BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CO-210

ROBERT A. WILLIAMS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2015-CF3-5883

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II. Whether, as Williams conceded below, the trial court permissibly concluded that the lack of procedural hearing under the Innocence Protection Act to waive Williams's right to DNA testing was insufficient to establish ineffectiveness.

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INTRODUCTION

This Court affirmed appellant Robert Williams's convictions for armed robbery and related offenses on direct appeal and, in the prior postconviction appeal, remanded for an evidentiary hearing to explore appellant's claim that trial counsel had been ineffective by failing to pursue DNA testing. In particular, the Court recognized that an evidentiary hearing may elucidate whether trial counsel "made a not-to-be-second-guessed strategic or tactical decision not to seek DNA testing."

That is just what the evidentiary hearing revealed. Counsel reasonably concluded that the speculative benefit of DNA testing did not outweigh the certain downside: that the defense would lose the ability to argue that the lack of DNA testing itself provided reasonable doubt. Further, counsel reasonably feared the potentially devastating risk that testing would prove appellant guilty. There is no basis to second-guess that strategic decision. Moreover, appellant never established that the lack of DNA testing caused him prejudice, as he failed to provide the sort of strong expert testimony that this Court had called for in the prior appeal, and he still has performed no DNA testing. Finally, appellant correctly conceded at the remand proceeding that the failure to obtain an on-the-record waiver of rights under the Innocence Protection Act did not establish ineffectiveness that would justify setting aside his conviction for an armed home invasion robbery.

COUNTERSTATEMENT OF THE CASE

Following a trial before the Honorable Zoe Bush, a jury convicted appellant of armed first-degree burglary (D.C. Code §§ 22-801(a), 22-4502), armed robbery (D.C. Code §§ 22-2801, 22-4502), armed assault with intent to commit robbery (D.C. Code §§ 22-401, 22-4502), three

counts of possession of a firearm during a crime of violence (D.C. Code § 22-4504(b)), and possession of an unregistered firearm (D.C. Code § 7-2502.01(a)) (8/24/16 Transcript (Tr.) 278-80; 16-CF-1190 Record (R.) 148-49 (judgment)).[1] All of the offenses were committed while appellant was on release in another case (D.C. Code § 23-1328(a)) (*id.*). Judge Bush sentenced appellant to a total of 12 years of incarceration and five years of supervised release (16-CF-1190 R. 148-49 (judgment); 11/30/16 Tr. 23-30). This Court affirmed appellant's convictions on direct appeal. *See Williams v. United States*, Mem. Op. & Judgment, No. 16-CF-1190 (D.C. June 12, 2019) (Direct Appeal MOJ).

Appellant moved for relief under D.C. Code § 23-110, alleging ineffective assistance of counsel (20-CO-672 R. 67-76 (23-110 Mot.)). He also sought postconviction DNA testing under the Innocence Protection Act (IPA), D.C. Code § 22-4133 (*id.* at 116-18 (IPA App.)). After filings by the parties (see *id.* at 96-106 (23-110 Opp.); *id.* at 111-15 (23-110 Reply); *id.* at 130-38 (IPA Opp.)), the Honorable Juliet McKenna denied

[1] All page references to the record are to the PDF page numbers. Each record citation also notes the relevant appeal number. Substantial portions of the Counterstatement are taken from the government's brief in the first § 23-110 appeal.

appellant's requests without a hearing (*id.* at 140-48 (First 23-110 Order)). This Court vacated and remanded for further proceedings. *See Williams v. United States*, Mem. Op. & Judgment, No. 20-CO-672 (D.C. Aug. 29, 2019) (23-110 MOJ).

On remand, the parties supplemented their prior filings (see 24-CO-210 R. 70-75 (Supp. to 23-110 Mot.); *id.* at 87-96 (Resp. to Supp. to 23-110 Mot.); *id.* at 122-33 (U.S. Post-Hr'g Memo.)). Following an evidentiary hearing, Judge McKenna orally denied appellant's motions on February 26, 2024 (2/26/24 Tr. 35-49). On March 6, 2024, appellant noticed an appeal (24-CO-210 R. 135 (notice of appeal)).

