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)

REPLY BRIEF OF THE APPELLANT

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I. The Court Stated That Innocent People Do Not Plead Guilty and Thus Violated Anthony Faltz's Due Process Rights

If a trial court is not open to the idea that innocent people do not plead guilty, it cannot be said to meaningfully apply a statute that explicitly contemplates that reality and mandates that courts do the same.

As a petitioner under the Innocence Protection Act, Anthony Faltz possesses a liberty interest 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 553, 562 (D.C. 2011) (emphasis added). There is no exception for petitioners who plead guilty—to the contrary, there is a specific statutory framework telling courts how they "*shall* consider" such petitioners, namely "the specific reason [he] pleaded guilty despite being actually innocent of the crime." D.C. Code § 22-4135(g)(1)(E) (emphasis added). As the Government notes, this mandatory consideration is one of the factors that the court must address in deciding to order or deny relief. Appellee's Br. 36. As a general matter, then, failing to consider the reasons behind the guilty plea would be a deprivation of Mr. Faltz's right to procedural due process.

Here the trial court *claimed* to consider Mr. Faltz's reasons for entering a guilty plea, but constructively failed to consider them at all. It did so by making

repeated, unambiguous statements that innocent people do not plead guilty to crimes, effectively reading a core portion of the Innocence Protection Act out of the law entirely. By failing to properly apply the statute, the trial court deprived Mr. Faltz of his due process rights. The Government's efforts to recast these statements, which would otherwise shock the conscience, as specific, fact-intensive inquiries into Mr. Faltz's credibility are unconvincing and unsupported by the record.

A. The Trial Court's Statements That Innocent People Do Not Plead Guilty Were Unequivocal and Cannot Be Rehabilitated

The nature of the court's statements, and of the resulting legal error, is obvious in context. First, in responding to counsel's argument that Mr. Faltz's unfamiliarity with the elements of manslaughter played a factor in his decision to plead guilty, the court interrupted counsel and brought up the plea itself:

> 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.

Following that exchange, the court and defense counsel continued their colloquy with defense counsel also arguing that, consistent with Mr. Faltz's testimony and the *Strickland* claims he raised against Ferris Bond, the primary reason he pled guilty was because he thought his lawyer had "given up on him," "didn't believe in him," and that if he had chosen a trial, he would have done so

"with an attorney at his side who he knew didn't believe in his case." The court responded not by making a credibility assessment of Mr. Faltz, but by doing the opposite, brushing the specific argument aside and retreating to generalities:

> 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).

The Government's opposition brief focuses on the court's mention of an offense "of this nature" in attempt to recast a sweeping statement of incredulity that *anyone* would *ever* plead guilty to something they did not do as a deep inquiry into Mr. Faltz's grasp of the elements of the charges against him. Appellee's Br. 39–40. That interpretation is once again belied by the court's final statement, in which it categorically dismissed defense counsel's argument that Mr. Faltz pled guilty as a result of the stunning about-face from his lawyer on the morning of jury selection:

> 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). The trial court's categorical belief that *no* innocent person would plead guilty—*even when your attorney has "given up"* —could hardly be more straightforward. The Government's argument to the contrary only functions by ignoring the actual words used by the court. But they were said. The sweeping

nature of the court's beliefs were laid bare in the comparison of murder to shoplifting: to this court the risk or circumstances did not matter—innocent people just do not plead guilty.

In this context, the Government's attempt to rehabilitate the trial court's unambiguous statements that innocent people do not plead guilty as fact-specific skepticism rooted in a credibility determination collapses under the weight of the record. *See* Appellee's Br. 38–40. If anything, the record in this case proves the opposite point and only highlights the legal error the court made—a court *cannot* meaningfully assess individual credibility if the court categorically refuses to consider that these *kinds* of claims are potentially credible.

It is no wonder, in this context, why the trial court essentially ignored Mr. Faltz's ineffective assistance of counsel claim related to Mr. Bond's performance and hardly addressed the effect the last-minute plea offer and declaration that the case was unwinnable might have on a defendant. It also makes the trial court's tortured recasting of Mr. Faltz's expression of moral remorse as an admission of factual guilt all the more understandable. If a defendant who pled guilty cannot, *by definition*, be innocent, every other factual assessment will go against him.

