BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

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

ANTHONY FALTZ, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2006-CF1-4490

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ISSUES PRESENTED

I. Whether the trial court abused its discretion by admitting testimony from government experts on accident reconstruction, where the experts were properly qualified and followed accepted scientific methods in evaluating the evidence, and where the defense challenge to the reliability of the experts' opinions went to the weight rather than the admissibility of the evidence.

II. Whether, in a case in which Faltz pleaded guilty to two counts of involuntary manslaughter for driving the car that killed two people in an automobile accident and subsequently testified he had not been driving the car, the trial court abused its discretion by denying Faltz's Innocence Protection Act claim where (1) the parties agreed that a large amount of Faltz's DNA was found in the center of the driver's-side airbag; (2) the trial court credited the government expert who testified that the driver in the front-end collision would have collided with the driver's-side airbag; (3) the trial court discredited the defense expert who testified that the driver in the collision possibly missed the driver's-side airbag; and (4) the trial court found that Faltz pleaded guilty because he was guilty and discredited his claims that he did not understand that he was admitting to driving the car.

III. Whether the trial court abused its discretion by denying Faltz's claims that trial counsel and collateral counsel rendered ineffective assistance for failing to assess the possibility of presenting DNA and accident-reconstruction experts where

(1) the DNA evidence now presented by Faltz was not available at the time of these prior proceedings; (2) the trial court rejected the opinion of Faltz's accident-reconstruction expert that Faltz was not the driver; and (3) the trial court reasonably concluded that Faltz would not have proceeded to trial because he knew he was guilty and he faced the prospect of a considerably longer sentence if he proceeded to trial.

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

CONSOLIDATED BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 7, 2006, a grand jury indicted appellant Anthony Faltz on two counts of second-degree murder and other offenses arising from a February 19, 2002, automobile collision in which Faltz's car struck and killed two occupants in another car (Record on Appeal (23-CO-507) (R3.) A:4, 32 Exh.22).[1] On September 19, 2006, Faltz pleaded guilty before the Honorable Erik P. Christian to two counts of

[1] In this consolidated appeal, we refer to the Record on Appeal in 14-CO-978 as "R2." "R1" refers to the record in 2013-CO-1302, which is not joined in this appeal. "App." refers to Faltz's appendix.

the lesser-included offense of involuntary manslaughter, and the United States dismissed the remaining charges (R3.A:8). On December 8, 2006, Judge Christian imposed consecutive terms of incarceration of 192 months on each offense (R3.A:9-10). Faltz did not appeal.

On November 11, 2009, Faltz filed a pro se motion pursuant to D.C. Code § 23-110 claiming ineffective assistance of trial counsel, to which the United States responded, and Faltz replied (R1.14, 18, 19). After Judge Christian appointed counsel, Faltz moved to withdraw his guilty plea, and the United States responded (R1.23, 25). After holding an evidentiary hearing on April 25, 2011, Judge Christian denied the motion on April 9, 2013 (R1.29). Faltz did not appeal.

On September 23, 2013, Faltz filed a pro se motion seeking reconsideration of Judge Christian's April 9, 2013, Order and relief from his own failure to note a timely appeal of that Order (R1.31). On October 25, 2013, Judge Christian denied relief (R1.32); on November 18, 2013, Faltz timely noted an appeal (13-CO-1302) from the October 25, 2013, Order (R.33).[2]

On August 5, 2014, this Court remanded the case with instructions to reconsider Faltz's request for relief from his failure timely to note an appeal from

[2] Concomitantly, Faltz noted an untimely appeal of Judge Christian's April 9, 2013, Order, which this Court sua sponte dismissed on jurisdictional grounds. *See Faltz v. United States*, No. 13-CO-1301 (D.C. Dec. 23, 2013).

Judge Christian's April 9, 2013, Order. *See Faltz v. United States*, No. 13-CO-1302 (D.C. Aug. 5, 2014). On August 7, 2014, Judge Christian granted relief and Faltz timely appealed (R2.4, 5). Faltz briefed his appeal in 14-CO-978 pro se; the United States briefed its opposition and Faltz replied. On June 11, 2015, this Court appointed counsel, and on February 4, 2016, the Court granted Faltz's motion to stay the appeal in 14-CO-978.

On April 7, 2015, Faltz filed pro se his motion to vacate his conviction pursuant to D.C. Code § 22-4135 (R3.2). On December 5, 2017, Faltz filed, through counsel, supplemental motions to vacate his convictions pursuant to D.C. Code §§ 22-4135 and 23-110 (R3.19, 32). The United States opposed on March 15, 2019 (R3.35). Judge Christian held evidentiary hearings on November 15, 16, and 17, 2022, after which the parties jointly submitted proposed findings of fact (R3.A:40; R3.74). On June 8, 2023, Judge Christian denied Faltz's motions (R3.75). On June 15, 2023, Faltz timely appealed (23-CO-507). On June 26, 2023, this Court consolidated the appeals in 14-CO-978 and 23-CO-507.

The Initial Investigation, Guilty Plea, and Sentencing[3]

At about 9:30 p.m. on February 19, 2002, officers of the Metropolitan Police Department (MPD) tried to stop a green 1997 Ford Crown Victoria for a prior hit-and-run (R3.74:4-5). The driver of the car fled from the police at a high rate of speed; there were three persons in the car, Faltz, Dorrell Ingram, and Darrell Ingram, two non-identical twin brothers (*id*.). The Ford traveled at a minimum speed of 65 miles per hour, passed through a red light at the intersection of Sherriff Road and 49th Street, in Northeast Washington, D.C., and struck a Nissan Maxima that had the right of way at the intersection (*id*. at 5; R1.29:2; 9-19-06 Tr. 12-13). Two young men—Marlon Robinson and Jay Williams—in the Maxima were killed in the crash (R3.74:5; 9-19-06 Tr. 12-13).

The impact of the crash caused the Ford to rotate 180 degrees and come to rest facing the pursuing police vehicles (R3.74:18). In aftermath of the crash, two police officers identified Dorrell Ingram as the person exiting the driver's-side door; one of those officers identified Faltz as the person exiting the rear passenger-side door (*id*. at 7-10).[4] Faltz suffered a right-hip injury during the accident and could

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[3] Where possible, we cite to the parties' March 28, 2023, joint proposed findings of fact (R3.74).

[4] Officer Gregory Phifer was in a police car behind the Ford, and Officer Herman Hodge's car was a block or so behind Officer Phifer's car (R3.74:6). Officer Phifer recalled pulling up to the accident, stopping his car, and running over to the *rear of*

(continued . . .)

barely walk (*id*. at 7). Dorrell Ingram was arrested and charged with two counts of second-degree murder for driving the Ford, and Faltz was not charged at the time with any homicide offenses (*id*. at 12).

Thirty to forty minutes after the crash, on February 19, 2002, MPD Detective Mike Miller, an accident-reconstruction expert in the Major Crash Investigations Unit of the Vehicular Homicide Squad, went to the scene of the crash and

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the right side of the car, which he identified as the passenger side of the Ford, and immediately detaining a person getting out of the right-rear door (R3.74; Joint Exhibit (JX) 1, at Exh. 7, page 8 (Phifer Grand Jury) ("As I got out of my vehicle I ran over to the passenger side of the vehicle, on the right side, the rear, and one of the passengers [Faltz] was exiting the vehicle at the time.")). Officer Phifer later identified that individual as Faltz (R3.74:10-11). He said he then took that person to the other side of the Ford, from which the other two individuals were exiting, one from the front and one from the back door (*id*. at 7).

