SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	Case No. CF-156[redacted]
v.	Judge: Stuart G. Nash
[redacted] WILLIAMS	
Defendant.	

Motion for Post-Conviction Relief

Pursuant to the Innocence Protection Act and D.C. Code § 23-110, Defendant [redacted] Williams respectfully moves this Court to vacate with prejudice his conviction for failure to appear at a hearing in his case in violation of the Bail Reform Act (BRA). In the alternative he asks for a new trial for this conviction. As explained in the accompanying Points and Authorities, the Court should grant this Motion because Williams is actually innocent of this crime and because his representation at trial was constitutionally deficient.

Williams requests a hearing on this Motion.

Dated: October 8, 2014

Respectfully submitted,

/s/Matthew B. Kaplan

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA v. [redacted] WILLIAMS Defendant.	Case No. CF-15[redacted] Judge: Stuart G. Nash

Memorandum of Points and Authorities in Support of Motion

Defendant [redacted]s [redacted]l Williams respectfully moves this Court to vacate his conviction for failure to appear at a hearing in his case in violation of the Bail Reform Act ("BRA"), D.C. Code § 23-1327. Evidence which is now available, but which was not presented at trial, indicates conclusively that, at the time of the hearing, Williams was involuntarily incarcerated at a secure psychiatric facility. Consequently, his failure to appear was not an intentional act, meaning that he did not commit the crime for which he was convicted.

This Motion is made pursuant to the Innocence Protection Act ("IPA") (D.C. Code § 22-4131 *et seq.*) on the grounds that Williams is actually innocent of the BRA charge. It is also made pursuant to D.C. Code section § 23-110 on the grounds that Williams' trial attorneys acted in a constitutionally deficient manner by failing to properly investigate the facts of Williams psychiatric incarceration

and by failing to use evidence in their own files that indicated that Williams was incarcerated at the time of the hearing and that, absent this deficient representation, Williams would not have been convicted of the BRA violation. [1]

Williams reserves the right to provide the Court with supplemental evidence and argument in support of this Motion should it become appropriate to do so.[2]

I. BACKGROUND

A. The BRA Charge And Conviction

In approximately early September 2012 Williams was arrested for theft for allegedly obtaining an inoperable vehicle from a D.C. resident via false pretenses. At his initial appearance before the Court in this matter on September 7, 2012 he was released pending trial and ordered to appear for a preliminary hearing at 11:00 a.m. on September 27, 2012.

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[1] Williams' current motion deals only with his BRA convictions. To the maximum extent permitted, he reserves his rights to seek post-conviction relief for the underlying charges in his case on which he was convicted: second degree theft, in violation of D.C. Code §§ 22-3211-12; unauthorized use of a motor vehicle, in violation of D.C. Code § 22-3215; and false impersonation of a public official, in violation of D.C. Code § 22-1404. These charges involve very different factual and legal issues than the BRA charge.

[2] Williams currently has an ex parte motion before this Court seeking certain additional discovery. However, given the nature of the evidence he has already marshalled in support of this Motion and the fact that he is currently incarcerated as a result of his convictions in this matter, Williams does not believe that the Court should delay setting a hearing on this Motion while he attempts to obtain that additional discovery.

Williams did not appear at the September 27 hearing, with the docket noting that "Def. Counsel made representations that the Deft. is in a hospital located in DC but was not transported to the Courthouse." Dkt. The Court rescheduled the preliminary hearing for October 11. *Id.* Although there is no evidence that anyone told Williams of his new hearing date, when he failed to appear on October 11 the Court issued a warrant for his absence on September 27 and the government ultimately added a BRA charge for failing to appear on that date to the counts against Williams. *Id.*

At trial, the government introduced evidence in support of the BRA charges showing that Williams had been notified that he needed to appear at the September 27 hearing but had failed to do so. Tr. Mar. 7, 2013 at 136, 141. It also presented testimony from Deputy United States Marshall John Lopez who indicated that when he had encountered Williams on December 4, 2012 Williams had provided him with a false name. *Id.* at 152-53. A fingerprint check had established Williams' true identity, causing Lopez to arrest Williams on the warrant that had been issued for Williams' failure to appear in this case. *Id.*