This represents a simple failure to properly apply the statute—a failure that colored every other element of this case. Given the nature of the error, the only appropriate remedy is to reverse and remand the case back to a different judge.

B. The Nature of the Trial Court's Error Requires This Court to Review the Due Process Violation De Novo and Treat It as Plain Error

The Government asserts that the trial court rejected Mr. Faltz's IPA motion based strictly on its evaluation of the facts of the case, and that the standard of review is therefore abuse of discretion. *See* Appellee's Br. 35–38. But as the record shows, the court ignored an element of the applicable statute—a straightforward legal error. *Mitchell v. United States*, 80 A.3d 962, 971 (D.C. 2013).

Reading a core portion of the IPA out of the statute represents a failure to "app[ly] the correct legal standard" that requires this Court to review the case *de novo*. *Id*. Moreover, by governing the entire hearing on the premise that innocent people do not plead guilty, the trial court constructively denied Mr. Faltz any hearing at all.

That constructive denial goes to the heart of why this error is not only not "harmless"—under which standard Mr. Faltz should be granted relief regardless—but is actually plain error. "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 the constitutional violation of Mr. Faltz's due process rights, and that violation's effect on the integrity and fairness of the proceedings, the plain error standard is met.

II. The Trial Court Did Not Conduct a Proper *Strickland* Analysis, Which Would Have Found Deficient Performance and Prejudice Warranting a New Trial

A. There Is No Procedural Bar to Litigating Mr. Faltz's Strickland Claims Against Ferris Bond

The Government attempts to address Mr. Bond's shockingly deficient performance by arguing that the trial court was procedurally barred from considering it at all. Appellee's Br. 41. In doing so, the Government misapplies the law.

First, a court's ability to hear a successive motion is neither barred nor mandated—it is discretionary. *See* D.C. Code § 23-110(e). The trial court itself recognized this at a pretrial status conference more than a year before the evidentiary hearing, indicating it would rehear *Strickland* claims relating to Mr. Bond. App. 834.

Second, as Mr. Faltz argued at that same pretrial conference, even if a procedural bar *did* potentially exist, Daniel Harn's failures at the initial § 23-110 hearing constituted the "cause and prejudice" to revive that claim. *McCrimmon v. United States*, 853 A.2d 154 (D.C. 2004). While citing dicta in *McCrimmon* for the proposition that cause and prejudice cannot be established without showing that the underlying claims themselves merit relief, the Government glosses over the fact that in *McCrimmon*, cause and prejudice *was* established by collateral ineffective assistance. *See* Appellee's Br. 42; *McCrimmon*, 853 A.2d at 159.

It is instructive that the Government does not cite a *single case* where a petitioner was procedurally barred based on an underlying *Strickland* claim. Its

closest cited precedent, *U.S. v. Frady*, was a successive motion based on improper jury instructions and had nothing to with the proposition that one "level" of ineffective assistance might constitute cause and prejudice for the failure of an initial *Strickland* claim. 456 U.S. 152, 167–69 (1982). The case before this Court represents precisely those circumstances, and the Government's effort to cobble together a procedural bar that has never been established is incorrect as a matter of law.

B. Ferris Bond's and Daniel Harn's Performances Constitute Ineffective Assistance of Counsel Under Strickland

Turning to the substance of the claims, the Government barely offers a response to the argument that, by refusing to consider Mr. Bond's performance, the trial court effectively prevented itself from evaluating Mr. Harn's performance, given that Mr. Harn's entire task was to argue Mr. Bond's ineffectiveness. Indeed, the trial court did not undertake a real *Strickland* analysis of either attorney.

As to Mr. Bond, the Supreme Court requires the court to find prejudice if a petitioner shows a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 582 U.S. 357, 364–65. Critically, the court must do so by examining "contemporaneous evidence to substantiate" those claims. *Id*. at 369. By flatly refusing to consider Mr. Bond's performance at all, the court confirmed it did not engage in this analysis.