The mistaken identifications of Dorrell Ingram and Faltz were, under the circumstances, understandable. As noted in the text, the officers had been engaged in a high-speed car chase, which ended in a violent collision. By the time the Ford came to a stop moments after it struck the decedents' vehicle, the Ford had rotated 180 degrees and was facing the officers' cars (R3.74:18; see R3.35: Exh. A at 3, 6 (photo of Ford turned 180-degrees; accident reconstruction by Detective Miller demonstrating the vehicle's 180-degree turn)). Accordingly, each seating position would have been entirely reversed: that is to say, the front seat would appear to be the back seat, and the passenger's side would actually be the driver's side. Thus, as the government argued to the trial court at the November 2022 evidentiary hearing, when Officer Phifer ran to the right side of the car and apprehended Faltz coming out of the rear door, he confused the driver's door with the rear-passenger door (see 11-17-22 Tr. 108-10). Moreover, Phifer described two men getting out of the "rear" of the car and one getting out of the front (R3.74:7), which comports with Faltz's testimony that two men were in the front and one was in the back (see R3.74:4) only if the "rear" Officer Phifer was describing was actually the front seat of a car that had rotated 180 degrees.

subsequently developed a report on the accident (R3.74:11-14; see R3.35 Exh. E (Miller Report), Exh. A at 5-6 (Chase Report)).

During the investigation, the driver's and passenger's front airbags of the Ford were swabbed for DNA (R3.74:18). The major DNA profile on the driver's-side airbag was initially compared to Dorrell Ingram's DNA, but the FBI excluded him in January 2003 as the contributor using methods available at the time in the early 2000's (*id*.). In November 2003, an FBI comparison excluded Darryl Ingram and identified Faltz as a contributor to the DNA on the center of the driver's-side airbag (*id*.).[5] On March 7, 2006, Faltz was indicted on two counts of second-degree murder for operating the motor vehicle that killed Robinson and Williams (*id*.; R1.1 Exh. A).

Faltz's Guilty Plea

Attorney Ferris Bond was appointed to represent Faltz (R3.A:1). On March 28, 2006, Attorney Bond presented Faltz with a government plea offer to two counts of involuntary manslaughter; Attorney Bond explained: "they claim you were driving a stolen car in the 4400 block of Edson Place SE," "They claim you were the

[5] On March 25, 2004, Dorrell Ingram filed a civil suit against the District of Columbia and certain officers (R3.74:18). In declarations dated November 1 and 16, 2005, respectively, Officer Phifer and Officer Hodges stated that they saw Ingram flee from the driver's door of the Ford (*id*. at 19).

driver," and "they claim you ran a red light and collided with a Nissan Maxima"; Faltz rejected the offer (R3.35 Exh. K; see also R3.35 Exh. L). On September 19, 2006, the day of trial, the government re-extended the plea offer and Faltz pleaded guilty to two counts of the lesser-included offenses of involuntary manslaughter (R3.A:8; R3.14 Exh. B; R3.35 Exh. L). The plea proffer described the crash, the presence of Faltz's DNA on the driver's-side airbag, the injury to his right hip, and the police testimony "from their point of view" that Faltz had emerged from the rear door of the car; the proffer did not expressly identify Faltz as the driver of the car (R3.74:39; 9-19-06 Tr. 13).

Faltz's Sentencing

At the December 8, 2006, sentencing, Attorney Bond made a "correction" to Faltz's apparent statement to the presentence report (PSR) writer that he had not been driving the Ford at the time of the crash; Attorney Bond explained Faltz meant that he was not driving the car earlier in the day (12-8-06 Tr. 3). Faltz read a letter to the court expressing his remorse because he was "the cause of someone losing their lives" (*id*. at 7; see R3.35 Exh. I). The prosecutor recounted the history of the case, explaining that Dorrell Ingram had originally been charged with the murders, but that the DNA evidence from the driver's-side airbag indicated that Faltz was "the person behind the wheel" (*id*. at 10). The prosecutor also described Faltz's right-hip dislocation as "consistent with what's called a pedal throw-back injury from the

impact of the floor board as the front end of the car is pushed back into the car at the point of impact" (*id*. at 10-11). The prosecutor asserted that "Faltz was driving" (*id*.). At the conclusion of allocution, the court gave each party an opportunity to respond; neither did (*id*. at 15).

Faltz's First Collateral Attack and the Trial Court's Denial After an Evidentiary Hearing

In his pro se D.C. Code § 23-110 motions, Faltz claimed that Attorney Bond had been ineffective by (1) failing to obtain discovery; (2) failing to conduct an adequate pre-trial investigation; (3) failing to discuss possible defenses; (4) failing to explain the elements of the original charges and the offenses to which Faltz pleaded guilty; (5) failing to explain that the judge could impose consecutive sentences; (6) telling Faltz that he would receive a sentence of 15 years in prison on each offense; and (7) promising Faltz that his sentences would be concurrent (R1.14, 19; R1.29:18).

In his subsequent motion to withdraw his guilty plea, in which Faltz was represented by Dan Harn, Esq., Faltz argued that (1) the Superior Court Criminal Rule 11 inquiry was defective because Faltz did not admit that he was driving the car and, therefore, there was no "factual basis" for the guilty pleas; and (2) the pleas should be set aside to correct a manifest injustice arising from ineffective assistance of Attorney Bond (R1.23; R1.2925-26, 28-29).

On April 25, 2011, the court held an evidentiary hearing on both motions at which Attorney Bond and Faltz testified (R3.A:16; R1.29:10). The court found that in rejecting the government's March 28, 2006, plea offer, Faltz was "well aware" he would be required to admit he was the driver of the vehicle (R1.29:3) Although Faltz denied to the PSR writer that he had been driving the car, Attorney Bond "correct[ed]" the PSR at sentencing (R1.29:6 (citing 12-8-06 Tr. 3)). The court further found that, at sentencing, Faltz expressed remorse for the two deaths, acknowledging that he had been "the cause of someone losing their lives" (*id*. (citing 12-8-06 Tr. 7)). The court found that, at sentencing, the government stated that Faltz had been driving the car, and that the defense did not dispute that representation (*id*. at 7-8). The court credited Attorney Bond's testimony that Faltz had acknowledged driving the car at the time of the accident (*id*. at 14). Although Faltz believed he was pleading guilty as a passenger in the vehicle, the court noted that he also admitted that he knew he had been charged as the driver (*id*.).

The court found that Attorney Bond had "conducted a proper pre-trial investigation" and "kept [Faltz] abreast of [counsel's] trial strategy, as well as discovery from the Government," and, therefore, Faltz failed to establish that counsel's performance was deficient (R1:29:18-19). In addition, the court found that Faltz failed to establish prejudice because his assertions were conclusory and unsupported by any evidence (*id*. at 20). The court discredited Faltz's contention that

he had only accepted the plea agreement because of Attorney Bond's alleged lack of preparation (*id*. at 21).

Furthermore, the court found that Faltz effectively had abandoned his claim that Attorney Bond had failed to consult with him; Faltz admitted at the evidentiary hearing that Attorney Bond had discussed potential defenses with him and they had agreed on a defense strategy (R1:29:20). The record established that counsel "provided [Faltz] a detailed explanation about the nature of the case, the case which the Government must prove, and the substance of an involuntary manslaughter charge" (*id*. at 23). The court also found that Faltz failed to establish prejudice because the record—including Faltz's responses at the plea hearing and his statements at the sentencing proceeding—demonstrated that Faltz had "actual notice of the substance of the charges against him" (*id*.).

Finally, with respect to the ineffectiveness claims pertaining to the sentencing proceeding, the court credited Attorney Bond's testimony and declined to credit Faltz's inconsistent hearing testimony, and, therefore, found that Faltz had not established deficient performance (R1.29:23). In addition, the court found that Faltz had not established prejudice because, at the plea hearing, Faltz acknowledged that he knew that the trial court had discretion to impose any sentence up to the 30-year statutory maximum on each offense and to make the sentences consecutive (*id*. at

23-24). The court accordingly found that Faltz failed to establish ineffective assistance of defense counsel and denied the § 23-110 motion (*id*. at p. 25).

