Appeal Nos. 14-CO-978 & 23-CO-507

DISTRICT OF COLUMBIA
COURT OF APPEALS

ANTHONY FALTZ,

Appellant,

v.

UNITED STATES

Appellee.

On Appeal from the Superior Court
of the District of Columbia, Criminal Division
Case No. 2006 CF1 004490
(The Honorable Erik P. Christian, Judge)

INITIAL BRIEF OF THE APPELLANT

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ASSERTION AND STATEMENT OF THE CASE

Appellant Anthony Faltz appeals a final order from the Superior Court for the District of Columbia Criminal Division denying his *Pro Se* Motion Pursuant to D.C. Code § 22-4315 to Vacate Convictions and Sentence on the Grounds of Actual Innocence, filed December 5, 2017, and his Supplemental Motion to Vacate Conviction Under the Innocence Protection Act and § 23-110, filed January 11, 2019. Mr. Faltz was the defendant in the underlying criminal proceedings and the petitioner in the post-conviction relief proceedings. Citations to the attached appendix are indicated by "App." and a page number.

Pursuant to the D.C. Innocence Protection Act, D.C. Code §§ 22-4131, *et seq.* (2013), and D.C. Code § 23-110, Mr. Faltz moved to vacate his conviction on two counts of involuntary manslaughter following his entry of a guilty plea. Mr. Faltz sought relief on the basis of his actual innocence and ineffective assistance of his trial counsel and post-conviction counsel. Following an evidentiary hearing, the lower court denied Mr. Faltz's request in a written opinion. This appeal follows.

STATEMENT OF THE ISSUES

I. This Court must reverse because the lower court denied Mr. Faltz's due process rights by conducting his hearing under the stated belief that innocent people do not plead guilty.

II. This Court must reverse because the lower court abused its discretion in performing an improper *Strickland* analysis of trial and post-conviction counsel and failing to find that his counsel's deficient performance prejudiced Mr. Faltz.

III. This Court must reverse because the lower court abused its discretion when it not only admitted, but credited, the testimony of government experts Miller and Chase despite their clear failures to meet the *Daubert* standard of expert reliability.

STATEMENT OF THE FACTS

On February 19, 2002, a stolen Crown Victoria sped through the streets of Washington, D.C., followed closely by police cars in pursuit. App. 161–62. The driver ran a red light and collided with the passenger side of a Nissan Maxima. App. 162. The occupants of the Nissan died as a result. App. 540–41. The Crown Victoria spun until coming to a stop at the side of the road. App. 424–25.

Three young men were in the Crown Victoria: twin brothers D.I and D.I., and their friend, Anthony Faltz. App. 410. Metropolitan police who were in active pursuit saw the crash and immediately arrived on scene. Numerous officers observed, and later testified, that Mr. Faltz was the backseat passenger of the Crown Victoria, and that D.I. was driving. App. 163–67, 175–76. Based on the officer's unequivocal observations, D.I. was ultimately charged with second-degree murder. App. 169.

The Government's focus began to shift away from D.I. only after it was unable to explain the presence of a DNA profile on the Crown Victoria's driver's side airbag. *See* App. 480–81. The MPD obtained a DNA profile from Mr. Faltz, and the FBI reported on January 31, 2005, that he could not be excluded as the contributor to the airbag. *See* App. 484–85.

Based on these results and its assumption that DNA from the center of the airbag could *only* have come from the car's driver, the Government reversed its

theory of the case completely. In January 2006, Mr. Faltz was charged with two counts of second degree murder, while all charges against the I brothers—now presumed to be the passengers—were dropped. *See* App. 2–3. All the while, the Government maintained its position in a civil case brought by D.I. that D.I. was the driver. *See Ingram v. District of Columbia*, No. 1:04-cv-00505-PLF, 2005 WL 3174624 (D.D.C. Oct. 5, 2005); App. 311–24.

Despite the presence of his DNA on the center of the airbag, Mr. Faltz resolutely maintained that he was not the driver of the Crown Victoria, and told his court-appointed attorney, Mr. Ferris Bond, that he had no intention of taking a plea deal, but instead wanted to try the case. App. 854. Instead of preparing for trial, Mr. Bond admitted that he did practically nothing to look into the DNA evidence. App. 663. Mr. Bond failed to explain to his client that while the DNA evidence did show Mr. Faltz's DNA profile on the driver's airbag, it also indicated the presence of at least one other person. *See* App. 485, 571. Mr. Bond did not request the full case file from the Government, including the FBI laboratory notes, which could have alerted him to serious chain of custody issues that raised the possibility of evidence contamination, resulting in the transfer of Mr. Faltz's DNA profile to the driver's airbag without him making direct contact with it at all. *See* App. 870–71. He failed to consult with a DNA expert who could help him understand or potentially challenge the DNA evidence, and apparently, never even considered doing so. App.

855. Mr. Bond also never consulted an accident reconstruction expert who could have explained to a jury how the existence of Mr. Faltz's DNA profile might be on the airbag despite him not being the driver. *Id*. Further, Mr. Bond failed to consult a medical expert who could explain how the hip injury that Mr. Faltz sustained in the crash was more consistent with being *a passenger* in the car, rather than the driver. App. 195; *see also* App. 586, 889.

Instead, Mr. Bond planned to explain the presence of Mr. Faltz's DNA on the driver's airbag by having Mr. Faltz testify himself, despite the fact that Mr. Faltz had no expertise whatsoever in DNA science, possible methods of DNA transfer, the physics of car accidents, or accident reconstruction, or indeed even a formal education beyond the 11th grade—a strategy that Stephen Mercer, Mr. Faltz's defense counsel standards expert, called "absurd" and "inconceivable." App. 869, 935.

On the morning of jury selection, Mr. Bond spoke to the prosecutor, received a new plea offer, and hastily conveyed it to Mr. Faltz. App. 575–76. The plea was to two counts of Involuntary Manslaughter, and Mr. Bond suggested to Mr. Faltz that he would receive a sentence of no more than 15 years. App. 578.

Critically, Mr. Bond appeared to accept the Government's version of what the DNA evidence showed without equivocation. As Mr. Faltz later stated, Mr. Bond told him "the *Government said* that my DNA was *all over* the airbag." App. 933

(emphasis added). With no effort to independently evaluate the DNA evidence through use of an expert, Mr. Bond later *admitted* that the idea of Mr. Faltz's DNA being "all over" the driver's airbag was based entirely on a "representation made to me by … the prosecutor." App. 662–63.

Mr. Faltz pleaded guilty. Despite his attorney's assurance that he would likely receive a total of 15 years, the lower court sentenced him to 16 years on each count of involuntary manslaughter, to run consecutively, totaling 32 years of incarceration. App. 559.

His plea notwithstanding, Mr. Faltz maintained his innocence of the allegation at the core of the Government's case. In the days after the plea, but before sentencing, Mr. Faltz provided a [redacted] that reaffirmed he was not the driver. App. 34, 196.

In the fall of 2009, Mr. Faltz filed a *pro se* motion to vacate and set aside his convictions and sentence, pursuant to D.C. Code § 23-110 alleging ineffective assistance of counsel against Mr. Bond. Appointed counsel, Mr. Daniel Harn, then filed a supplemental motion to withdraw the guilty plea pursuant to Rule 32(e) (current Rule 11(d)) on the grounds that there was a defect in the plea colloquy and that the plea was not knowing and voluntary due to ineffective assistance of counsel. App. 25.

On April 25, 2011 the lower court held an evidentiary hearing to consider Mr. Faltz's motion to withdraw the guilty plea. *See* App. 562, 565. The hearing pulled back the curtain on the investigation—or lack thereof—that Mr. Bond had done into the DNA evidence before abruptly advising his client to take the Government's plea offer. Mr. Bond admitted that he failed to consult with any experts, either DNA or accident reconstructionists, who could explain how the presence of Mr. Faltz's DNA profile on the center of the driver's airbag did not automatically mean that he was the driver. *See* App. 663–65.