As the trial court itself pointed out at the initial § 23-110 hearing, it could not as a matter of logic find deficient performance or prejudice against Mr. Bond for failures to investigate without a showing of *what a proper investigation would have looked like*. App. 71. The court only lacked this showing because Mr. Harn failed to provide it. Given the nature of the claims, the logic also works in reverse. Without an analysis of Mr. Bond's failures, the court could not have performed a real *Strickland* analysis on Mr. Harn—given that its task was to evaluate whether Mr. Harn's post-conviction investigation and performance prejudiced Mr. Faltz in a hearing that was designed to evaluate Mr. Bond's performance. Given the two-tiered nature of the ineffectiveness claim, the establishment of "cause and prejudice," and the presentation of relevant testimony and evidence apropos to Mr. Bond's performance that was *missing during the first § 23-110 hearing,* the trial court absolutely should have reheard the claims against Mr. Bond—indeed, this was the only way to fairly evaluate the claims against Mr. Harn.

This Court now has the benefit of an evidentiary hearing that *did* provide such a showing—and given everything we know now, for the first time, the sheer scope of both attorneys' deficient performance and prejudice is on the record.

The Government attempts to address this issue in part by asserting that the trial court did not have to evaluate the performance prong of *Strickland* on the part of either Mr. Bond or Mr. Harn because Mr. Faltz could not, and cannot, possibly

establish prejudice. Appellee's Br. 44–46. One of the core reasons the Government offers for that alleged inability is the supposed factual strength of the evidence against Mr. Faltz. But as the evidentiary hearing made clear, the case against Mr. Faltz was actually quite weak, and both Mr. Bond's and Mr. Harn's failure to investigate caused substantial prejudice.

It bears repeating that at the time of trial, the Government had exactly one piece of forensic evidence suggesting Mr. Faltz was the driver of the car—his DNA on the center of the driver's side airbag. Apart from that, the remainder of what the Government now calls a "mountain" of evidence of guilt was the self-serving statements of the Ingram brothers—one of whom was originally charged with the crime—and a misdiagnosed "ankle" injury supposedly consistent with being the driver that was actually a broken hip likely resulting from Mr. Faltz flying into the back of the driver's seat after the collision. Appellee's Br. 40; App. 169; *see also* App. 586, 888–89. Uncontradicted officer observations of the crash and its immediate aftermath further corroborate Mr. Faltz's recounting of the events. Indeed, multiple trained MPD officers observed Dorrell Ingram flee out of the driver's seat of the car only moments after the collision. App. 164–67.

Both the trial court and the Government elide this reality by inflating the strength of the evidence against Mr. Faltz, in ways that range from simple overstatement to outright misunderstandings. First, as noted above, in its argument

that Mr. Faltz "repeatedly acknowledged his factual guilt," the Government echoed the trial court's contorted attempts to paint Mr. Faltz's post-plea letter to the court expressing remorse for his role in the accident as factual admissions to being the driver. Appellee's Br. 44; App. 412. But even beyond that, the Government repeatedly mischaracterizes core portions of Mr. Faltz's argument.

For example, the Government subtly, but misleadingly, suggests that Mr. Faltz's argument for innocence "rested" on the idea that Dorrell Ingram must have "missed the airbag entirely." Appellee's Br. 21. While defense expert Gregory Russell did testify that this was *possible*, the major findings of Mr. Russell's report and testimony is that the physics of the collision were perfectly consistent with Dorrell Ingram hitting the *side*, not the center, of the airbag from his position as the driver. *See* App. 886 (arguing that the physics of side-impact collisions would have pushed the driver left towards the car's A-pillar and made it unlikely that he contacted the center of the airbag, but may have "skimmed" the side).

Again, in contrast to the Government's implication, Mr. Faltz has never claimed that his own DNA *must* have gotten on the center via hitting it directly—indeed, both defense experts Norah Rudin and Mr. Russell independently pointed out that saliva, for example, is a rich source of DNA and Mr. Faltz's DNA could have easily hit the airbag given the realities of a high-speed collision, potentially transferring a relatively large sample despite making no direct contact at all. App.