In denying Faltz's motion to withdraw his guilty pleas, the trial court rejected Faltz's claim that there was no factual basis for the plea. The government's factual proffer included uncontroverted evidence that Faltz's DNA was found all over the driver's-side airbag of the vehicle that caused the collision (R1.29:26). In addition, had the case gone to trial, the government would have presented evidence showing that the injury Faltz sustained in the collision was consistent with a "pedal throw-back injury" caused by "the impact of the floor board" on the driver's body "as the front end of the car is pushed back" at the point of impact (R1.29:7, 14). The court found that this evidence "completed the story of the investigation" and permitted a reasonable fact finder to discount the police officers' initial impression that Faltz had alighted from the rear seat; therefore, the court found, the proffer was sufficient to establish beyond a reasonable doubt that Faltz was the driver (R1.29:26-27).

The court further found that: (1) at the plea hearing, Faltz agreed that the government's proffer was correct; (2) at the sentencing hearing, Faltz failed to dispute any fact set forth in the proffer, which the prosecutor had reiterated; and (3) at the post-conviction hearing, Faltz conceded that he knew that he had been charged as the driver of the vehicle (R1.29:27-28). The court declined to credit Faltz's post-conviction testimony that he thought he was pleading guilty as the passenger, not the

driver (*id*. at 28). Reviewing the record as a whole, the court found that Faltz entered his pleas knowingly and voluntarily (*id*. at 28-29).

The court rejected Faltz's manifest-injustice argument. Faltz did not establish ineffective assistance of counsel or demonstrate that, in light of any alleged intellectual impairment that Faltz suffered, the trial court was required to take additional steps to safeguard Faltz's rights (R1.29:28-29).

Faltz's Second Collateral Attack and the Trial Court's Denial After an Evidentiary Hearing

After Faltz filed his pro se motion pursuant to D.C. Code § 22-4135 on April 7, 2015 (see R3.2), this Court appointed Deborah Persico to represent Faltz on appeal in 14-CO-978. On July 15, 2015, this Court stayed the appeal to permit Attorney Persico to review the case. During the post-trial discovery process, the U.S. Attorney's Office informed Attorney Persico that there appeared to be a question whether the FBI had indeed tested the driver's-side airbag as opposed to the front-passenger's airbag (*id*.). Attorney Persico enlisted the aid of the Mid-Atlantic Innocence Project (MAIP) (*id*.). After a review of the evidence in December 2015, the parties confirmed that the FBI had indeed tested the correct airbag, the driver's-side airbag, and agreed that the issue appeared to be simply related to a numbering discrepancy (*id*. at 10-11).

The parties then conducted DNA testing of both of the Ford's airbags at Bode Cellmark Forensics (Bode) (R3.35:11). The DNA testing confirmed that Faltz's DNA—and only Faltz's DNA—was found on the "center mass" of the driver's-side airbag (*id*.). The report also stated that DNA obtained from the "right edge" of the driver's-side airbag produced a "partial DNA profile" consistent with a mixture of at least two individuals; due to the possibility of allelic drop out, Bode could not make any conclusions about the mixture profile (*id*.). The report noted that DNA obtained from the "left edge" of the driver's-side airbag produced a "partial DNA profile"; due to the limited data obtained, Bode could not render any conclusions (*id*. at 11-12). No DNA profiles were obtained from the front-seat passenger's airbag (*id*. at 12).

Faltz's Renewed Claims

In his January 2019 supplemental motion, Faltz argued that he was actually innocent and his conviction should be vacated under D.C. Code § 22-4135 on the strength of (1) "new evidence" in the form of "probabilistic genotyping" analysis by DNA expert Norah Rudin indicating that Dorrell Ingram's DNA was recovered from the edge of the driver's-side airbag; and (2) an accident-reconstruction analysis by Gregory Russell indicating that the presence of Faltz's DNA on the center of the driver's-side airbag was consistent with Faltz's position in the rear seat of the car at the time of the crash (R3.32). He further pressed claims under D.C. Code § 23-

110 that (1) Attorney Bond was ineffective for failing to consult with DNA or accident-reconstruction experts and (2) Attorney Harn was ineffective for the same reasons (*id*.).

The government countered that Faltz's proffer did not establish actual innocence. The DNA recovered from the center of the airbag belonged only to Faltz (R3.35). Accident reconstruction showed that only the driver's face could have touched the center of the airbag during the 40 milliseconds after impact, before the car began rotating (R3.35). The government contended that Faltz's claim that Attorney Bond was ineffective was procedurally defaulted, and that his claim that Attorney Harn was ineffective lacked merit because Faltz could show neither deficiency nor prejudice (*id*.).

The Evidentiary Hearing

At the hearing, the trial court received two binders of joint exhibits (JX) which included a joint stipulation of facts (11-15-22 Tr. 37).[6]

[6] We attach the parties' joint exhibits to our accompanying motion to supplement the record on appeal.

1. Faltz's Testimony[7]

Faltz testified that, at the time of the crash, Dorrell Ingram was driving, Darryl Ingram was in the front-passenger seat, and Faltz was in the backseat without a seatbelt (R3.74:4). Faltz said the car was going 50 to 60 miles per hour at the time of the crash; after the crash, he exited the rear-passenger door but could barely walk because of the injury to his right hip (*id*. at 5-7).

Faltz further stated that he told Attorney Bond he wanted to proceed to trial because he was innocent (R3.74:37). He denied ever telling Attorney Bond that he was driving the car at the time of the crash and claimed that Attorney Bond never told him that he must be found to be the driver in order to plead guilty (*id*.). Faltz stated that he would not have pleaded guilty if he had known that Dorrell Ingram's DNA was on the driver's-side airbag (*id*. at 38). He stated that he pleaded guilty based on his role as the passenger in the car (*id*. at 39). He moved to withdraw his guilty plea only after learning that he had to be the driver to plead guilty (*id*. at 42).

Faltz knew when he pleaded guilty that the government was charging him with two counts of second-degree murder, assault on a police officer, and unauthorized use of a motor vehicle on the theory that he was driving the vehicle at the time of the crash (11-15-22 Tr. 56, 60). He understood that both Ingram brothers

[7] Faltz testified twice at the hearing (see 11-15-22 Tr. 44-93; 11-17-22 Tr. 49-65).

would have testified against him at trial and that the government would have established that his hip injury was sustained because he was the driver of the vehicle at the time of the crash (*id*. at 59-60). He understood that, if he were convicted of the four charged counts, he would have been sentenced to "a lot more time" than he faced on the two manslaughter charges (*id*. at 57).

2. DNA Evidence

Norah Rudin was qualified as a defense expert in forensic DNA analysis (R3.74:20). She did not contest Bode's conclusion that Faltz was the major contributor to the DNA found in the center of the driver's-side airbag, and that Dorrell and Darrell Ingram were excluded as major contributors to that DNA (*id.*). In examining the DNA sample found on the right side of the driver's-side airbag, Rudin relied upon probabilistic genotyping, a method that employs likelihood ratios to analyze low-quality, complex DNA mixtures (*id*. at 19-20). Rudin opined that her analysis "strongly supported" Dorrell Ingram as the likely contributor to the DNA on the right side of the driver's-side airbag (*id.* at 21-22). However, Rudin admitted that her analysis could also support the conclusion that both Faltz and Dorrell were potential contributors to that sample, just in different quantities (*id*.). The parties agreed that probabilistic genotyping was unavailable at the time of the original evidence collection, at the time of Faltz's guilty plea in 2006, and at the time Bode analyzed the sample in 2016 (*id*. at 23, 25).

Bruce Budowle was qualified as a government expert in DNA testing, analysis, and interpretation (R3.74:22; 11-16-22 Tr. 129-30). Budowle agreed with Bode's 2016 conclusions regarding the DNA sample recovered from the center of the driver's-side airbag (R3.74:23). He opined that the sample from the center of the airbag had substantially more DNA than the edge sample, which he described as more of a trace sample (*id*.). He opined that Dorrell Ingram was a likely contributor to the DNA in the right-edge sample, and that Rudin's analysis overstated the likelihood that the sample was Dorrell's alone instead of a mixture from both Dorrell and Faltz (*id*. at 24).