Ironically, for all of Mr. Bond's admissions that he performed no investigation into the forensic evidence against his client beyond an initial discovery review, Daniel Harn, Mr. Faltz's post-conviction counsel, repeated most of Mr. Bond's mistakes by doing little investigation of his own. No DNA or accident reconstruction experts were presented by Mr. Harn during the § 23-110 hearing, and Mr. Faltz later stated under oath that (mirroring Mr. Bond) Mr. Harn never discussed the issue of retaining expert witnesses with him. App. 856.

Ultimately, the lower court denied Mr. Faltz's motion. Notably, the court found that *Strickland* prejudice had not been shown because Mr. Harn "*failed to present any witnesses or evidence* which would demonstrate that a better investigation could have been performed." App. 71 (emphasis added). In short, Mr. Faltz's post-conviction lawyer claimed that the trial lawyer failed to perform an

investigation that could have undermined the Government's claims—and the post-conviction lawyer failed to show prejudice because he did *precisely the same thing*.

Fourteen years after the original FBI DNA testing was performed, Bode Cellmark Forensics performed re-testing of the driver's airbag and issued a report on June 15, 2016 ("Bode Report"). App. 176, 724. While the Bode Report did not undermine the finding that Mr. Faltz's DNA was indeed on the center of the driver's airbag, it did identify a swab from the right edge of the airbag that identified the DNA profiles of at least two people but declined to interpret the results, likely because it did not have access to the sophisticated technology required to interpret a complex DNA mixed sample. App. 176–78.

New IPA counsel for Mr. Faltz, however, asked Dr. Norah Rudin, a nationally recognized DNA expert, if she could interpret the sample using probabilistic genotyping, a cutting edge approach that employs sophisticated use of statistical modeling techniques allowing DNA analysts to assign "likelihood ratios" to the DNA samples in question. App. 178. Dr. Rudin testified that likelihood ratios consider far more information than traditional (or "binary") DNA methods in determining whether certain individuals are likely to have contributed DNA to mixed samples. App. 880.

Using this methodology, which was unavailable to the FBI in 2002, Dr. Rudin was able to show that D.I. *could not be excluded* as a DNA contributor

to the airbag, in contrast to the FBI's original analysis. *See* App. 178, 182, 730–31. In fact, "[t]he evidence supporting the presence of D.I. in [the sample taken from the edge of the driver's airbag] is about *100 times stronger* than the evidence supporting the presence of Anthony Faltz." *See* App. 730 (emphasis added).

The finding of D.I.'s DNA on the airbag—and specifically, on the side of the airbag—comported with the report of defense accident reconstruction expert C. Gregory Russell. Mr. Russell's analysis found that due to the "t-bone" nature of the collision, in which the striking Crown Victoria hit the Nissan Maxima at a perpendicular angle, the Crown Victoria would have immediately started rotating upon impact. *See* App. 921. In turn, that rotation would have caused the occupants to move *forward and to the left relative to the vehicle*. App. 186.

As a result, if D.I. was in fact driving the car, he would have moved toward the front left side of the vehicle, where the windshield meets the driver's door. App. 711. And critically, Mr. Faltz, the unrestrained backseat passenger, would have moved through the car *toward the driver's area*—a conclusion Mr. Russell testified was supported by photographs of the Crown Victoria taken on the night of the crash that showed the back of the driver's seat bent forward, presumably from the force of Mr. Faltz being thrown forward during the collision. App. 711–12; App. 886.

In this analysis, Mr. Faltz could have left his DNA on the center of the driver's airbag by flying toward or into it from his back seat passenger position, while D.I. movement forward and to the left would likely lead to him making contact with the *side* of the airbag, if not missing it entirely. App. 186–87.

While Mr. Faltz renewed his claims of innocence, he also raised new claims against both Mr. Bond and Mr. Harn. Specifically, Mr. Faltz added a claim of ineffective assistance of counsel for Mr. Bond's failure to investigate both the forensic DNA evidence and the physics of the accident, as shown by his failure to present testimony from, or even consult, a scientific expert who could speak to either of the two forms of evidence. App. 110. Mr. Faltz also added additional ineffective assistance of counsel claims against Mr. Harn, his first post-conviction attorney, whose total failure to investigate the same issues made it impossible for him to prove how Mr. Bond's performance prejudiced Mr. Faltz, because they were ineffective in almost identical ways. App. 110–11.

At the hearing on the new IAC and IPA claims, the defense called Mr. Faltz and three expert witnesses. Critically, the observations and prior statements of the police officers who responded to the crash were included in a joint stipulation submitted as an exhibit and read into the record as substantive evidence, representing multiple witnesses who "testified" that D.I. was driving the Crown

Victoria at the time of the crash, while Mr. Faltz was the rear passenger. App. 161–62, 846.

Mr. Faltz testified first, and largely reiterated what he had already claimed in his multiple written motions and prior testimony in the 2011 § 23-110 hearing. Mr. Faltz also testified for the first time about Mr. Harn's representation, repeating that Mr. Harn had never discussed the possibility of hiring, or even speaking to, any expert witnesses in his 2011 § 23-110 hearing. App. 856.

Stephen Mercer testified to the appropriate "standard of care" a competent defense attorney is expected to offer a client in cases involving complex forensic evidence such as DNA—and how both Mr. Bond and Mr. Harn fell far short. As to Mr. Harn, Mr. Mercer testified that based on his review of the 2011 § 23-110 hearing transcript, "Mr. Harn [] appears to have conducted an inadequate investigation because there is *no* indication that the laboratory case file had been obtained and there's no indication that the chain of custody for this trace evidence had ever been scrutinized." App. 203 (emphasis added). Given Mr. Harn's own failures, Mr. Mercer said it would have been impossible for him to establish prejudice on the part of Mr. Bond. App. 867-68.

More broadly, Mr. Mercer testified that upon learning DNA evidence is central to a case, a competent criminal defense attorney should obtain discovery and investigate the DNA evidence, which includes: "read[ing] and review[ing] [the

DNA] report and [] obtain[ing] the laboratory case file and documentation that exists for that report[.]" App. 202. These steps are "essential" to any investigation and obligatory for any criminal defense attorney—even one without extensive experience in forensic analysis. *Id.*

As mentioned *supra*, the defense also called Dr. Norah Rudin, who testified to her use of probabilistic genotyping to interpret the complex mix DNA sample on the side of the airbag—and how it revealed a far higher likelihood of D.I.s DNA profile than Anthony Faltz's. In response, the Government presented Dr. Bruce Budowle, who also qualified as a DNA expert. Dr. Budowle critiqued Dr. Rudin's approach, particularly on issues involving the potential presence of "stutter"—or false "peaks" in a DNA sample—and whether she was correct in evaluating the likelihood ratios of Mr. Faltz compared to D.I. on the airbag sample. App. 895–96.

But most significantly, despite his differences with Dr. Rudin's approach on likelihood ratio analysis Dr. Budowle repeatedly affirmed that D.I. was a likely contributor to the DNA sample on the right side of the Ford Crown Victoria's driver's side airbag, along with Mr. Faltz. App. 897, 899. Unquestioned on all sides, then, was that D.I.s DNA was on the driver's airbag—the only major dispute was how strong the comparative strength of the profiles were between D.I. and Mr. Faltz.

The rest of the hearing involved testimony from the Government's expert witnesses, Michael Miller and Brian Chase on the one hand, and defense expert, Mr. Russell on the other hand, about the physics of vehicle movement (including its occupants), the speed of airbag deployment, and the very reliability of the Government's accident evidence.

For his part, Mr. Russell stood by the conclusions reached in his expert report, chief among them that, due to the forward, diagonal movement of the occupants of the Crown Victoria, it is possible that an unrestrained rear passenger—such as Mr. Faltz—would have made contact with the driver's airbag during the collision. App. 187. Mr. Russell testified that scene evidence supported this forward, diagonal movement, as the back of the driver's seat was bent forward and to the left, likely indicating that a large, heavy, rear seat occupant traveled directly toward the driver's side of the car. App. 189. Mr. Russell also testified that, in addition to the occupants' bodies moving forward in a diagonal movement, any related bodily fluids would follow this same trajectory, in accordance with the laws of physics. *Id.* For example, saliva, sweat, or blood droplets would all have traveled forward, in a diagonal manner during the collision. *Id.*

Prior to their testimony at the hearing, both Mr. Miller's and Mr. Chase's expert reports had been subject to significant reliability challenges by the defense team. Defense counsel filed pre-trial *Daubert* challenges to both expert reports in an

attempt to have both Mr. Miller and Mr. Chase excluded from testifying. *See* App. 141; App. 149. Importantly, Mr. Miller's "accident reconstruction" was entirely based on a "field sketch" from the night of the crash, and Mr. Miller's effort at a full accident reconstruction came more than *four years* after the incident. *See* App. 144, 170–72. By that time, Mr. Miller was unable to forensically map the location of the vehicles, any skid marks, gouge marks, fluid trails, or other debris from the night of the collision because the road had been repaved and no scene evidence remained. *See* App. 172. Defense counsel argued that because of these deficiencies, Mr. Miller's conclusions were "speculative" under the *Daubert* standard, and his expert opinions were therefore unreliable. *See* App. 144.