189, 920. It is the *Government*, not Mr. Faltz, that persistently assumes the DNA on the airbag *had* to have been the result of direct physical contact despite multiple compelling arguments to the contrary.

The Government goes on to argue that because the DNA testing conducted by Dr. Rudin establishing the presence of Dorrell Ingram's DNA on the driver's side airbag was not available at the time of trial, it cannot inform this Court's *Strickland* analysis. Appellee's Br. 44. But while the *identity* of the DNA contributor was unknown at the time, the fact that there was a mixture of more than one contributor should have been known by Mr. Bond, and shared with Mr. Faltz—but he failed to obtain (or, if he did obtain, competently review) the full laboratory case file showing a mixture of at least three contributors. App. 481, 948. By itself, the very existence of this mixture could have been a powerful piece of evidence to the jury that the presence of one person's DNA on an airbag does not automatically make that person the driver at the time of an accident—a point grasped by Mr. Faltz himself, who testified that he would have proceeded to trial if he knew another person's DNA was on the airbag.

Indeed, the Government's reliance on the fact that Dorrell Ingram's DNA was not yet identified as being on the airbag is another data point demonstrating that it still fails to understand not just Mr. Russell's main finding, but the core of Mr. Faltz's forensic case for innocence: the location of the *DNA*, by itself, tells a fact

finder little to nothing definitive about the location of the vehicle's *occupants* at the time of the crash. Moreover, at the heart of Mr. Faltz's *Strickland* argument is that Mr. Bond and Mr. Harn did not understand that forensic reality either, but could have and would have, if they had simply consulted with DNA and accident reconstruction experts, and then put those experts on the stand to explain the same point to a jury (or in Mr. Harn's case, the court).

If Mr. Bond had done so, and equipped himself with a real scientific challenge to the Government's incorrect, but apparently unshaken, belief that DNA placement is dispositive of guilt, the jury would have been left with direct eyewitness testimony by multiple responding police officers that Dorrell Ingram exited the driver's seat of the car immediately following the crash and fled on foot, while Mr. Faltz staggered out of the backseat of the vehicle. App. 102–03, 122–23.

With a real understanding of accident reconstruction, Mr. Bond could have also made additional compelling points, such as the failure to find *any* DNA on the *passenger* side airbag despite universal agreement that Darryl Ingram, Dorrell's brother, was sitting there. App. 168. With this knowledge, Mr. Bond could have argued, for example, that the apparent absence of Darryl's DNA on the passenger airbag lends enormous credibility to the defense expert's conclusion that all occupants of the car moved forward and to the left, such that it is possible for the occupants to skim or miss the airbags entirely. He also could have argued that this

is utterly inconsistent with the Government's theory that airbags deploy so quickly the people sitting directly in front of them *cannot help* but make direct contact with the center of the airbag. App. 193.

For his part, Mr. Harn had no way to make any of these arguments about Mr. Bond because he, in turn, repeated Mr. Bond's investigative failures. Ironically, the court actually pointed out what a demonstration of both deficient performance and prejudice might have looked like in its initial rejection of Mr. Faltz's § 23-110 claims, noting that Mr. Harn "*failed to present any witnesses or evidence which would demonstrate that a better investigation could have been performed*" by Mr. Bond. App. 71 (emphasis added).

Presenting these witnesses and evidence is exactly what Mr. Faltz did at his evidentiary hearing. Armed with this, as well as the aforementioned officer testimony that Mr. Faltz exited the vehicle from the rear passenger side of the car, it defies credulity to argue that there was no "reasonable probability" that Mr. Faltz would have rejected the plea offer and gone to trial, and that a jury in turn could not have possibly found reasonable doubt.

As stated above, if Mr. Bond had done the proper investigation, the jury would have been presented with a DNA mix on the airbag that had no necessary correlation with the position of the car's occupants, as well as the testimony of several MPD officers who saw Anthony Faltz exit the back of the car and Dorrell Ingram flee from

the front driver's side. Instead, Mr. Bond did the opposite—he accepted the Government's flawed understanding of its own evidence and told Mr. Faltz that the case could not be won. Properly understood, the Government's cause and prejudice argument is that there is no significant difference between those two outcomes—an argument that, at its best, strains credulity.