3. Accident-Reconstruction Evidence

MPD Detective Miller testified that, on the night of the collision, he observed skid marks, gouge marks, fluid trails, and scattered parts of the vehicles (R3.74: 13). He observed that the right-lower portion of the driver's seat of the Ford was pushed forward (*id*. at 14). He collected information on the speed of the vehicles from officers on the scene and made a field sketch of the scene (*id*. at 13).[8] He returned to the scene in August 2002, and again in May 2006, when he forensically mapped the

[8] Detective Miller did not prepare an accident-reconstruction report at the time because he was not the primary detective. By the time he became the primary detective, he determined that an accident reconstruction was not required because other evidence, including DNA evidence, established who had been driving the car (R3.74:14).

curb, gutters, and traffic signals (*id*. at 15). Detective Miller also estimated speed, vehicle-approach angles, and vehicle-departure angles (*id*. at 16). In 2017, Detective Miller examined the Ford's driver's-side airbag (*id*.). He concluded that the space between the A-pillar (the support between the front windshield and the drivers' window) and the fully deployed airbag measured three inches (*id*. at 16-17). He found no blood on the A-pillar, the driver's-side window, or in the driver's-side compartment (*id*. at 17).

Detective Miller was qualified over defense objection as an expert in collision reconstruction (R3.74:13). He opined that, based on the rotation of the Ford and the damage to the driver's seat, the rear passenger was seated behind the driver at the time of the collision (*id*. at 17). He concluded that the Nissan was struck on the passenger side going south, and the Ford was impacted on the front of the car going east (*id*.). He concluded that the Ford moved forward 16 feet after impact, and rotated 180 degrees "after maximum engagement, after the airbags fully inflated, and after Mr. Faltz hit the airbag" (*id*. at 17-18).

C. Gregory Russell was qualified as a defense expert in traffic-accident reconstruction (R3.74:26). Russell did not analyze the airbag in this case or perform an accident reconstruction (*id*.). Russell opined, based on testimony from Officer Phifer who saw the car steer to the right, that "it would be expected for the driver" of the Ford to have engaged in evasive driving prior to the accident (*id*. at 27). He

opined that, upon impact, the Ford would have slowed and begun an immediate rotation clockwise, whereby the unrestrained driver would have moved forward to the A-pillar; he opined that it was possible the driver missed the airbag altogether, and unlikely that the driver contacted the center of the airbag (*id*. at 29-30). He further opined that an unrestrained rear passenger would have moved forward toward the airbag during the collision, and that Faltz's DNA was deposited on the center of the airbag when his body was thrust forward from the rear seat during the crash (*id*. at 30-31). To his support his hypothesis, Russell presented photographs and evidence of a single-vehicle collision that involved a side impact into a fixed utility pole (R3.74:30). Although Russell agreed that this scenario did not directly correspond with the type of impact in the charged crash, he explained that there are circumstances where the driver could miss the airbag (*id*.).

Brian Chase testified, over defense objection, as a government expert in the field of collision reconstruction and the science of automotive technology (R3.74:33). Chase agreed with Russell that the time to inflate an airbag in a 1997 Ford Crown Victoria was 40 milliseconds, which is less than the blink of an eye, and about half the time to maximum engagement at 100 milliseconds (*id*. at 33-34). In the case of a severe frontal impact sufficient to deploy the airbags, as in the current case, the driver of the vehicle could not avoid the airbag, which is consistent with the design of the airbag to comply with federal safety standards (*id*. at 34). Chase

agreed with Russell that under the facts of this case, the occupants of the vehicle, including the driver, would move forward and to the left, but that such movement would not occur until after maximum engagement (*id*. at 34-35). Chase opined that, after maximum engagement, the Ford rotated (*id*. at 35).

4. Legal Expert Evidence

Stephen Mercer was qualified over partial government objection as an expert in criminal defense and DNA forensic litigation (R3.74:43).[9] He opined that Attorney Harn's deficiencies included his failure to (1) competently review the laboratory case file; (2) consult a DNA expert; (3) identify key issues in the chain-of-custody documents; and (4) consult an accident-reconstruction expert (*id*. at 43-44). Mercer opined that in a case where DNA is central, a competent defense attorney has an obligation to review the laboratory case file and examine the chain of custody of the evidence (*id*. at 45). Mercer found no evidence that Attorney Harn had reviewed the laboratory case file or examined the chain of custody (*id*. at 46). Mercer opined that his review of the chain of custody showed clear opportunities for secondary and tertiary transfer of DNA onto the airbags (*id*. at 49-50).[10] Mercer

[9] Mercer did not speak to Attorneys Bond or Harn (*id*. at 44).

[10] Budowle opined that the DNA found in the center of the airbag was not plausibly deposited as a result of secondary or tertiary transfer because those transfers typically result in trace, lower-level amounts, in contrast to the large quantity of DNA found in the airbag's center (*id*. at 51).

further opined that Attorney Harn and Attorney Bond should have consulted with an accident-reconstruction expert to understand the forces and dynamics that occur within a vehicle during a crash (*id*. at 52). Mercer opined that if counsel had performed properly, there was a substantial probability that a reasonable defendant would have rejected the plea offer and obtained a better outcome (*id*. at 52-53).

The Trial Court's Order of June 8, 2023

After carefully reviewing the history of the case and the law relevant to a claim under the Innocence Protection Act, D.C. Code § 22-4135(a) (see R3.75:1-2), the trial court found that a large quantity of only Faltz's DNA was found in the center of the driver's-side airbag (*id*. at 3). The court credited the government's expert, Brian Chase, who testified that it would have been impossible for the driver to miss the center of the driver's-side airbag in the charged crash (*id*. at 3-4). The court was "unconvinced" by Russell's accident reconstruction which rested on a theory that the driver missed the airbag entirely and that Faltz, who was in the rear seat, hit the center of the airbag by flying forward during the crash (*id*.). In discounting the defense expert's testimony, the court noted that the expert relied on incomplete notes from a crash 20 years ago and analogized to crash tests involving circumstances "not at all similar" to Faltz's crash (*id*.).

The trial court found that Faltz had told the court "repeatedly . . . that he was responsible for the murder[s]" (R3.75:4). Specifically, the court pointed to (1)

Faltz's guilty plea hearing where the government made clear that Faltz's DNA was found on the driver's-side airbag; (2) Faltz's letter to the court at sentencing taking responsibility for having "been the cause of someone losing their life"; and (3) the government's unchallenged statement at sentencing that Faltz was driving the vehicle (*id*.). Moreover, before Faltz pleaded guilty, Attorney Bond wrote him a letter explaining the government's plea offer, "which repeatedly asserted the government's belief that [Faltz] was driving the vehicle" (*id*.). Attorney Bond previously testified that Faltz had admitted driving at the time of the collision (*id*.). The court further found that Faltz pleaded guilty because he is guilty and not for any other reason (*id*.). The court therefore denied Faltz's IPA claim (*id*. at 1, 4).

With respect to Faltz's § 23-110 claims, the court declined to consider ineffectiveness claims regarding Attorney Bond on the ground that the court had previously denied those claims (R3.75:4). With respect to Faltz's claim that Attorney Harn was ineffective, the court found that Faltz could not establish prejudice because (1) Faltz had repeatedly admitted his guilt, specifically that he drove the vehicle that killed two people; (2) a substantial amount of Faltz's DNA was found in the center of the driver's-side air bag; and (3) by pleading guilty, Faltz avoided the possibility of a "considerably longer sentence" (*id*. at 4-5). The court concluded that Faltz's § 23-110 claims, to the extent they were not procedurally barred, were meritless, and therefore denied the claims (*id*. at 5).