But even more notable was the extent to which Mr. Chase relied on Mr. Miller's report in formulating his own conclusions. One of Mr. Chase's core claims in his expert report was the remarkable contention that after colliding with the Nissan, the Crown Victoria proceeded directly forward for 16.9 feet and *only then* started to rotate. App. 743. Moreover, in what appeared to be a substantial misunderstanding of Mr. Miller's expert report, Mr. Chase credited Mr. Miller with conducting a "forensic crash reconstruction" of the two cars, that Mr. Miller did so "immediately following the crash," and that "critical scene physical evidence which dissipates over time was forensically mapped and documented." App. 738. Critically, it was at least in part on the *basis of Mr. Miller's "reconstruction"* that

Mr. Chase determined that the driver's airbag would have been fully deployed before the Crown Victoria ever began rotating and that the rear seat passenger could not have made contact with the driver's airbag. *See* App. 744. As a result, the defense filed motions to exclude both Mr. Miller and Mr. Chase's reports—and the testimony that would inevitably follow.

Lastly Mr. Faltz returned to the stand, and re-affirmed that he "wanted to go to trial." App. 931. Most importantly, Mr. Faltz testified that he never would have pled guilty if it had been explained to him that D.I.'s DNA was *also* on the driver's airbag, and instead would have taken the case to trial. App. 931–32. But when Mr. Bond told him "this is as good as it's going to get, and that the Government said that my DNA is all over the airbag and [the Ingrams] were going to say I was the driver," he changed his mind. App. 933. Later, Mr. Faltz elaborated on what effect that conversation had on his mindset: "[Mr. Bond was] basically saying like he *really didn't have a defense ready for me*." App. 934 (emphasis added).

After initial closing arguments, the court made clear just how deep its preconceived skepticism of Mr. Faltz's claims ran. During the defense's rebuttal, Judge Christian repeatedly referenced a letter that Mr. Faltz had written to the court prior to his sentencing and expressed incredulity that the court should not treat the letter's phrasing as an "admission" that Mr. Faltz was actually the driver, despite no such language in the letter itself. In reality, the letter included statements that Mr.

Faltz had countless sleepless nights over having been "the cause" of two people losing their lives, that he needed someone to believe he was not a murderer, and that he was pleading guilty in order to take responsibility for his actions. App. 197. Mr. Faltz also testified that he wrote the letter because he felt guilty about being "involved" in the crash that killed two people, and that as the oldest of the three young men, he thought he might have been able to stop D.I. from fleeing the police, or should not have joined the Ingrams in joy-riding in the first place. In that sense, Mr. Faltz explained, he felt like he helped "cause" the deaths of the victims. *Id.*

But more importantly, the court used defense counsel's rebuttal as an opportunity to question why any defendant would possibly plead guilty to a crime he did not commit:

> THE COURT: Stick with me here. Why would you plead guilty to having killed someone who killed two people --
> MR. MILLIKAN: Well, been involved –
> THE COURT: -- when you -- when you knew you weren't the driver?

App. 936.

The court responded to defense counsel's argument that Mr. Faltz was abandoned by his original attorney not by addressing the specifics, but by incredulously wondering why an innocent person would plead guilty at all:

> THE COURT: I'm just trying to understand, you know, *if somebody is telling you to plead guilty to something that you didn't do, especially of this nature,*

> *and, you know, you can call it whatever you want, you can call it shoplifting, and why would you plead guilty if you didn't steal the bubble gum*.
> MR. MILLIKAN: Well, Your Honor –
> THE COURT: Shoplift the bubble gum.

App. 939 (emphasis added).

Finally, the court followed up on its previous incredulity by stating what was perhaps the clearest articulation of its skepticism that an innocent person would ever plead guilty:

> THE COURT: If your lawyer told you, you know -- you know *even if the lawyer expressly told you I'm giving up on this case and you're going to plead, what person would plead guilty? What person would plead guilty to murder*?

App. 940 (emphasis added).

On June 8, 2023, the court issued a six-page Order once again denying all of Mr. Faltz's claims. App. 408–09.

Significant to the issues raised here, the court stated that it refused to consider evidence of Mr. Bond's deficient performance *at all*. The sum total of the Order's discussion of Mr. Bond was to say "[t]his Court has already considered and ruled against Defendant's claims that his trial counsel provided ineffective assistance of counsel on April 9, 2013. For that reason, the court *will not consider* claims of ineffective assistance of counsel against Mr. Bond in this Order." App. 412 (emphasis added). The new "failure to investigate" claim raised against Mr. Bond in Mr. Faltz's motion, and discussed by multiple witnesses in the hearing, was simply not addressed.

As to the new *Strickland* claims against Mr. Harn, the court said:

> Here, Defendant has repeatedly acknowledged his guilt in this matter, meaning that he drove the vehicle that struck the Nissan killing two people. A substantial amount of Defendant's DNA was located on the center of the driver-side airbag. By pleading guilty, Defendant avoided the possibility of a considerably longer sentence. This Court finds that Defendant's § 23-110 claims in this matter, to the extent that they are not procedurally barred by the Court's prior ruling on his initial § 23-110 motion, are meritless.

App. 413.

Finally, the court emphasized its belief in Mr. Faltz's factual guilt, and echoed its challenge to defense counsel during rebuttal argument, repeatedly referencing Mr. Faltz's guilty plea with no regard whatsoever to Mr. Bond's alleged failures to properly advise him, or Mr. Faltz's testimony that he felt his lawyer had given up on him. Instead, the court primarily discussed the plea in tandem with the evidence against Mr. Faltz, finding that because "the government made clear that Defendant's DNA was found on the driver's airbag," it was presumably obvious to Mr. Faltz that he was pleading guilty as the driver. App. 412. The Order also referenced Mr. Faltz's letter to the court as an admission of factual guilt, despite the fact that, read in context, Mr. Faltz made no such admission.

Following the court's denial of both his IPA and § 23-110 claims, Mr. Faltz timely filed an appeal, and subsequently moved to consolidate the appeal with his previous appeal of the denial of his Motion to Withdraw Guilty Plea that had been

heard at the 2011 § 23-110 hearing. *See* App. 416, 419. This Court granted that Motion, and the appeals were consolidated. App. 419.

SUMMARY OF THE ARGUMENT

First, the lower court denied Mr. Faltz's due process rights by conducting his evidentiary hearing under the IPA with the stated belief that innocent people do not plead guilty. The IPA grants "a liberty interest in providing for post-conviction relief, and the District's procedures for vindicating that interest must satisfy due process." *Hood v. United States*, 28 A.3d 553, 562 (D.C. 2011). More specifically, the IPA contemplates that petitioners may be actually innocent despite having pled guilty, and can therefore still be entitled to relief under this statutory framework. *See* D.C. Code § 22-4135(g)(1)(E). By clarifying its position that innocent people do not plead guilty, the lower court effectively decided Mr. Faltz's IPA claim before ever providing him a chance to make his case. The lower court deprived Mr. Faltz of his liberty interest in seeking post-conviction relief without due process, thereby violating Mr. Faltz's due process rights.