At trial, "Williams' defense to the count of failure to appear [was] that his failure to appear was not willful because he was hospitalized on the day that he was scheduled to appear in court." Tr. Mar. 11, 2013 at 112 (jury instructions giving defense theory). But the only evidence introduced in support of this defense

was a redacted document from Williams' medical records, admitted by stipulation, that indicated that he had been released from Providence Hospital at some time on September 27, 2012, the date he was alleged to have failed to appear in court. But the hearing at issue was scheduled for 11:00 a.m. on that date and no evidence was offered as to the time of Williams' release on September 27 or whether Williams was free to leave the hospital without his doctor's permission. *See* Tr. Mar. 11, 2013 at 151 (Defense counsel acknowledging in closing argument that exhibit "doesn't say what time he was discharged.... We don't know when."). The limited evidence introduced by defense counsel permitted the jury to find that Williams was released from the hospital in sufficient time to appear at his hearing or that, even if he was not, he was free to simply walk out of the hospital even if he had not been formally discharged..

The jury convicted Williams on the BRA charge.

B. The New Evidence

Williams, who has an extensive record of petty criminal offenses, did not testify at trial. He has, however, provided a Declaration in support of this Motion, attached as Exhibit I, which explains why he was hospitalized in September 2012—his hospitalization was not disputed, but not explained at trial.

According to Williams, in approximately the second half of September 2012, shortly after being released pending trial in this case, he was arrested for

violating the conditions of supervised release imposed after a prior conviction. Williams Decl. ¶ 4. (That violation may have been his arrest in this case.) After this arrest Williams, who has a long history of mental illness, was taken to the D.C. Central Cell Block where he attempted to hang himself. *Id.* When his suicide attempt was discovered he was transferred to the District of Columbia's Comprehensive Psychiatric Emergency Program ("CPEP") and then, shortly thereafter, transferred, still in police custody, to Providence Hospital's Seton House Psychiatric Facility, also in the District of Columbia. *Id.*

Consequently, on the morning of September 27, 2012, the date of his hearing, Williams had been confined at Seton House for several days. *Id.* ¶ 6. He testifies in his Declaration that he knew he was supposed to be in court for a hearing on the morning of September 27 and had asked to be allowed to leave the facility in sufficient time to timely appear at the hearing, but was not allowed to do so and was physically unable to do so because, at the time he was supposed to be in court, he was still physically confined at Seton House, a secure facility. *Id.* ¶¶ 5-6.

Williams' account is supported by a May 12, 2014 Declaration, submitted as Exhibited II to this Motion, by Dr. Farzad Davoudian. Dr. Davoudian, a psychiatrist, was the principal physician in charge of Williams' treatment at Seton House and was personally responsible for his discharge from that facility.

Davoudian confirms that Williams was confined at Seton House, a secure facility and that "[a]s a practical matter, because of the security measures at the facility, Mr. Williams would have not been physically able to voluntarily leave the facility until he was discharged." Davoudian Decl. ¶ 5. Davoudian further testifies that, based on records created contemporaneously by himself and other medical professionals, on the date of the court hearing at issue he is "100% certain that [Williams] would not have been released from the locked facility before noon on September 27, 2012." *Id.* ¶ 10. He testifies that he is certain that the times entered on these records are accurate because the accurate entry of times is of critical importance for medical treatment and it was his practice, and the practice of others he worked with, to make accurate time entries. *Id.* ¶ 3.