SUMMARY OF ARGUMENT

The trial court did not abuse its broad discretion by admitting expert testimony from Miller and Chase. The experts were properly qualified and based their opinions on raw data (a field sketch, photographs, and measurements) compiled by Miller at the crash scene. Faltz had full opportunity to cross-examine the government's experts and confront them with the contrary opinion of the defense accident-reconstruction expert Russell. The court reasonably concluded that Faltz's challenge to the reliability of the experts' opinions went to the weight of their testimony, not its admissibility. In any event, regardless of the expert testimony, there is no reasonable probability that the trial court would have accepted Faltz's actual-innocence claim given the strength of the evidence establishing Faltz's responsibility for the deadly crash.

The trial court did not abuse its discretion by denying Faltz's IPA claim. The court credited the government experts who opined that the driver of the car collided with the driver's-side airbag, which was fully consistent with the parties' agreement that a large portion of Faltz's DNA was found there. Moreover, the court reasonably discredited the contrary opinions of defense expert Russell. Furthermore, contrary to Faltz's claim, the court did not apply the wrong statutory standard when evaluating Faltz's reasons for pleading guilty in the context of his IPA claim; the court made a credibility determination after observing Faltz testify multiple times.

Nor did the trial court abuse its discretion by denying Faltz's ineffectiveness claims. Faltz's claims regarding Attorney Bond were procedurally barred and an abuse of the writ. In any case, Faltz failed to demonstrate prejudice to excuse his default, which is to say, that the underlying claim has merit. Faltz's ineffectiveness claim regarding Attorney Harn's performance as collateral counsel, assuming such claims are cognizable, also lacks merit. Faltz's new DNA testimony was not available at the time of trial or in the initial § 23-110 proceedings. Even after Faltz's latest legal team presented an accident-reconstruction expert, the court reasonably rejected the expert's theory to explain Faltz's DNA on the driver's airbag. Finally, as the court found without clear error, Faltz pleaded guilty because he was guilty and sought to avoid a considerably longer sentence if he went to trial. Thus, Faltz failed to show that, but for the alleged deficiencies of collateral (or trial) counsel, he would have rejected the guilty plea and proceeded to trial.

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion by Permitting Testimony from Government Experts Michael Miller and Brian Chase.

A. Additional Background

Prior to the evidentiary hearing, Faltz moved to preclude expert testimony from government experts (former Detective) Michael Miller and Brian Chase (App.

140, 149; see also 11-15-22 Tr. 9-13). Faltz complained that Miller did not conduct a forensic mapping of the crash scene until four years after the accident, and his opinion was therefore speculative and unsubstantiated (App. 140).[11] Moreover, Faltz asserted that Chase's report was flawed because Chase relied upon Miller's analysis while mistakenly assuming that Miller's crash-scene reconstruction was performed immediately after the crash (App. 149).

The government countered that Miller had been present on the crash scene, marking it with spray paint, taking photographs, and documenting skid marks, gouge marks, and fluid trails (11-15-22 Tr. 14; R3.74:13). Miller completed a field sketch (*id*.). Miller examined the vehicles on the scene and subsequently in an accident reconstruction (11-15-22 Tr 14). He had collected substantial amounts of data, and could explain the data during his testimony (*id.*). His report incorporated this data (*id*. at 14-15). Although the timing of Miller's report would be subject to impeachment, it was not a basis for disqualifying his opinion or rejecting Chase's reliance upon Miller's analysis (*id*.). Indeed, defense expert Russell relied on Miller's data in his analysis (*id*. at 15-16).

[11] Miller and Chase testified that forensic mapping is a term used to describe using "Total Station," a surveying tool, to measure distances and angles at a crash scene (R3.74:14; 11-15-22 Tr. 68, 181-82).

The court denied the defense motion, ruling that the defense concern "goes more to the weight versus the admissibility of these witnesses" (11-15-22 Tr. 16). Miller had been on the scene and could provide some contemporaneous account of events (*id*.). The court further stated "if the defense's expert is relying upon the reports of other experts, including Miller and Chase," then there is no reason "why they should be excluded" (*id*.).

During the hearing, Russell adopted his January 25, 2017, report, which was based upon "available physical evidence, collision dynamics, and . . . police observations," and which incorporated scene photographs of the vehicles and the pavement (JX.35:4, 16-19; 11-16-22 Tr. 32).[12] Russell had not examined the scene, evidence, the vehicles themselves, or the airbags, and he had not used exemplar vehicles to recreate the crash (11-16-22 Tr. 81-82). He opined that Miller's field sketch was not to scale and was "completely and totally meaningless" (11-16-22 Tr. 71).[13]

Chase testified that "he now understands" that Miller's final accident reconstruction was not performed immediately after the crash; Chase reevaluated his

[12] In rebuttal to Miller, Russell also adopted his supplemental report, which included scene photographs as well as Miller's sketch, notes, and 2006 accident reconstruction (JX.36:4-8, 12, 33; 11-16-22 Tr. 32-33).

[13] Russell had qualified as an expert in accident reconstruction "dozens of times" (11-16-22 Tr. 27-28).

own 2017 and 2018 reports and stood by his conclusions (R3.74:35-36; see JX.53, 54).[14] Miller had performed a field sketch but not a forensic mapping at the time of the crash (*id*.). Chase explained that when Miller performed a forensic mapping of the scene in 2006, Miller used scientific crash-reconstruction techniques, wherein he forensically mapped the resurfaced road with a Total Station surveying tool and supplemented that mapping with information from his field sketch and photographs (11-17-22 Tr. 5-8; see 11-16-22 Tr. 163-64). On cross-examination, Miller acknowledged that the locations, speed, and departure angles in his 2006 forensic mapping were estimates and not precise (*id*. at 193-96).

B. Standard of Review and Applicable Legal Principles

"Whether to admit expert testimony is committed to the discretion of the trial court; a ruling either admitting or excluding such evidence will not be disturbed unless manifestly erroneous—i.e., for abuse of discretion." *Girardot v. United States*, 92 A.3d 1107, 1113 (D.C. 2014) (quoting *Benn v. United States*, 978 A.2d 1257, 1273 (D.C. 2009)); *see In re Melton*, 597 A.2d 892, 901 (D.C. 1991) (en banc)

[14] Miller had qualified as an expert in crash and collision reconstruction 25 times and had never failed to qualify once proffered (11-16-22 Tr. 157-58). Chase had qualified as an expert in collision reconstruction science and automotive technology more than 100 times and had never failed to qualify (*id*. at 202-03).

("The admission or exclusion of expert testimony . . . is committed to the trial court's broad discretion.").

For cases pending on direct review or not yet final on the date of this Court's decision in *Motorola v. Murray*, 147 A.3d 751, 752 (D.C. 2016) (en banc), expert testimony is admitted under the following standard:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Parker v. United States, 249 A.3d 388, 401-02 (D.C. 2021) (quoting Fed. R. Evid. 702); *Motorola*, 147 A.3d at 757.[15]

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[15] In the trial court, Faltz maintained that *Motorola* represented the correct standard for admission of expert testimony, whereas the government maintained that the prior standard of *Dyas v. United States*, 376 A.2d 827 (D.C. 1977), applied (R3.69, 71; App. 140, 149). Under *Dyas*, expert testimony is admissible if:

> (1) the subject matter [is] so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness [has] sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Dyas, 376 A.2d at 832 (internal quotations omitted).

(continued . . .)

"'[T]he opinions of an expert witness may be based in part on hearsay or other inadmissible information as long as the hearsay or other inadmissible information meets minimum standards of reliability and is of a type reasonably (i.e. customarily) relied on in the practice of the expert witness's profession.'" *Ruffin v. United States*, 219 A.3d 997, 1007 (D.C. 2019) (quoting *Melton*, 597 at 910). "While the court may not abdicate its gatekeeping responsibility to ensure the evidentiary reliability of expert testimony, it typically must 'accord an expert wide latitude in choosing the sources on which to base his or her opinions.'" *Id*. (quoting *Melton*, 597 A.2d at 903). "In general, 'a properly qualified expert is assumed to have the necessary skill to evaluate any second-hand information and to give it only such probative force as the circumstances warrant.'" *Id*. (quoting *Melton*, 597 A.2d at 903). "'In most cases . . . objections to the reliability of out-of-court material relied upon by [an expert] will be treated as affecting only the weight, and not the admissibility, of the [expert testimony].'" *Id*. (quoting *Melton*, 597 A.2d at 903-04).