Second, the lower court failed to conduct a proper *Strickland* analysis in refusing to consider Mr. Faltz's claims of ineffective assistance of counsel. The *Strickland* test requires that "a defendant must establish that his counsel's performance was deficient and that the deficiency resulted in prejudice." *Andrews v. United States*, 179 A.3d 279, 293 (D.C. 2018) (citing *Strickland v. Washington*, 466

U.S. 668, 687 (1984)). When a conviction results from a guilty plea, the defendant need not show that he necessarily would have won a trial, but simply that "the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Mr. Faltz alleged that both his trial counsel and initial post-conviction counsel provided ineffective assistance. By relying on Mr. Faltz's guilty plea to justify its decision and failing to analyze whether counsel provided competent advice and, if not, what Mr. Faltz would have done differently under the advice of competent counsel, the lower court completely departed from a proper application of the *Strickland* test.

Third, the lower court failed to apply the *Daubert* standard when it admitted and credited the opinions of the government's experts. The lower court failed to analyze whether the experts' reports, methods, and conclusions satisfied the requirements of *Daubert*. These unreliable experts subsequently influenced the lower court to make conclusions contrary to uncontradicted testimony and unsupported by acceptable scientific standards.

Each of these errors constitutes reversible error requiring a remand of Mr. Faltz's case for a new evidentiary hearing.

ARGUMENT

I. THE COURT'S PRESUMPTION THAT INNOCENT PEOPLE DO NOT PLEAD GUILTY VIOLATED DUE PROCESS

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The trial court deprived Mr. Faltz of his liberty interest in post-conviction relief under the Innocence Protection Act ("IPA") by presiding over his evidentiary hearing with an unfair and incorrect presupposition that innocent people do not plead guilty.

The IPA grants Mr. Faltz a liberty interest in pursuing the vacation of a conviction, *see* D.C. Code § 22-4135(a), that may not be deprived without due process of law. "The IPA has created a liberty interest in providing for post-conviction relief, and the *District's procedures for vindicating that interest must satisfy due process*." *Hood v. United States*, 28 A.3d at 562 (D.C. 2011) (emphasis added). Specifically contemplated within this framework is Mr. Faltz's opportunity to explain—and the court's obligation to consider—"the specific reason [he] pleaded guilty despite being actually innocent of the crime" because his "conviction resulted from a guilty plea." D.C. Code § 22-4135(g)(1)(E). Thus, as part of his liberty interest in pursuing relief under the IPA, Mr. Faltz must have "the opportunity to be heard 'at a meaningful time and in a meaningful manner'" as to why he pled guilty

despite his actual innocence. Anything less would be a deprivation of his right to due process.

Here, the District of Columbia conferred a liberty interest in the form of a procedure for post-conviction relief through the IPA. The court must deliver fundamental fairness in each aspect of the evidentiary hearing established to realize that interest. *See Hood*, 28 A.3d 553 at 562 ("[T]he District's procedures for vindicating [the liberty interest in providing post-conviction relief] must satisfy due process."). Where the trial court fails to deliver fundamental fairness, IPA petitioners rely on this Court to remedy the deprivation of their due process right.

The nature of that deprivation in the instant case changes the most common standard of review used in IPA cases. The usual standard of review for denials of relief under the IPA is abuse of discretion. *Richardson v. United States*, 8 A.3d 1245, 1249 (D.C. 2010). But that standard is employed to review alleged errors of *fact*—most typically, a judge's "rejection of alleged newly discovered evidence offered to prove" innocence. *Williams v. United States*, 187 A.3d 559, 563 (D.C. 2018). For errors of law, the proper standard of review is *de novo*—as one IPA case put it, whether the court "applied the correct legal standard." *Mitchell v. United States*, 80 A.3d 962, 971 (D.C. 2013). Here, petitioner alleges that the trial court did not "app[ly] the correct legal standard" when it effectively read § 24-4135(g)(1)(E) out of existence through comments made in the hearing itself, and echoed in the final

Order denying relief. As that represents a clear error of law, the appropriate standard for this Court is to review the alleged due process violations in the Faltz case *de novo*.

Given the underlying facts, it bears repeating what is already well known: innocent people often plead guilty for a variety of reasons. As an empirical matter, the National Registry of Exonerations has identified that 25 percent of all exonerations nationwide began as guilty pleas. National Registry of Exonerations, 2022 Annual Report, May 8, 2023, at 7. Even prior to that, the National Registry identified a specific dynamic relevant to Mr. Faltz's case in a 2015 report—"*almost all manslaughter guilty plea exonerations started as murder cases and were plea bargained down to manslaughter*." Nat'l Registry of Exonerations, "Innocents Who Plead Guilty," Nov. 24, 2015, at 4. Indeed, according to the National Registry, nearly *half* of all manslaughter exonerations started out as guilty pleas—an unusually high rate. *Id*.

This data confirms what courts have long understood about guilty pleas. *See Brady v. United States*, 397 U.S. 742, 757–58 (1970) (guilty pleas are "no more foolproof than full trials to the court or to the jury."); *Schmidt v. State*, 909 N.W.2d 778, 788 (Iowa 2018) ("A plea does not weed out the innocent."). Plea deals have become a core part of the American criminal justice system—and not because they are particularly reliable indicators of factual guilt.

But this is not an understanding that the court shared. The court revealed—via multiple statements of increasing clarity—its belief that factually innocent people do not plead guilty to the crimes of which they are accused. It first expressed incredulity that even attorney ineffectiveness could have anything to do with a decision to plead guilty, regardless of the charge:

> I'm just trying to understand, you know, *if somebody is telling you to plead guilty to something that you didn't do*, especially of this nature and, you know, you can call it whatever you want, you can call it shoplifting, and *why would you plead guilty if you didn't steal the bubble gum*.

App. 939 (emphasis added). The court then followed up by expressing more blatantly how deep its disbelief was of the idea that innocent people might, under any circumstances, decide to plead guilty:

> If your lawyer told you, you know - you know even if the lawyer expressly told you I'm giving up on this case and you're going to plead, *what person would plead guilty? What person would plead guilty to murder?*

App. 940 (emphasis added). With these statements, the court articulated in no uncertain terms its strong belief that innocent people do not plead guilty—and that any rational person would decide to proceed to trial even if their attorney had explicitly "giv[en] up on [their] case."

As both the statistics and case law make clear, the lower court's decision departs from empirical reality. But more importantly, it flatly defies the express considerations of the IPA, which requires that the court "*shall* consider … [i]f the conviction resulted from a guilty plea, the specific reason the movant pleaded guilty

despite being actually innocent of the crime." D.C. Code § 22-4135(g)(1)(E) (emphasis added). The specific statutory language of the IPA is clear and unequivocal—courts *must* contemplate the reality that factually innocent people can, and do, admit legal guilt. The statute even provides a separate procedural carve-out for *how* petitioners should address that issue.

The lower court flagrantly ignored that portion of the IPA. By stating on the record—at least twice—that the lower court believed innocent people do not plead guilty to crimes they did not commit, the lower court was telling Mr. Faltz that he could not meet his burden under the IPA *under any circumstances*. From that standpoint, Mr. Faltz's fate was sealed the moment the evidentiary hearing began—having once pled guilty, he was forever guilty in the lower court's eyes, regardless of what the evidence might show.

But the error goes even deeper than that. The presupposition that innocent people do not plead guilty was effectively a statement that the IPA did not control Mr. Faltz's hearing at all—or at least, the portion dealing with guilty pleas could simply be read out of the statute for purposes of addressing Mr. Faltz's claims. Contrary to black-letter law, the lower court told Mr. Faltz, in a hearing designed in part to evaluate whether he met his burden to show why he pled guilty, that he *could never prove his case* regardless of what evidence he presented. A hearing conducted in that context is not only a fundamentally unfair one, it proceeds under the premise

that it is not governed by one of the core elements of the IPA. Indeed, if a defendant seeks relief under the IPA and is granted a hearing that flagrantly ignores the IPA—or at least one of the more relevant portions of it—it is tantamount to refusing to hold a hearing at all. Such a proceeding represents a profound deprivation of Mr. Faltz's due process rights, and the liberty interest conveyed to him by the IPA.

