, 1080-81, 1083 (8th Cir. 2014) (counsel adequately consulted with defendant where: "prior to sentencing, she discussed with Walking Eagle his right to appeal under the plea agreement, answered his questions with regard to those rights, and explained his chances of a successful appeal"; and, "after sentencing," counsel "revisited the topic of appeal with Walking Eagle and again discussed his chances of successfully appealing" the one jurisdictional claim not waived by his plea agreement's "general waiver of appeal"); *Bednarski*, 481 F.3d at 533-34, 535-36 (counsel adequately consulted with defendant about appeal where, *inter alia*, counsel informed defendant on drive to sentencing hearing that, "if he wanted to appeal then [counsel] would file the notice of appeal, but he would not handle the actual appeal" and, after his sentencing defendant did not ask counsel to appeal, though defendant "was surprised by the harshness of the sentence"); *see generally Flores-Ortega*, 528 U.S. at 489 (Souter, J., concurring in part and dissenting in part) ("If the crime is minor, the issues simple, and the defendant sophisticated, a 5-minute conversation with his lawyer may suffice; if the charge is serious, the potential claims subtle, and a defendant uneducated, hours of counseling may be in order.").

CONCLUSION

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

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
JOHN P. MANNARINO
ELIOT A. FOLSOM
Assistant United States Attorneys

/s/
DAVID B. GOODHAND, D.C. Bar #438844
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
david.goodhand2@usdoj.gov
(202) 252-6829

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, William Collins, Esq., wcollins@pdsdc.org, on this 15th day of July, 2024.

/s/
DAVID B. GOODHAND
Assistant United States Attorney