Because Faltz's conviction was not pending on direct review or otherwise not final at the time of the evidentiary hearing on his IPA claims in 2022, *see Davis v. Moore,* 772 A.2d 204, 230 (D.C. 2001) (en banc), the *Dyas* standard, not the *Motorola* standard, would apply to his collateral attack. *See Gathers v. United States*, 977 A.2d 969, 972-73 (D.C. 2009) (*Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to collateral attack on criminal conviction). The trial court did not resolve this question (see 11-15-22 Tr. 16). This Court need not decide this question either because, for the reasons set out in the text, the trial court did not abuse its broad discretion under either standard.

C. Analysis

Contrary to Faltz's claim (at 40-48), the trial court did not abuse its discretion by permitting Miller to testify to a crash-scene reconstruction based on contemporaneous notes, photographs, and a field sketch. Chase, who had been qualified as an expert over 100 times, testified that Miller's 2006 forensic mapping of the scene was based on generally accepted scientific crash-reconstruction techniques (11-17-22 Tr. 5-8). Both Chase and Miller acknowledged that the forensic mapping had been performed four years after the crash and had incorporated data from the unscaled field sketch and photographs (*id*. at 193-96; R3.74:35). Although Russell discounted Miller's calculations, he never established that the information failed to meet the minimum standards of reliability that would render it sufficient for experts in the field to rely upon. *Ruffin,* 219 A.3d at 1007. Given the wide latitude this Court accords experts to choose the sources upon which they base their opinions, and the assumption that a properly qualified expert has the necessary skill to evaluate uncertain information and give it the probative force it deserves, *see Ruffin*, 219 A.3d at 1007, Faltz cannot establish that the trial court abused its broad discretion by admitting the testimony. *Girardot*, 92 A.3d at 1113. "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *Motorola,* 147 A.3d at 757.

Moreover, Faltz cross-examined both experts extensively and probed the methodologies and reliability of the experts' conclusions (see 11-16-22 Tr.179-98; 11-17-22 Tr. 4-17). Miller admitted freely that, under the circumstances, his calculations could only be considered estimates (11-16-22 Tr. 193-96). Thus, the trial court, sitting as the finder of fact, received an accurate picture of each expert's opinion. Accordingly, it was within the trial court's prerogative to conclude that the defense challenge to the reliability of the information relied upon by Chase and Miller affected only the weight, not the admissibility of their testimony. *Ruffin*, 219 A.3d at 1007.

Faltz complains (at 43) that the trial court erroneously allowed the government's experts to testify based on the incorrect assumption that Russell had relied on the expert reports of Miller and Chase. Taken in context, the judge found, as the government had represented, that Russell's analysis relied "on the evidence, diagrams, and measurements taken by Miller" (11-15-22 Tr. 15-16). This was true; Russell had no first-hand knowledge of the scene or evidence other than what he found in the scene photographs and Miller's notes, measurements, and diagram (see JX.35:4, 16-19; JX.36:4-8, 12, 33; 11-16-22 Tr. 32-33, 81-82). In any event, Russell's disagreement with Miller's reconstruction was amply developed at the hearing, and the record shows that the trial court understood the basis for Russell's

opinions and compared Russell's findings to those of the government experts (see 11-16-22 Tr. 67-77, 97-103; 11-17-22 Tr. 31-34, 37).[16]

For these reasons, Faltz cannot show manifest error. *See Ruffin*, 219 A.2d at 1006-08 (no abuse of discretion to admit expert DNA testimony from private expert who relied on DNA test results from the D.C. Department of Forensic Sciences which had lost its accreditation over the department's interpretation procedures); *Melton*, 597 A.2d at 902-04 (no abuse of discretion to admit expert psychiatric testimony based in part on allegedly unreliable reports from family members and past hospital records where bases for expert's opinions were subject to cross-examination).

Finally, any error in admitting the government expert testimony was harmless. *See Gardner v. United States*, 140 A.3d 1172, 1185 (D.C. 2016). Even if the Court had not heard Miller and Chase, as discussed infra, there is no reasonable probability that the court would have found Faltz to be actually innocent under the IPA. The court emphasized Faltz's own admissions of having driven the car and the presence of the large amount of his DNA on the center of the airbag. In addition, the court

[16] The cases relied upon by Faltz (at 43-45) do not establish that it was an impermissible to admit the testimony. *See Dickerson v. District of Columbia*, 182 A.3d 721, 726-729 (D.C. 2018) (no abuse of discretion to preclude defense expert who had trained himself as an expert on field-sobriety tests); *Girardot*, 92 A.3d at 1109-14 (same; defense proffered expert on why children make false complaints of sexual abuse).

discredited Russell's theory because it was based on scenarios, like the side-impact utility-pole collision example, that the court found were not relevant to the charged collision (see R3.75:3-4; see JX.35:21-26). On the strength of these independent findings, the 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.'" *Gardner*, 140 A.3d at 1186 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). [17]

II. The Trial Court Properly Analyzed Faltz's IPA Motion.

Faltz complains (at 21-29) that the trial court misconstrued the IPA's statutory requirement that the court consider "the specific reason the movant pleaded guilty despite being actually innocent of the crime." D.C. Code § 22-4135(g)(1)(E). His claims lack merit.

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[17] Were this Court to find an abuse of discretion, the Court should remand to permit the trial court to determine which opinions were admissible. *See Benn v. United States*, 978 A.2d 1257, 1280 (D.C. 2009) (remanding to permit trial court to properly consider expert testimony in the context of the facts of the case). Faltz never challenged Chase's qualifications as an expert (see, e.g., 11-16-22 Tr. 203). Chase expressly grounded his opinion that, in a frontal collision, the driver would contact the center of the driver's-side airbag on federal safety standards that required the same; he did not ground this opinion in Miller's reconstruction (*id*. at 206-08; 11-17-22 Tr. 15). Also, the opinions of Miller and Chase that (1) the driver of the Ford would have impacted the driver's air bag in a frontal collision, and (2) there was insufficient room between the A-pillar and the inflated airbag for the driver to miss the airbag in a frontal collision, primarily relied on the raw data collected by Miller in 2002 rather than the challenged 2006 accident reconstruction.

A. Additional Background

During rebuttal argument on the motion, defense counsel argued that Faltz believed that a murder charge would require him to admit to driving the Ford whereas an involuntary-manslaughter charge would turn only on his liability as a passenger (11-17-22 Tr. 125-26). When the court asked counsel how Faltz could have pleaded guilty as a passenger, counsel responded that Faltz did not understand involuntary manslaughter and felt guilty because he was "involved if in some peripheral way" (*id*. at 127-28). The court then asked why Faltz would plead guilty if he knew he was not the driver and noted that Faltz knew that the Ingrams' cases had been dismissed and the Ingrams were going to testify against him; counsel responded that Faltz believed his lawyer "had given up on him" (*id*. at 128-30).

The court then asked:

> I'm just trying to understand . . . if somebody is telling you to plead guilty to something that you didn't do, especially of this nature . . . 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? (11-17-22 Tr. 131).

Counsel answered, "I don't know how often [exonerations in guilty pleas] happen[ ], but it happens" (*id*.). The court clarified, "The circumstances of this case in a guilty plea . . . to the charges here" (*id*. at 131-32). The court asked, "even if your lawyer expressly told you I'm giving up on this case and you're going to plead, what person

would plead guilty . . . to murder?" (*id*. at 132). Counsel responded again that Faltz pleaded guilty to involuntary manslaughter (*id*.).