Further, there is no merit to an argument that the lower court's questions or statements were rhetorical in an effort, moot court-style, to elicit an explanation from defense counsel as to why his client might have pled guilty despite being innocent. This formulation would ignore the reality that the court began asking these questions immediately *after* counsel's lengthy argument that there were at least two separate reasons—failure to have the elements of the charge explained to him, and a well-informed belief that his attorney had "given up on him" and did not believe in his case—that answered that exact question. If the court found that argument unconvincing, or if it needed to hear more evidence, it could have said so—or even said nothing at all. Instead, the lower court responded to the *specific* reasoning articulated by defense counsel by retreating to the *general* proposition that even people falsely accused of stealing "bubble gum" would not plead guilty to shoplifting, and that regardless of what an attorney might advise a client, an innocent one would reject a plea recommendation and proceed to trial.

Nor can it be plausibly argued that by framing these statements as "questions," these moments from the hearing–which would otherwise shock the conscience—can be explained away as the intellectual musings of a curious lower court. As noted above, this was a judge directly responding to defense arguments and making his own positions abundantly clear. When the court openly declared that it was not even open to the concept that an innocent person pleads guilty, it should not be of any relevance to *this* Court that these statements were phrased as questions—and putting question marks at the end of these sentences does not transform them from blatant due process violations into harmless musings.

As an appellate issue, this may well be a matter of first impression for this Court—based on undersigned counsel's thorough research, there does not appear to be an analogous case where a judge simply rejects the premise of the IPA during the hearing itself. But regardless of the absence of case law, both the resulting error and harm in Mr. Faltz's case are obvious. The statute tells the judge that specific remedies—vacated convictions or new trials—must exist for innocent people who take pleas. But the court flouted the statute by stating its position that innocent people would never plead guilty. By ignoring that portion of the statute so completely, and depriving Mr. Faltz of any conceivable way he could make his case, the court quite obviously deprived Mr. Faltz of his due process rights, and the harm—a denial of his IPA claims regardless of the evidence—is just as obvious.

The nature of the error only underscores why the court must review this *de novo*. This Court does not need to "defer" to the lower court's judgment that Mr. Faltz was factually guilty. At base, this error is about statutory interpretation—to the extent that the lower court articulated a clearly voiced belief that innocent people do not plead guilty, it misapplied a statute that commands the court to take seriously the possibility that some innocent people do precisely that. By not applying § 22-4135(g)(1) at all—by effectively reading it out of the statute—the lower court made a profound error of law.

Similarly, a harmless error analysis here is straightforward. If a presiding judge and factfinder holds an IPA hearing under the stated premise that innocent people never plead guilty, that is tantamount to not having a hearing at all and denying a defendant an opportunity to make his case. This Court has held that in IPA cases regarding statutory interpretation, an error is harmless only if a Court can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Veney v. United States*, 929 A.2d 448, 466 (D.C. 2007) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)).

Under that standard, the harm in this case is clear. The IPA clearly specifies a remedy for innocent people who plead guilty. The judge said in no uncertain terms that he was not open to that remedy. Indeed, this case goes beyond harmless error -

the error here is plain. "Plain error" is defined as error that both "affect[s the appellant's] substantial rights," and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Miller v. United States,* 209 A.3d 75, 78 (D.C. 2019) (internal citations and quotations omitted). Given constitutional violation of Mr. Faltz's due process rights, that standard is met. A due process violation, by definition, affects substantial rights that go to the heart of the fairness and integrity of the proceedings.

Appellant Anthony Faltz respectfully requests this Court to correct this egregious error by mandating one of the two IPA remedies the lower court refused to recognize—either vacating his conviction, or reversing and remanding to a different judge for a new trial.

II. THE COURT PERFORMED A DEFICIENT *STRICKLAND* ANALYSIS

The denial of a § 23-110 motion is reviewed for an abuse of discretion.[1] *Gardner v. United States*, 140 A.3d 1172, 1195 (D.C. 2016). For the trial court's findings of fact, this Court evaluates under a clear error standard, and for the trial court's determinations of questions of law, *de novo*. *Id*.

Mr. Harn's failures in the § 23-110 hearing simply repeated Mr. Bond's failures at trial, making it impossible for any court to adequately evaluate the

[1] As it represents a collateral attack rather than a direct appeal, the appropriate vehicle for a *Strickland* challenge in the District of Columbia is a § 23-110 motion.

prejudice that resulted from those trial failures—and therefore clearly constituted sufficient cause and prejudice to overcome any procedural bar and mandate that Mr. Faltz's claims against Mr. Bond be heard. However, given that most of the claims against Mr. Bond are incorporated by their nature in the claims against Mr. Harn—for failing to perform the investigation that would have demonstrated *Strickland* ineffectiveness against Mr. Bond—this argument will focus on the lower court's analysis of Mr. Harn's performance.

As a threshold matter, the lower court did not apply a proper *Strickland* analysis in evaluating Mr. Harn's performance. *Strickland*'s application to guilty pleas is well established. *See Lee v. United States*, 582 U.S. 357 (2017); *Lafler*, 566 U.S. 156; *Hill* v. *Lockhart*, 474 U.S. 52 (1985). In this context, *Strickland* prejudice can be shown by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee* at 364–65 (quoting *Hill* at 59). While the trial court was not required to simply take Faltz's *post hoc* word for it that he wanted to proceed to trial, it *is* required to examine the "contemporaneous evidence to substantiate" those claims. *Id.* at 368.

Here, the lower court failed to engage in the *Strickland* analysis. Instead, the lower court dismissed the claims against Mr. Bond outright, which in turn, made it impossible to evaluate Mr. Harn's performance. Given the intertwined nature of the claims against both attorneys, no court could possibly evaluate Mr. Harn's

ineffectiveness in proving either Mr. Bond's deficiency or his prejudice without at least *some* attention to whether Mr. Bond was himself ineffective. By refusing to discuss Mr. Bond, the lower court failed *Lee*'s mandate to evaluate the "contemporaneous evidence" that Mr. Faltz would have gone to trial if not for the ineffective assistance of his attorney—indeed, given its incredulousness that an attorney's poor advice could *ever* lead to a defendant pleading guilty, the lower court did not appear to see the *Lee* framework as a conceptual possibility.

In addition to refusing to even discuss Mr. Bond, the lower court accurately summarized the *Strickland* "reasonable probability standard"—and then simply hand-waved Mr. Harn's deficient performance away. Instead of actually examining Mr. Harn's performance, the court performed a "prejudice" analysis by leaning on its own malicious interpretation of Mr. Faltz's letter to the court, engaged in circular logic that Mr. Faltz *pled* guilty because he *was* guilty, and referenced the undisputed fact that Mr. Faltz's DNA was found on the center of the airbag. App. 412–13. In confining its analysis to those issues—and those issues entirely—the lower court simply misapplied *Strickland* and barely attempted to run the required analysis at all.

This non-analysis of Mr. Harn under *Strickland*, combined with the flat refusal to analyze Mr. Bond in any way whatsoever, is a clear misapplication of *Strickland* via *Lee*. The *Strickland*/*Lee* standard for evaluating prejudice required the lower

court to consider: (i) the likelihood that Mr. Bond's performance at trial prejudiced Mr. Faltz by causing him to accept a guilty plea instead of proceeding to trial, and (ii) whether Mr. Harn's post-conviction investigation and performance prejudiced Mr. Faltz in the subsequent § 23-110 hearing that was designed to evaluate Mr. Bond's performance. The lower court provided analysis of neither and should be reversed as a matter of law.

But if this Court should disagree, and find that a fairer reading of the lower court's Order was that it *did* perform a real *Strickland* analysis of Mr. Faltz's ineffective assistance of counsel claims, albeit poorly articulated, it is still the case that the lower court completed the analysis incorrectly and therefore abused its discretion. If the lower court had followed a correct *Strickland* analysis, it would have granted relief, found that Mr. Faltz pled guilty due to his lawyer's constitutional deficiencies under *Strickland*, and ordered a new trial.

As discussed above, the controlling case for a *Strickland* analysis of accepted guilty pleas is *Lee v. United States*, which affirmed the previously decided *Hill v. Lockhart*[2] but also refined its framework until it applied a "hybrid" *Lee*/*Hill* analysis. Both decisions adopt the same fundamental premise that *Strickland* prejudice can be shown by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee* at

[2] 474 U.S. 52 (1985).

364–65 (quoting *Hill* at 59). But where *Hill* emphasizes that a defendant makes that demonstration by showing that an attorney's competent performance–particularly when the allegation is centered on a failure to investigate and therefore advise the defendant properly—"would have changed the outcome of a trial," *Lee* qualifies that standard heavily. *Id*.