Mr. Harn then built upon these errors by repeating them, dooming his own ability to show how Mr. Bond was deficient, and how those deficiencies prejudiced Mr. Faltz. The deficiencies of both attorneys were sweeping; the prejudice to Mr. Faltz is clear after a full litigation of the issues they neglected to litigate, and this Court should reverse and remand for a new trial.

III. The Court Committed Reversible Error in Admitting Miller and Chase's Unreliable Expert Reports and Testimony

To counter the error made by the trial court in admitting expert testimony from Michael Miller and Brian Chase, the Government misrepresents the record evidence by confusing Detective Miller's role as a fact witness who responded to and observed scene evidence on the night of the crash with the expert evidence he proffered of an "accident reconstruction" he conducted four years after the crash. The former is admissible as fact testimony. The latter is not admissible as expert testimony because it is speculative and unreliable. This also renders Mr. Chase's report unreliable, since

he relied on Detective Miller's report to reach his critical conclusion about the movement of the vehicle and its occupants.

A. The Trial Court Admitted the Miller and Chase Reports In Part Because It Failed to Understand the Distinction Between Miller's Fact and Expert Opinion Testimony

At the heart of the error made by the trial court is its failure to distinguish between fact and expert testimony. This confusion permeates not just the trial court's performance, but the Government's own opposition brief.

It is undisputed that Detective Miller responded to the scene on the night of the accident. It is also correct that while on scene, he took photographs and documented portions of the scene in a rough sketch. This *factual* evidence is not at issue and never has been. Critically, it is this factual evidence that defense expert Gregory Russell considered and partially relied on. For example, in his report, Mr. Russell explains how scene photographs support his conclusion that the driver may not have physically struck the center of the airbag. *See, e.g.*, App. 708–12.

What was proffered as Detective Miller's *expert* report, however, was not based on the materials he generated on the night of the collision or shortly thereafter. Rather, the expert report consisted of an "accident reconstruction" performed four years after the accident—at a time when, as Detective Miller himself admitted, all scene evidence had been destroyed. App. 906–07. By his own concession, Detective

Miller's report could not be called a "reconstruction" because the conclusions in it were merely "estimates" of speed. App. 907.

The trial court did not address this issue when evaluating the admissibility of the Miller and Chase reports—in fact, it undertook *no* independent substantive analysis of the Miller and Chase reports at all. Instead, it used its own mistaken belief that Mr. Russell "relied" on them as a kind of stand-in for reliability. In denying petitioner's *Daubert* motion, the court argued:

> 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.

While both the court and the Government mistakenly characterize Mr. Russell as "relying" on the Miller and Chase expert reports, the record is unambiguous regarding Mr. Russell's low opinion of those reports. Mr. Russell's supplemental report, for example, devotes at least four pages to an explanation of why Detective Miller's reconstruction is unreliable (and by extension, why Mr. Chase's conclusions depending on that "reconstruction" are also invalid). *See* App. 767–71. Mr. Russell also accused Mr. Chase's assessment of the car's post-impact travel as "def[ying] the Laws of Physics," and testified that the Miller/Chase conclusions about steering wheel rotation were "completely and totally wrong." App. 768, 921. Needless to say, this is not the language of "reliance."

B. The Miller and Chase Reports Were Inadmissible Under Either Controlling Legal Standard

Under *any* standard, the Miller and Chase reports were unreliable and should have been excluded. Like *Daubert*, courts have held that unreliable expert reports should not be admitted under the *Dyas* standard. *See e.g.*, *Russell v. Call/D, LLC*, 122 A.3d 860, 867 (D.C. 2015) ("Implicit in [the *Dyas*] requirement is that the expert [must] have a reliable basis for [his] theory steeped in fact or adequate data, as opposed to offering a mere guess or conjecture.").