B. Standard of Review and Applicable Legal Principles

"The IPA provides that '[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.'" *Williams v. United States*, 187 A.3d 559, 561 (D.C. 2018) (quoting D.C. Code § 22-4135(a)); *Caston v. United States*, 146 A.3d 1082, 1089 (D.C. 2016) (same). The movant must "set forth specific, non-conclusory facts" which "identify[] the specific new evidence," "[e]stablish[] how that evidence demonstrates that the movant is actually innocent despite having been convicted at trial or having pled guilty," and "[e]stablish[] why the new evidence is not cumulative or impeaching." D.C. Code § 22-4135(c). "'Actual innocence' or 'actually innocent' means that the person did not commit the crime of which he or she was convicted." D.C. Code § 22-4131(1).

In considering an IPA claim, a court "may consider any relevant evidence," but "shall consider":

(A) The new evidence;

(B) How the new evidence demonstrates actual innocence;

> (C) Why the new evidence is or is not cumulative or impeaching; . . . [and]
>
> (E) If 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). If, after considering those factors, 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." D.C. Code § 22-4135(g)(2). If 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." D.C. Code § 22-4135(g)(3).

This Court reviews the denial of an IPA motion for abuse of discretion. *Williams*, 187 A.3d at 562; *Caston*, 146 A.3d at 1090. The scope of the Court's review is "narrow on the question of whether that new evidence establishes appellant's actual innocence." *Id*. at 563 (cleaned up).

C. Analysis

As the court found, and the parties agreed, a large quantity of Faltz's DNA was found on the center of the driver's-side airbag, and the Ingram twins were excluded from that DNA sample (R3.74:20, 23; R3.75:1-2). Moreover, the court credited the government's expert Chase who testified that it would have been impossible for the driver to miss the center of the driver-side airbag in the frontal collision (R3.75:3-4). There was abundant evidence to support Chase's conclusion:

the airbag inflated in 40 milliseconds, well before the Ford reached maximum engagement at 100 milliseconds, and there was no time for the driver to avoid the airbag in a frontal collision (R3.74:33-34). There were only 3.5 inches between the inflated airbag and the A-pillar on the driver's door, and there was no damage or blood on the A-pillar or the driver's window; thus, there was no evidence that the driver's head was thrown violently against only the pillar or window while avoiding the airbag (*id*. at 16-17). Finally, both Chase and Miller opined that the Ford would not have begun to rotate until after maximum engagement, by which time the airbag would have already inflated and deflated; thus, the rotation of the car did not bear on whether the driver collided with the center of the airbag (*id*. at 17-18, 34-35).

By contrast, the court discredited the defense expert Russell who theorized that the driver missed the airbag altogether based upon factual scenarios much different than in this case (R3.75:3). The court was understandably unconvinced by the defense theory (see *id*.) and permissibly chose to credit the government experts. *See Wallace v. United States*, 936 A.2d 757, 770–71 (D.C. 2007) (cleaned up) (when expert testimony presents "two permissible views of the evidence," the trial court's "choice between them cannot be deemed clearly erroneous."). Although Faltz challenges the trial court's admission of the expert testimony from Miller and Chase, he raises no independent challenge to the trial court's conclusion (see R3.75:1-2) that Faltz's new DNA and accident-reconstruction evidence failed to establish his

actual innocence. On this ground alone, Faltz's claim fails because he cannot show that the new evidence he proffered demonstrates his actual innocence. D.C. Code § 22-4135(g)(1)(A), (B); *see Williams*, 187 A.3d at 563-64 (no prejudice where trial court denied IPA claim after finding that proffered new evidence did not demonstrate defendant's actual innocence).

Nor did the court clearly err in finding that Faltz pleaded guilty because he was guilty and not for any other reason. § 22-4135(g)(1)(E). The court found that Faltz had repeatedly admitted his guilt: at the plea hearing and in his letter to the court at sentencing (R3.75:4). The court discredited Faltz's testimony that he thought he was pleading guilty as the passenger: Attorney Bond's letter to Faltz clearly explained that the government planned to prove that Faltz had been driving (*id*.). Moreover, Faltz had admitted to Attorney Bond that he was, in fact, driving (*id.*). Having spoken to Faltz at his guilty plea and observed him testify twice (in 2011 and 2022) about his plea, the trial court was in a unique position to assess Faltz's credibility. The court had ample grounds to reject Faltz's claims. See, e.g., R3.75:4 ("The Court is wholly unconvinced that Defendant pleaded guilty for any reason other than because he is guilty."); R1.29:28 ("The Court finds it difficult to accept Defendant's new assertion that he thought he was pleading guilty as the passenger."). On appeal, the trial court's factual findings, anchored in repeated credibility assessments of Faltz, are beyond appellate reversal. *See Williams*, 187 A.3d at 561

(in an IPA hearing, "the Superior Court judge's factual findings anchored in credibility assessments derived from personal observations of the witnesses [are] beyond appellate reversal unless those factual findings are clearly erroneous.") (cleaned up); *see, e.g. Turner v. United States*, 116 A.3d 894, 928-29 (D.C. 2015) (no abuse of discretion to deny IPA claim where trial court discredited recantations of four government witnesses as "not worthy of belief").

Faltz asserts (at 21-29) that the trial court misconstrued the inquiry required by the IPA when a defendant asserts his innocence after entering a guilty plea. Specifically, he claims (at 21) that the trial court's exchanges with defense counsel during rebuttal argument indicated an "unfair incorrect presumption that innocent people do not plead guilty." Faltz wholly misconstrues the context of the court's exchange with counsel. Contrary to Faltz's claim, the court's questions did not presuppose that a factually innocent person could not plead guilty. Rather, the court was appropriately skeptical. Courts must consider "sworn statements from a defendant at his plea hearing with a 'strong presumption of verity.'" *Maddux v. District of Columbia*, 212 A.3d 827, 839 (D.C. 2019) (quoting, inter alia, *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977)) (internal quotation marks omitted)). Here, the court focused on why Faltz would have pleaded guilty, especially given "the circumstances of this case" (11-17-22 Tr. 131; see also *id*. (asking why defendant would plead guilty to offense "especially of this nature"). The court reasonably

expressed its skepticism of Faltz's repeated assertions that, although he knew he had to be the driver to plead guilty to murder, he did not know he had to be the driver to plead guilty to involuntary manslaughter, particularly where the cases against the other persons in the car had been dismissed. Most importantly, *the trial court had already discredited Faltz on this same point after hearing him testify in 2011* (R1.29:3, 14). Faltz earned the court's skepticism through his own conduct in this case, including his repeated denials that he had admitted to his lawyer that he was driving the car (R3.74:37). The trial court was required to be impartial, not gullible. *See Liteky v. United States*, 510 U.S. 540, 552 (1994) ("Impartiality is not gullibility."). Far from demonstrating a belief generally that innocent people do not plead guilty, the record demonstrates the court's suspicion (and ultimate finding) that Faltz himself, given the mountain of evidence that he was the driver and knew he was pleading guilty as the driver, did not plead guilty for any reason other than he knew he was guilty.

III. The Trial Court Did Not Abuse Its Discretion by Denying Faltz's Claims that Trial Counsel and Collateral Counsel Were Ineffective.

Faltz claims (at 29-40) that both trial counsel and collateral counsel were ineffective for failing to present DNA and accident-reconstruction experts at trial or the 2011 evidentiary hearing. His claims lack merit. Faltz's claim regarding trial counsel is successive to the ineffectiveness claim the trial court previously rejected,

and Faltz cannot show cause and prejudice to excuse his default. His claim regarding collateral counsel fails because, as the trial court reasonably found, Faltz pleaded guilty because he was guilty, he knew he was likely to receive much more time in prison if he went to trial, and any potential testimony from DNA and accident-reconstruction experts would not have been reasonably likely to change that decision.