Davoudian attaches copies of two pages of relevant medical records to his Declaration, certifying the accuracy of the copies and explaining the meaning of these documents. Exhibit A to his Declaration includes Davoudian's handwritten discharge notes, which include an indication that they were made at noon on September 27. Davoudian testifies that Williams would not have been released prior to that time. *Id.* ¶ 6. On the same page is a "nursing discharge note," with a time entry of 12:45 p.m. and containing a further partially legible notation indicating that Williams was released at "12:??" p.m. *Id.* ¶ 7 & Ex. A. Exhibit B to Davoudian's declaration is a checklist which indicates that hospital personnel

(who contemporaneously signed their names to the sheet, certifying its accuracy) checked on Williams at fifteen minutes intervals from 7:30 a.m. through 12:30 p.m. on September 27. *Id.* ¶¶ 8 & Ex. B. The last entry on this sheet indicates that Williams was discharged at 12:30 p.m. *Id.*

Davoudian further says he would have testified at trial as he testifies in his Declaration, but that he does not recall ever being contacted by defense counsel for information on the time of Williams' discharge. *Id.* ¶ 11. The two documents attached as exhibits to Davoudian's declaration were in trial counsel's files. Decl. of Matthew B. Kaplan, attached as Ex. III to this Motion, but were not used at trial.

II. ARGUMENT

A. Williams Was Not Guilty Of A BRA Violation.

Had the evidence now presented to this Court been raised at Williams' trial he would not have been convicted of the BRA violation. In fact, the evidence now available affirmatively establishes that Williams was not guilty of this crime.

"To prove a BRA violation, the government must prove that the defendant (1) was released pending trial or sentencing, (2) was ordered to appear in court on a specified date or at a specified time, (3) and willfully failed to appear." *Gilliam v. United States*, 46 A.3d 360, 369 (D.C. 2012) (citations and quotations omitted). Although "[t]he statute provides that '[a]ny failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is

willful,'" *id.*, to establish willfulness "the government must prove ... that the defendant's failure to appear in court when requested was knowing, intentional, and deliberate, rather than inadvertent or accidental." *Foster v. United States*, 699 A.2d 1113, 1116 (D.C. 1997). Because willfulness is an element of a BRA violation it must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

At trial the only aspect of the BRA charges at issue was whether Williams' failure to appear was willful. The government's theory—which was consistent with the presumption permitted by the statute—was that the jury should conclude that Williams had acted willfully because he had been told when and where to appear, but had not done so and had not provided a reasonable explanation for not doing so. Given the evidence presented, it was arguably reasonable for the jury to adopt this argument, as it apparently did.

The evidence Williams now presents, however, indicates that Williams was locked in a secure facility which he was not free to leave, meaning that his failure to appear was, by definition, not voluntary. The accuracy of this new evidence does not appear to be subject to reasonable dispute—it is from disinterested sources and is not inconsistent with any evidence presented at trial. Consequently,

Williams has established that he did not commit the BRA violation for which he was convicted.[3]

B. Williams Is Entitled To Relief Under The Innocence Protection Act

The IPA provides that "at any time" "[a] person convicted of a criminal offense in the Superior Court of the District of Columbia may move the court to vacate the conviction or to grant a new trial on grounds of actual innocence based on new evidence." D.C. Code § 22-4135. "'Actual innocence' ... means that the person did not commit the crime of which he or she was convicted." § 22-4131. "'New evidence,'" includes "evidence that... [w]as not ***personally known*** and could not, in the exercise of reasonable diligence, have been ***personally known*** to the movant at the time of the trial." *Id.* (emphasis added).

Although the evidence here should have been readily discoverable by Williams' attorneys, it nevertheless constitutes newly discovered evidence in that it was not and could not with reasonable diligence, have been "personally known" to

[3] Williams presumably would have been well advised after his release from Seton House to somehow reach out to the Court to explain his failure to appear. But it is not surprising that Williams, who has a limited education and significant mental health issues, did not do so. In any event, Williams was convicted of voluntarily failing to appear on September 27, 2012—a crime he did not commit—not for poor judgment. His decision to give a false name to a law enforcement officer more than two months after his failure to appear is irrelevant, especially since, in December, Williams probably correctly assumed that he would be arrested if he accurately identified himself.