First, *Lee* makes the point that "when a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain"—because no presumptions of trial reliability can possibly attach to a *trial that never took place*. *Lee* at 364 (quoting *Roe* v. *Flores-Ortega* at 482) (internal quotation marks omitted). Second, when evaluating what a *specific* defendant would have done, "the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decision making"—in the *Lee* case, the remote possibility of an acquittal in the face of overwhelming evidence against the defendant, weighed against his almost certain deportation if he accepted the Government's plea bargain. *Id*. at 368.

Here, Mr. Faltz alleged two separate "levels" of ineffective assistance of counsel: Mr. Bond at trial, and Mr. Harn at his initial § 23-110 hearing in April 2011. The core of his claims against Mr. Bond were that Mr. Faltz, who was prepared to go to trial and consistently maintained that he was innocent of driving the car that

caused the accident, was blindsided by his attorney, not only with a last-minute plea offer on the morning of jury selection, but a last-minute advisement that he should take the plea because Mr. Bond thought he had an unwinnable case. Key to the ineffectiveness claim is the allegation that had Mr. Bond done *any* degree of forensic investigation—namely, consulting with DNA and accident reconstruction experts—he would have learned there were multiple avenues to attack the core piece of DNA evidence the Government had in what was otherwise a quite weak case. But because Mr. Bond had done no such investigation—and indeed, effectively took the Government's own word on the strength of its evidence against Mr. Faltz—he had not prepared a viable defense, admitted to his client that he had no real defense, and wrongly advised Mr. Faltz that a guilty plea with a 15-year sentence was the best Mr. Faltz could possibly hope for. Faced with the prospect of an attorney who not only did not believe in him, but who had clearly not prepared a viable DNA defense if he *did* decide to proceed to trial, Mr. Faltz pled guilty despite his factual innocence.

The second level of ineffective assistance of counsel came when Mr. Faltz attempted to withdraw his guilty plea, and a § 23-110 hearing was held to allow him to make his case. Needing to establish both deficient performance and prejudice on the part of Mr. Bond, Mr. Faltz's new attorney Mr. Harn elicited substantial testimony demonstrating that Mr. Bond had in fact performed no meaningful investigation in the case. But because Mr. Harn himself *also* performed no

meaningful investigation—failing to consult with DNA, accident reconstruction, or medical experts who might have been in a position to tell the court that Mr. Faltz's case was far stronger than Mr. Bond had assumed or the Government had represented—he only repeated Mr. Bond's errors and was in no position to establish a different set of circumstances under which Mr. Faltz might have rejected the plea and taken the case to trial. Indeed, the lower court actually made this point when it denied Mr. Faltz's § 23-110 claims, saying in its judgment that Mr. Harn failed to demonstrate prejudice in Mr. Bond's performance specifically because he "*failed to present any witnesses or evidence* which would demonstrate that a better investigation could have been performed." App. 71.

Fundamentally, any *Strickland* claim rests on a counterfactual—in this context, what *would* the defendant have done *at the time* if his attorney had competently and adequately investigated his case and advised him? The court's role, then, is to essentially place itself in the position the defendant occupied at the time the *Strickland* deficiencies allegedly had an effect—what could the attorney have done differently, and what might the defendant have done differently if his lawyer had been constitutionally competent? Indeed, this is *precisely* the sort of analysis that Chief Justice Roberts conducts in *Lee*—discussing the defendant's repeated questions to his lawyer about the risks of deportation if he pled guilty, noting both the defendant's and attorney's evident confusion and misunderstanding of portions

of the plea colloquy itself, and examining the attorney's own statements that he had advised a plea despite not having thoroughly examined the deportation issue. *Lee* at 369, 362.

This is where the lower court committed its most serious error. The Order shows almost no indication that the court brought itself back to the decisions that Mr. Faltz's attorneys made, and certainly did not evaluate how Mr. Faltz might have responded to his options if those decisions had been different. Indeed, it is difficult to see how the lower court could have even *begun* to evaluate Mr. Faltz's thought process at the time of the plea, given that it refused to even consider evidence relating to Mr. Bond's performance.

At most, the lower court gestured at evaluating Mr. Harn under the *Strickland* test, accurately summarizing the "reasonable probability" standard, but then proceeded to do little actual evaluation of Mr. Harn. App. 413. Although petitioner concedes that if a court properly finds lack of prejudice, it is not bound to perform an analysis of deficient performance, it is still notable that the lower court's Order reflects no effort to determine whether either attorney was deficient. In addition to the lower court's omission of an evaluation of Mr. Bond's prejudicial performance "through" Mr. Harn, as discussed above, it also skipped any analysis as to how Mr. Harn's failure to investigate prevented Mr. Faltz from developing evidence he could

use to prevail on his *Strickland* claims against Mr. Bond—which was the core of the "prejudice" case against Mr. Harn.

The contrast to *Lee*, in a way that *favors* Mr. Faltz, is striking. In *Lee*, the Supreme Court found *Strickland* prejudice and reversed the defendant's conviction even in the face of overwhelming evidence and a "dire" chance at acquittal—but it did so anyway due to the attorney's failure to advise on collateral consequences that he did not understand. The instant case instead presents a set of facts that raises the real possibility that, absent his attorney's total failure to investigate a viable defense and present that defense to his client instead of giving up and recommending a plea, the defendant might well have never been convicted at all.

Even when reviewed by a judge skeptical of Mr. Faltz's factual innocence, it must be acknowledged that had the case gone before a jury with the benefit of a competent defense attorney, Mr. Faltz's chances of outright acquittal would have been extremely high. With the benefit of current knowledge and an appropriate investigation, the jury would have been faced with a qualified DNA expert, a qualified accident reconstruction expert, and several police officers who would have offered direct, percipient eyewitness testimony that Mr. Faltz was not driving the Crown Victoria. An additional expert witness, Stephen Mercer, who made a career out of litigating complex DNA cases, testified that Mr. Bond's plea recommendation was a substantively bad one given that he had done no work to undermine the

Government's DNA evidence, and that an appropriate investigation could well have undermined it. App. 872–74, 876–77. Combined with Mr. Faltz's own testimony that he wanted to go to trial all along, Mr. Bond's own admission that a plea had barely been discussed since the early days of the case, and the objective fact that the plea offer was conveyed and discussed for the first time on the morning of jury selection, it is hardly plausible to argue that there is no "reasonable probability" that Mr. Faltz would have proceeded to trial if his lawyer had talked to the appropriate experts and done a bare minimum of investigation to equip his client with a stronger defense.

Similarly, the lower court's Order did not discuss *Strickland*'s other prong, deficient performance. As Mr. Mercer testified at length, evidence of deficient performance by both Mr. Bond and Mr. Harn permeated the history of this case. Indeed, the entire course of the evidentiary hearing now being reviewed by this Court was effectively a demonstration of what either Mr. Bond or Mr. Harn could have done with a bare minimum of investigation. And as Mr. Faltz testified, and Mr. Mercer elaborated on from the perspective of a veteran DNA litigator, without a capable defense informed by investigation, Mr. Bond was in no position—and could not have been in position—to offer his client the benefit of truly informed advice.

Mr. Mercer's analysis is well-supported by relevant case law. Failure to consider consulting an expert is considered "an omission, not a strategic decision,"

Young v. United States, 56 A.3d 1184, 1198 (D.C. 2012), *as amended* (Jan. 10, 2013), and therefore is "patently unreasonable and [falls] below what is expected of competent counsel." *Kigozi*, 55 A.3d at 654. It is objectively unreasonable for counsel to not consult an expert to impeach or discredit a crucial issue in the case that a juror would be unlikely to answer without assistance, even if defense believed that jurors would have general knowledge of the subject. *Id.* at 652–53.

This is precisely analogous to Mr. Faltz's case. The centrality of the DNA on the airbag is not only common sense, it is the piece of evidence that caused the Government to charge Mr. Faltz with murder in the first place. In that context, its importance to his case could hardly be overstated. Few attorneys could have addressed it without the benefit of an expert, if not multiple experts—as Mr. Bond himself implicitly admitted when he told Mr. Faltz that the case was unwinnable. And yet neither Mr. Bond nor Mr. Harn ever *consulted* an expert, let alone presented one to the jury. Clear precedent establishes deficient performance for that "omission" alone.