A. Faltz's Ineffectiveness Claim Regarding Attorney Bond is Successive and Procedurally Barred.

If not procedurally barred, this Court reviews a trial court's denial of a § 23-110 motion for abuse of discretion. *Rivera v. United States*, 941 A.2d 434, 441 (D.C. 2008). In conducting that review, this Court assesses the trial court's findings of fact for clear error and determinations on questions of law de novo. *Jenkins v. United States*, 870 A.2d 27, 33-34 (D.C. 2005).

Here, the trial previously rejected Faltz's ineffectiveness claim regarding Attorney Bond. Thus, the ineffectiveness claims about Attorney Bond in this case are successive and procedurally barred unless Faltz can show cause and prejudice to excuse his default. *See Hardy v. United States*, 988 A.2d 950, 960-61 (D.C. 2010); D.C. Code § 23-110(e); *see also United States v. Frady*, 456 U.S. 152, 167 (1982).[18]

[18] For the reasons set forth in the government's brief in 14-CO-978, the trial court did not abuse its discretion in denying Faltz's first § 23-110 motion.

Even assuming, as Faltz claims, that Attorney Harn's failure to press an ineffectiveness claim for failure to consult a DNA and accident expert establishes cause to excuse his default, *see (Anthony) Washington v. United States*, 834 A.2d 899, 903 n.8 (D.C. 2003),[19] Faltz cannot demonstrate prejudice. He cannot make this showing because, as set out infra, he cannot demonstrate that his underlying ineffectiveness claim merited relief. *McCrimmon v. United States*, 853 A.2d 154, 161 (D.C. 2004). Accordingly, the trial court did not abuse its discretion in denying his claim. *Hardy*, 988 A.2d at 960-61.

B. Applicable Legal Principles

A § 23-110 motion filed after a defendant has pleaded guilty and been sentenced is treated as a motion to withdraw the guilty plea, and granted only if the defendant can establish that the trial court's acceptance of his plea was manifestly unjust. *Bradley v. United States*, 881 A.2d 640, 646 (D.C. 2005).

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[19] It is not clear that Faltz had a statutory right to effective assistance of collateral counsel in the preparation of his first § 23-110 motion, such that collateral counsel's alleged deficiencies (1) provided cause to excuse his default in presenting a successive claim of ineffective *trial* counsel, and (2) gave rise to a viable claim of ineffective assistance of *collateral* counsel. In *McCrimmon*, 853 A.2d at 160-61, McCrimmon had a statutory right to effective assistance of collateral counsel where his first collateral counsel filed his § 23-110 motion during the pendency of McCrimmon's direct appeal. By contrast, Faltz did not file his first § 23-110 motion during a direct appeal.

To prevail upon an ineffective-assistance-of-counsel claim, Faltz must demonstrate that: (1) his counsel's performance was deficient, that is, counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) counsel's deficient performance "prejudiced the defense," that is, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this case, Faltz must demonstrate there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

C. Analysis

Contrary to his claim (at 29-40), Faltz failed to demonstrate that any deficiencies by collateral counsel (or trial counsel) prejudiced him, such that he was reasonably likely to have rejected the government's plea offer and proceed to trial.[20]

[20] The trial court was not obliged to address Faltz's proffered deficiency. *See Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."). Nor has Faltz demonstrated deficiency as to collateral or trial counsel: there are "'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'" *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (quoting *Strickland*, 466 U.S. at 689)). As the government argued to the court at the evidentiary hearing (see 11-17-22 Tr. 112-13), Attorney Bond testified in 2011 that he made a tactical decision to focus on the police officer eyewitness testimony placing Dorrell Ingram in the driver's seat, and argue that the DNA evidence was

(continued . . .)

First, as the trial court found, Faltz repeatedly acknowledged his factual guilt (R3.74:5); for the reasons set out supra, this finding was not clearly erroneous. Second, the DNA evidence available at the time of the 2006 plea or the 2011 evidentiary hearing was limited to the large amount of Faltz's DNA in the center of the driver's-side airbag (R3.74:20, 25). As Faltz agrees, the methodology to analyze the small amount of DNA on the right edge of the airbag was not available at either time (*id*.) and cannot inform the *Strickland* prejudice analysis. *See Strickland*, 466 U.S. at 689 (attorney performance must be evaluated from "counsel's perspective at the time"). Hence, Faltz's claim at the hearing (see R3.74:38) that he would not have pleaded guilty had he known there was a DNA mixture on the airbag is irrelevant to the ineffectiveness inquiry. Faltz proffers (at 4-5, 34) that had Attorney Harn (or Attorney Bond) reviewed the laboratory file, they would have uncovered opportunities to claim secondary or tertiary transfer, but fails to show how such a claim would have aided him at the hearing (or at a trial), particularly given the

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not relevant. This decision was reasonable, particularly in front of a jury. Moreover, as the government also argued (see *id.*), a competent attorney would have to consider "the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether [the defendant] was telling the truth, or transform the case into a battle of the experts." *Harrington*, 562 U.S. at 108-09. Finally, as set forth in the text, the expert testimony would not have aided Faltz at trial; neither attorney can be deemed deficient for failing to pursue what would have been inconsequential avenues. *See (David) Washington v. United States,* 689 A.2d 568, 572 (D.C. 1997) ("[T]he failure to file a meritless motion does not constitute ineffective assistance of counsel.").

testimony from the government DNA expert that the large amount of DNA recovered from the center of the airbag was inconsistent with secondary or tertiary transfer (R3.74:51). Accordingly, Faltz cannot show that a defense DNA expert would have affected the outcome of either proceeding. *See, e.g., Lopez v. United States*, 863 A.2d 852, 863-64 (D.C. 2004) (no prejudice from failure to call expert as witness at trial where factual underpinnings of expert's opinion would have been discredited on cross-examination). Third, for the reasons found by the court, and set out supra, an accident-reconstruction expert was not likely to be outcome determinative in 2011 or 2006.

Faltz urges (at 26, 39) that he would have rejected the plea offer in 2006 had he not believed Attorney Bond had "given up" on him. The trial court was not obliged to credit this assertion (see R3.74:5), especially given Faltz's repeated admissions of guilt. In addition, Faltz knew when he pleaded guilty that he faced additional charges in addition to the two murder counts, both Ingram brothers would testify against him, the government would present evidence that he suffered a hip injury consistent with being the driver, and he faced a "lot more time" if convicted at trial (11-15-22 Tr. 56-60).

Relying on *Lee v. United States*, 582 U.S. 357, 365 (2017), Faltz contends (at 30-36) that the trial court applied the wrong standard and erred in its prejudice determination. Not so. The court properly stated the prejudice inquiry—whether, but

for counsel's unprofessional errors, Faltz would not have pleaded guilty (R3.74:5). This is precisely the standard articulated in *Lee*. *See Lee*, 582 U.S. at 364-65; *see also Hill*, 474 U.S. at 59. In *Lee*, the parties agreed that had Lee been properly advised he would be subject to deportation after pleading guilty, he would have proceeded to trial no matter how long the odds. 582 U.S. at 362. Here, by contrast, there was no similar consideration extrinsic to Faltz's odds of success at trial; this was a typical case, where a "a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." *Id*. at 367. For these reasons, Faltz cannot demonstrate that if he were advised differently in 2006, he would have rejected the plea offer and proceeded to trial. *Lee*, 582 U.S. at 364; *Hill*, 474 U.S. at 59.

CONCLUSION

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

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

(1) An individual's social-security number
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(6) Financial account numbers

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(a) the acronym "SS#" where the individual's social-security number would have been included;
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(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.

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing appellee's brief to be served by electronic means, through the Court's EFS system, upon counsel for appellant, James Millikan, Esq., jmillikan@exonerate.org, and Leslie W. Kostyshak, lkostyshak@huntonak.com, on this 17th day of January, 2024.

/s/
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