This is precisely the situation in which the trial court found itself here. Mr. Chase placed substantial weight in his report about the supposed reliability and precision of the Miller report, calling it a "forensic crash reconstruction" that was conducted "immediately following the crash," and was reliable, in part, because "critical scene physical evidence which dissipates over time was forensically mapped and documented." App. 738. But *every one* of those statements is incorrect as a factual matter, as Mr. Russell pointed out, and as Detective Miller conceded. In fact, Detective Miller's report was essentially guesswork, and it was prepared years later without the benefit of scene evidence, thereby rendering Chase's reliance utterly misplaced, and his report scientifically unmoored.

While experts are assumed to have the skills to evaluate data and give it the proper probative force, Mr. Chase undertook no critical evaluation of the data, relying on it blindly. Incredibly, when cross-examined, Mr. Chase admitted that he

only realized after seeing Detective Miller testify at the evidentiary hearing that same day that his understanding of the basis of Mr. Miller's report was wrong—but Mr. Chase went on to say that he *still* stood by every one of his conclusions. App. 192. Compounding his misunderstanding, Mr. Chase also testified it was *Detective Miller* who found that the Crown Victoria collided with the Nissan, and then proceeded 16.9 feet in a straight line before beginning to rotate—a finding that Detective Miller explicitly denied during his own testimony. App. 743, 908–09.

To assert the admissibility of both reports, the Government reaches back to 1991 and relies on *In re Melton*, 597 A.2d 892 (D.C. 1991). *Melton*, however, was a civil commitment case that dealt with the question of whether a psychiatrist was permitted to rely on hearsay evidence to make a diagnosis, and the record was replete with testimony that they can and do rely on such evidence. *Id*. at 902.

The contrast to the case before this Court is striking. Here, one expert—Mr. Chase—formed an opinion based in part on his flatly erroneous assumptions about a previous report—Detective Miller's—that itself was based on speculation and "estimates" formed years after most of the relevant evidence was gone. The question was not, as in *Melton*, whether an expert could rely on hearsay evidence in order to reach a conclusion. Instead, it was whether Detective Miller's report could rely on imprecise, speculative, and even no-longer-existent evidence to form a supposedly precise "reconstruction" that wasn't precise at all—and then whether Mr. Chase's

report could rely on the supposed integrity and precision of *that* report to come to an additional set of conclusions.

Even under the more forgiving *Dyas* framework, "[t]he purpose of expert opinion testimony is to avoid jury findings based on mere speculation or conjecture." *Washington v. Washington Hosp. Ctr.*, 579 A.2d 177, 181 (D.C. 1990). But the Miller report, and the Chase report that followed, were replete with *exactly* such imprecise "speculation." Under either the *Daubert* or *Dyas* standard, those reports and the testimony deriving from them fail basic tests of reliability and should have been excluded.

C. The Government's Expert Witnesses Do Not Help the Trier of Fact Understand the Evidence

Finally, the Government, echoing the trial court, asserts that the unreliability of Detective Miller and Mr. Chase is an issue of weight, rather than admissibility. It is not, for the reasons stated above. But even if it were a question of weight, this record shows that the trial court *did not* "receive[] an accurate picture of each expert's opinion," as the Government would have it. Appellee's Br. 31. Moreover, petitioner has made a compelling case that the "weight" of this evidence is *de minimis* at best. As petitioner has argued regarding the *Strickland* issues in this case *supra*, a proper defense investigation informed by proper defense experts could

have, at the very least, raised a compelling argument for reasonable doubt had the case been presented to a jury—as Mr. Faltz always wanted.

The trial court's confused understanding of the Miller and Chase reports and their testimony underscores precisely why the court plays a critical gatekeeping role for expert testimony and the legal error made here. Not only were the Miller and Chase reports unreliable and speculative, but the court credited them to such a degree that it actually misunderstood *Mr. Russell's* supposed reliance on them.

Indeed, the ultimate test of expert opinion admissibility is whether those opinions "help the trier of fact to understand the evidence" at issue. Fed. R. Evid. 702(a). By that standard, the Miller and Chase reports failed spectacularly. They succeeded only in presenting a speculative set of assertions that did more to mislead the trial court than they did to assist it.

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).

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Respectfully submitted,

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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.

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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 mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

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
Signature

14-CO-978 & 23-CO-507
Case Number(s)

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2/21/2024
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February 2024, 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