But even more broadly, as discussed above, with proper investigation and advice Mr. Faltz's case would have been highly triable in the context of all the evidence. Indeed, Mr. Faltz very nearly went to trial anyway, before his attorney explicitly informed him that he had no real defense against the central tenet of the prosecution's case and that he should take a plea rather than go to trial with an

unwinnable case. A proper evaluation of a plea under *Lee* and *Hill* requires analysis of whether there was a "reasonable probability" that the defendant would have gone to trial absent his attorney's ineffectiveness, and the lower court failed to apply that standard here.

Quite obviously, this error was not harmless—had counsel performed effectively, Mr. Faltz would not have taken this plea. As the substantive evidence makes clear, this was a winnable case with the appropriate preparation, experts, and understanding of the core issues.

At an absolute minimum, it is clear that reasonable doubt could well have existed at trial. With the Government's sole piece of forensic evidence—Mr. Faltz's DNA on the center of the airbag—given plausible explanations by both DNA and accident reconstruction experts that did *not* require that Mr. Faltz was the driver of the Crown Victoria, and bolstered by the testimony of multiple police officers who saw D.I. get out of the driver's seat and Mr. Faltz get out of the rear passenger side, reasonable doubt would have existed in abundance. From that standpoint, when the lower court performed an incorrect application of *Strickland* by taking almost *none* of that into account, the error was far from harmless.

III. THE COURT ERRED IN DENYING THE MOTIONS TO EXCLUDE EXPERT TESTIMONY

The touchstone for the admissibility of expert evidence is reliability, and, as gatekeeper, the trial court plays a critical role in ensuring the standard is met. *See*

Williams v. United States, 210 A.3d 734, 742 (D.C. 2019) (citing *Motorola*, 147 A.3d at 757) ("Ultimately, [t]he goal [under *Daubert* and Fed. R. Evid. 702] is to deny admission to expert testimony that is not reliable, but to admit competing theories if they are derived from reliable principles that have been reliably applied."). Where a claim of error arising from this role was preserved, this Court reviews for an abuse of discretion.[3] *Gardner v. United States*, 140 A.3d 1172, 1183 (D.C. 2016); *see also Parker v. United States*, 249 A.3d 388, 401 (D.C. 2021).

The preliminary reliability determination and the manner in which it is made are "committed to the trial judge's discretion, reviewable for abuse." *Lewis v. United States*, 263 A.3d 1049, 1059 (D.C. 2021). Evaluation of expert evidence is "quintessentially a discretionary function of the trial court, and [the Court of Appeals] owe[s] a great degree of deference to its decision." *Id.* at 1064; *Johnson v. United States*, 683 A.2d 1087, 1095 (D.C. 1996) (en banc). But when the trial court's exercise of discretion is clearly erroneous, the Court of Appeals must consider reversing the trial court's decision. *Parker*, 249 A.3d at 404 (citing *Kozlovska v. United States*, 30 A.3d 799, 801 (D.C. 2011)). The trial court exercised its discretion erroneously if "it [acted] for an improper or legally insufficient reason, if its ruling

[3] This standard applies to both the exclusion *or* admission of scientific evidence. *Motorola Inc. v. Murray*, 147 A.3d 751, 755 (D.C. 2016) (en banc) (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

lacked a firm factual foundation, or if the trial court otherwise failed to exercise its judgment in a rational and informed manner." *Hinton v. United States*, 979 A.2d 663, 683–84 (D.C. 2009) (internal quotations omitted). If the error is *not* harmless error, the Court of Appeals will reverse and remand. *Benn v. United States*, 978 A.2d 1257, 1261 (D.C. 2009).

During the evidentiary hearing, the court incorrectly admitted the testimony of Government experts Miller and Chase despite its unreliability. The court's holding was stated on the record as follows:

> THE COURT: I'm going to deny that one – request to exclude their testimony. That goes more to the weight versus the admissibility of these witnesses. If Detective Miller -- there's testimony that he was perhaps -- he was on the scene and he's able to provide that testimonial evidence, and if the defense's expert is relying upon the reports of other experts, including Miller and Chase, then I don't see why they should be excluded.

App. 839.

In *Motorola*, the D.C. Court of Appeals adopted the Federal Rule of Evidence 702/*Daubert* standard to govern the admissibility of expert testimony in D.C. Courts. 147 A.3d at 752. The factors that the trial court must consider include: whether "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence" and that it "is based on sufficient facts or data" and is the "product of reliable principles and methods" that "the expert has reliably applied ... to the facts of the case." *Id.* at 756.

In Mr. Faltz's case, the court committed an abuse of discretion because it did not properly apply those factors in deciding the admissibility of Miller's and Chase's testimony. Though the trial court's decision to admit expert testimony is ultimately discretionary, it is not *entirely* free of any standards. Indeed, the trial court must "take no shortcuts" and "exercise its discretion with reference to *all* the necessary criteria." *Girardot v. United States*, 92 A.3d 1107, 1109 (D.C. 2014). In denying Mr. Faltz's motions to exclude the expert testimony of Miller and Chase, the lower court simply stated: "if the defense's expert is relying upon the reports of other experts, including Miller and Chase, then I don't see why they should be excluded." App. 839.

As an initial matter, the statement that Mr. Russell relied on Mr. Miller and Mr. Chase—made by the Government in argument and echoed by the court in its ruling—was false. *See* App. 411, 839. Nothing in Mr. Russell's report relies on the so-called accident reconstruction performed by Mr. Miller. And, Mr. Russell himself testified that the "reconstruction" was unreliable, and that he did not rely upon it in forming his expert opinions. Nov. 16, 2022 Tr. at 69:19–72:16; 76:12–77:8. Second, the court conflated the ability of Mr. Miller to be able to provide *factual* testimony as to what he did and saw on the *night of* the accident with the reliability of his accident reconstruction that was documented *four years* after the fact. Finally, and most significantly, the trial court did not engage in a meaningful analysis of the

experts' reports, their methods, nor the contents of their expected testimony as required by Rule 702 and *Daubert*. Instead, it took a "shortcut," and pointed to the (erroneous) fact that Mr. Russell relied upon the government's experts and concluded that the expert testimony of both Mr. Miller and Mr. Chase should therefore be admitted.[4] This Court has repeatedly found an abuse of discretion when a trial court fails to conduct the proper legal test for admissibility of expert testimony. *See Benn v. United States*, 978 A.2d 1257, 1273 (D.C. 2009), *Parker v. United States*, 249 A.3d 388, 402 (D.C. 2021).

Had the lower court employed the correct analysis, it would have carefully considered the reliability of the Miller and Chase reports and excluded them. An expert "must have a reliable basis for his theory steeped in fact or adequate data, as opposed to offering a mere guess or conjecture." *Dickerson v. District of Columbia*, 182 A.3d 721, 727 (D.C. 2018) (quoting *Russell v. Call/D, L.L.C.*, 122 A.3d 860,

[4] In *Heath v. United States*, 26 A.3d 266 (D.C. 2011), the Court of Appeals considered Judge Christian's error in excluding the defendant's proffered expert testimony without first conducting the required test for admissibility of such testimony. *Id.* at 274. In granting the government's motion to exclude the defendant's expert, Judge Christian simply ruled that cross-examination of eyewitnesses would render the defense's expert testimony unnecessary. *Id.* This Court found Judge Christian's ruling on the motion "conclusory" and insufficient to show that he had properly performed a case-specific consideration of the required factors for admissibility of expert testimony. *Id.* at 274, *Heath*, 26 A.3d at 274 n.16. However, this Court ultimately found the error in that case harmless.

867 (D.C. 2015) (citation omitted)). If an expert is "unable to show a reliable basis for their theory," it must be excluded. *Dickerson*, 182 A.3d at 727.