Williams. Normally, an attorney's knowledge and lack of diligence is imputed to his client, *see Long v. United States*, 83 A.3d 369, 376 (D.C. 2013), but the IPA drafters repeated references to information that was "personally" known to the movant indicates that they wanted to depart from this normal rule—the only apparent reason for the use of this modifier is to indicate that the fact that exculpatory information that was or should have been known to the movant's attorney, but not by the movant "personally," should not bar IPA relief. This is consistent with the IPA's legislative history, which indicates that the legislators who enacted it were "concern[ed] that existing post-conviction remedies for the wrongly-convicted were not always adequate" and believed that "every measure should be taken to allow wrongfully-convicted individuals the opportunity to prove their innocence." *Teoume-Lessane v. United States*, 931 A.2d 478, 489 (2007).

Williams personally did everything he could reasonably be expected to do to support his claim that his failure to appear was involuntary. He told his attorneys why he failed to appear and then observed them put on a defense consistent with what he told them. Williams had no apparent reason to believe that his attorneys would not adequately investigate his defense or even to produce supporting evidence from their own files. Moreover, even to the extent that he may have been concerned about the adequacy of his defense on the BRA charge, as an incarcerated indigent defendant represented by appointed counsel there was little

he could do about it—he could not hire replacement attorneys and, given his confinement at the D.C. Jail he could not personally review his attorneys' files or conduct his own investigation.

A motion pursuant to the IPA must

> set forth specific, non-conclusory facts:
> (1) Identifying the specific new evidence;
> (2) Establishing how that evidence demonstrates that the movant is actually innocent despite having been convicted at trial or having pled guilty; and
> (3) Establishing why the new evidence is not cumulative or impeaching.

D.C. Code § 22-4135(c). This Motion does so: the new evidence is the evidence contained in Davoudian's declaration and its attachments, it demonstrates that Williams did not violate the BRA and it is not cumulative or impeaching—it provides previously absent evidentiary support for the argument advanced by Williams at trial.

An IPA motion must also include "an affidavit by the movant ... stating that movant is actually innocent of the crime that is the subject of the motion, and that the new evidence was not deliberately withheld by the movant for purposes of strategic advantage." § 22-4135(d). Such an affidavit accompanies this motion. Moreover, apart from the affidavit, it is clear that the evidence now raised was not withheld "for purposes of strategic advantage"—Williams accrued no advantage

from the non-disclosure of this evidence, which was fully consistent with his theory of the case.

The IPA also provides specific guidance on how a court should resolve a motion brought pursuant to the Act:

> In determining whether to grant relief, the court may consider any relevant evidence, but shall consider the following:
>
> (A) The new evidence;
>
> (B) How the new evidence demonstrates actual innocence;
>
> (C) Why the new evidence is or is not cumulative or impeaching; [and]
>
> (D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial;
>
> ....
>
> (2) If, after considering the factors in paragraph (1) of this subsection, the court concludes that it is more likely than not that the movant is actually innocent of the crime, the court shall grant a new trial.
>
> (3) If, after considering the factors in paragraph (1) of this subsection, the court concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice.

§ 22-4135(g).

Because Williams' new evidence is sufficient to clearly and convincingly establish that Williams' absence was not voluntary, this Court should vacate the

BRA charge and dismiss it with prejudice. Alternatively, the Court should grant Williams a new trial.

C. Williams Is Entitled To Relief On Grounds Of Ineffective Assistance Of Counsel

Williams also moves, pursuant to D.C. Code § 23-110 that his conviction be set aside for ineffective assistance of counsel. To obtain relief on the grounds that trial counsel was ineffective a defendant must satisfy the two-pronged test established by *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient.... [S]pecifically, the defendant's burden is to establish that "counsel's representation fell below an objective standard of reasonableness," as measured by reference to "prevailing professional norms."
>
> Second, the defendant must demonstrate that counsel's deficient performance prejudiced the defense by "depriv[ing] the defendant of a fair trial, a trial whose result is reliable." .... To meet his burden, the defendant ordinarily must show there is "a reasonable probability that but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Blakeney v. United States, 77 A.3d 328, 340-41 (D.C. 2013). (quoting *Strickland* 466 U.S. at 687-94 (1984)) (footnotes omitted). "Under this standard, 'a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.... The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by

a preponderance of the evidence to have determined the outcome." *Id.* at 341 n.18 (quoting *Strickland*, 466 U.S. at 693-94).

In this case counsel's representation fell below "prevailing professional norms." Counsel's defense was that Williams was involuntarily absent because he was hospitalized. But the only evidence counsel presented was that Williams was released from the hospital on the day of the hearing. They presented no evidence about the time of Williams' release or about whether he was free to leave the hospital prior to his release. Such evidence would have been available following a minimally diligent investigation. Dr. Davoudian indicates that, had he been asked to do so, he would have testified at trial that Williams was discharged after the time of his hearing and that, prior to that discharge, Williams was physically prevented from leaving. And Davoudian's testimony would have been supported by the documents now attached to his Declaration. Moreover, trial counsel inexplicably did not use ***documents in trial counsel's own files***, apparently obtained by counsel from Providence Hospital prior to trial, which affirmatively indicated that Williams was not released until after the time of the hearing that he failed to attend.

This unexplained failure to present evidence that weakens the prosecution's case and bolsters the defense satisfies *Strickland*'s first prong—that counsel's performance was constitutionally deficient. In *Long v. United States*, 910 A.2d

298, 309 (D.C. 2006) (mandate recalled on other grounds, 79 A.3d 310 (2013)), a first degree murder case, the Court of Appeals remanded for a § 23-110 hearing where Long had alleged that his trial counsel had "knowingly failed to present an alibi witness ... and one or more other witnesses ... who would have testified that [a government witness] admitted shooting and killing [the decedent] himself." 910 A.2d at 309. The court concluded that:

> [T]he allegedly available testimony, if credible, would have been highly material and obviously would have undermined the prosecution's case and bolstered Long's actual defense at trial. It is well settled that counsel's unexplained failure to present such testimony constitutes deficient performance.

Id. (citations omitted); *see also Lopez v. United States*, 801 A.2d 39, 46 (D.C. 2002) ("We have recognized previously that the failure of trial counsel to investigate properly a case, to interview exculpatory witnesses, and to present their testimony constitutes constitutional ineffectiveness.") (quotations omitted); *Frederick v. United States*, 741 A.2d 427, 439 (D.C. 1999) (same); *Byrd v. United States*, 614 A.2d 25, 30 (D.C. 1992) (same). Like the testimony of the witnesses who were not called in *Long*, the evidence now presented by Williams would have gravely undermined the prosecution's case. Trial counsel's unexplained failure to present that evidence constitutes deficient performance.

Strickland's second prong has also been satisfied—if the evidence at issue had been presented at trial there is certainly "a reasonable probability that... the

result of the proceeding would have been different." *Blakeney v. United States*, 77 A.3d at 341. Indeed, as discussed above, the evidence affirmatively shows that Williams did not commit the BRA violation for which he was convicted.

Because Williams' legal representation was constitutionally deficient, he is entitled to a new trial.

III. CONCLUSION

For the foregoing reasons, the Court should grant Williams' Motion. Because he has established his actual innocence by clear and convincing evidence, his BRA conviction should be reversed and dismissed with prejudice pursuant to the IPA. Alternatively, he should be granted a new trial pursuant to the IPA and, on grounds of ineffective assistance of counsel, pursuant § 23-110.

Dated: October 8, 2014

Respectfully submitted,

/s/Matthew B. Kaplan

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Certificate of Service

I hereby certify that, on the date indicated below, I caused one copy of the foregoing document to be served via U.S. Mail to:

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/s/Matthew B. Kaplan
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Dated: October 8, 2014