In Mr. Faltz's motions to exclude the experts and at the evidentiary hearing, the court was presented with evidence that Mr. Miller's "reconstruction" of the crash was performed more than four years after the accident occurred, long after any physical evidence remained at the scene. *See* App. 496–97 (testifying that the scene was not forensically mapped and that the markings made on the night of the collision had since been destroyed); App. 509. Because Mr. Miller's "reconstruction" was performed without the benefit of any physical evidence and without forensic mapping, it was inherently speculative, rendering his opinions based upon this report unreliable. *See Dickerson*, 182 A.3d at 727. The court's failure to exclude Miller's opinions based on this unreliable report was clear error. *Id.* at 728.

Likewise, the Government's other accident reconstruction expert, Mr. Chase, relied on Mr. Miller to conclude that the Crown Victoria moved forward 16.9 feet before beginning its rotation based on a misapprehension that the Miller report was conducted contemporaneously with the actual collision. *See* App. 738 ("[Miller] conducted a *forensic crash reconstruction* of the pre-impact and impact dynamics of the two involved vehicles. The crash scene reconstruction, *conducted by Detective Miller immediately following the crash*, was based upon accepted scientific crash reconstruction techniques and formulae; moreover, *critical scene physical evidence*

which dissipates over time was forensically mapped and documented.") (emphasis added).

While these reliability issues were apparent in the record *before* the evidentiary hearing, the hearing only highlighted them. Mr. Miller testified that though there was significant scene evidence that he marked on the night of the crash including skid marks, gouge marks, and fluid trails, he didn't forensically map the scene on the night of the crash, or in August 2002, when he returned to the scene and found that the markings he had made of the scene evidence were fading. App. 170–71, 902–03. When Mr. Miller *did* ultimately map the scene in May 2006, there was no roadway evidence remaining; consequently, only the road itself is forensically mapped in his expert report. App. 906–07. As a result, Mr. Miller himself testified that he would not call his report an accident "reconstruction" and that all of the calculations in his report are merely estimates.[5] App. 171, 907.

Despite all this, the court not only allowed the testimony but credited it.[6] By not fulfilling its role as gatekeeper and properly excluding unreliable testimony, the

[5] After hearing Miller testify, Mr. Chase conceded that—contrary to his report—Miller had not performed a complete reconstruction immediately following the crash, and that no scene evidence had been forensically mapped. App. 192.

[6] Incredibly, the lower court also erroneously discredited Mr. Faltz's expert for relying on Detective Miller's incomplete report, *see* App. 411 ("Defendant's crash reconstruction expert that testified to this theory was admittedly relying upon incomplete notes from a crash 20 years ago") despite the fact that Mr. Faltz's expert offered uncontested testimony that he *did not rely* on Miller's incomplete report. Nov. 16, 2022 Tr. at 76:20–77:8.

court abused its discretion. Indeed, the court's error only serves to highlight the importance of the gatekeeping function in the first place. Had the court properly considered the Miller and Chase reports under *Daubert*, recognized their basic unreliability, and excluded them as it was required, the court may not have mischaracterized what they erroneously concluded—in the face of uncontradicted testimony—that defense expert Mr. Russell relied on them. It is precisely to *prevent* the fact-finder from becoming confused or misled by unreliable expert testimony during a trial or hearing that the standard exists in the first place.

As the beneficiary of the error, the burden belongs to the government to show that the error was harmless—that "the judgment was not substantially swayed by" the admission of the expert testimony of Miller and Chase. *Smith v. United States*, 666 A.2d 1216, 1225 (D.C. 1995) (citing *Kotteakos*, 328 U.S. at 765). Any argument that the admission of Mr. Miller's and Mr. Chase's expert testimony did not have a "substantial influence" on the evidentiary hearing is implausible. In fact, the court's order "credit[s] the Government's expert, Brian Chase, who testified that in the actual crash that occurred, it would be impossible for the driver to miss the center of the driver-side airbag." App. 411–12 (June 8, 2023); *see Hinton*, 979 A.2d at 691. In this respect, this case is distinguishable from cases where the admission of expert testimony is clear error but harmless because the fact finder does not rely on it or other evidence is overwhelming. *See, e.g.*, *Plummer v. United States*, 43 A.3d 260,

at 271 (holding admission harmless where the court did not rely on expert testimony). It is the Government's task to prove that it is "*highly probable*" that the court's error in admitting the expert testimony of Miller and Chase "did not contribute to the [outcome]." *Townsend v. District of Columbia*, 183 A.3d at 734 (D.C. 2018). Given the court's own words about the supposed strength of that testimony—and the overall weakness of the Government's case without that testimony, as discussed above—this is a burden that the Government cannot meet.

The appropriate remedy is to grant Mr. Faltz a new trial and remand with an instruction to exclude Miller's and Chase's expert testimony as unreliable.

CONCLUSION

Appellant Anthony Faltz respectfully requests that this Court vacate the lower court's order and remand this case for a new evidentiary hearing before a new judge. *See Graves v. United States*, 245 A.3d 963, 977 (D.C. 2021).

Dated: September 18, 2023

Respectfully submitted,

/s/ James Millikan

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2023, a true and correct copy of the foregoing was served, via electronic filing, on Appellee's counsel in these matters through the D.C. Court of Appeals electronic filing system.

/s/ James Millikan
James Millikan

Counsel for Anthony Faltz

D.C. Code § 22-4135

The Official Code is current through June 30, 2023

District of Columbia Official Code > Division IV. Criminal law and procedure and prisoners. (Titles 22 — 24) > Title 22. Criminal Offenses and Penalties. (Subts. I — VII) > Subtitle III-A. DNA Testing. (Chs. 41A — 41B) > Chapter 41A. DNA Testing and Post-Conviction Relief for Innocent Persons. (§§ 22-4131 — 22-4135)

§ 22-4135. Motion to vacate a conviction or grant a new trial on the ground of actual innocence.

(a) 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.

(b) Notwithstanding the time limits in any other provision of law, a motion for relief under this section may be made at any time.

(c) The motion shall 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)

(1) The motion shall include an affidavit by the movant, under penalty of perjury, 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.

(2) The denial of a motion for relief under this section shall not be admissible in any prosecution based on the filing of a false affidavit.

(e)

(1) Unless the motion and files and records of the case conclusively show that the movant is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto.

(2) The court may appoint counsel for an indigent movant under this section pursuant to Chapter 26 of Title 11.

(3) The court may entertain and determine the motion without requiring production of the movant at the hearing.

(4) A movant shall be entitled to invoke the processes of discovery available under Superior Court Rules of Criminal Procedure or Civil Procedure, or elsewhere in the usages and principles of law if, and to the extent that, the judge, in the exercise of the judge's discretion and for good cause shown, grants leave to do so, but not otherwise.

(f) A motion for relief made pursuant to this section may be dismissed if the government demonstrates that it has been materially prejudiced in its ability to respond to the motion by the delay in its filing, unless the

movant shows that the motion is based on grounds which the movant could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(g)

(1) 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;

(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; and

(E) If the conviction resulted from a guilty plea, the specific reason the movant pleaded guilty despite being actually innocent of the crime.

(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.

(4) If the conviction resulted from a plea of guilty, and other charges were dismissed as part of a plea agreement, the court shall reinstate any charges of which the defendant has not demonstrated that the defendant is actually innocent.

(h) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same movant.

(i) An order entered on the motion is a final order for purposes of appeal.

History

(May 17, 2002, D.C. Law 14-134, § 6, *49 DCR 408*; Dec. 10, 2009, D.C. Law 18-88, § 301, *56 DCR 7413*.)

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D.C. Code § 23-110

The Official Code is current through June 30, 2023

District of Columbia Official Code > Division IV. Criminal law and procedure and prisoners. (Titles 22 — 24) > Title 23. Criminal Procedure. (Chs. 1 — 19) > Chapter 1. General Provisions. (§§ 23-101 — 23-115)

§ 23-110. Remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b)

(1) A motion for such relief may be made at any time.

(2) A motion for such relief may be dismissed if the government demonstrates that it has been materially prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds which the movant could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

History

(July 29, 1970, *84 Stat. 608*, *Pub. L. 91-358*, title II, § 210(a); Dec. 10, 2009, D.C. Law 18-88, § 220, *56 DCR 7413*.)

End of Document

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

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

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

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

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

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

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/ James Millikan	14-CO-978 & 23-CO-507
Signature	Case Number(s)
James Millikan	9/18/23
Name	Date
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