The Trial and Direct Appeal

This Court summarized the home invasion at the heart of this case in the direct appeal:

> The evidence at trial was that on April 28, 2015, Angela Roberts was moving out of the Benning Courts apartment complex, located at 1705 Benning Road, Northeast, when an individual later identified as appellant entered her apartment and placed a gun to the back of her head demanding money. After Ms. Roberts declined to give appellant money, he struck her on the head with the gun. Elliott Dupervil, who shared the apartment with Ms. Roberts, came into the living room after hearing screaming and attempted to call the police. Appellant followed Mr. Dupervil into his room with the gun, took between $80 and $100 from Mr. Dupervil's dresser, then

> fled the apartment. Mr. Dupervil immediately called 911 and described the individual who robbed them as a dark-skinned male, wearing a mask, blue jeans, a black "hoodie," and blue New Balance sneakers. (Direct Appeal MOJ at 2.)

Neither victim could identify the masked intruder's face (see 8/22/16 Tr. 81-82; 8/23/16 Tr. 199). But they both identified a person depicted on the apartment complex's surveillance video as the man who had invaded their apartment (see 8/22/16 Tr. 64-65, 67-68, 72-73, 76, 79; 8/23/16 Tr. 187, 196-97, 200-01; see also Direct Appeal MOJ at 2). Roberts based this identification on "the way that that person [was] dressed," including wearing a hooded sweatshirt inappropriate for the weather (8/22/16 Tr. 64-65, 67-68, 72-73, 76). Dupervil likewise based the identification on what the intruder wore (8/23/16 Tr. 196-97, 204, 207-08). Dupervil offered a detailed description of the intruder's attire, in part because he was a "sneaker guy" who recognized the blue New Balance shoes that the intruder wore. *See* 8/23/16 Tr. 187, 201 ("He had some, like, blue New Balances, I believe. I recognized the shoes because I look at shoes a lot. So I remember the shoes.").

Surveillance video buttressed Roberts's and Dupervil's identifications, exposing the movements of the man they had identified. Roberts that day had been hanging out with neighbor Jahmeek Price

("Ju-Ju"), and a few minutes before the home invasion, Roberts had given Price money to go buy marijuana (8/22/16 Tr. 40-41, 43-44, 62, 90, 103). After Price left the apartment, video captured him and the suspect walking into Price's nearby building (see generally 8/22/16 Tr. 62-63, 67, 72-79, 98-111; 8/23/16 Tr. 225-27). A few minutes later, Price and the suspect emerged together and walked to Roberts's and Dupervil's building (*id.*). Price soon exited, but the suspect spent approximately three minutes inside the building (*id.*)—a span of time matching Roberts's estimated duration of the home invasion (8/22/16 Tr. 62, 88).

Investigator Alexis Sakulich "identified appellant as the suspect depicted in the surveillance footage" (Direct Appeal MOJ at 3). She had worked in the area encompassing Benning Courts for nine years (*id.* at 2-3). And during that time, Investigator Sakulich had "interactions with appellant over the course of 'some years,' at times seeing him on a day-to-day basis within the 'general area' of the Benning Courts apartment complex" (*id.* at 3). While the suspect's "face is not directly shown in all of the footage, she was able to base her identification on her familiarity with appellant's general facial features, hairline, and other characteristics" (*id.*).

After Investigator Sakulich viewed the surveillance video (8/22/16 Tr. 117), appellant was arrested at "the apartment complex located across the street from the robbery, six hours after the incident" (MOJ at 2). Appellant's outfit at arrest "largely matched the individual in the video surveillance," particularly his jeans and sneakers (*id.*; see also 8/22/16 Tr. 112; 8/23/16 Tr. 229). In addition, the police found "a black hoodie [in] a closet approximately five feet from appellant" (MOJ at 2). Roberts described the intruder wearing a dark hoodie, and Dupervil said he wore a black jacket with a hood (8/22/17 Tr. 84-85; 8/23/16 Tr. 187). In the apartment where appellant was arrested, the police also found $67 in cash and white headphones similar to those worn by the suspect in some of the footage (Direct Appeal MOJ at 2).

The case included no DNA testing. A crime scene officer took swabs from some items that the intruder had touched for potential testing (8/22/16 Tr. 135-38). DNA testing requires a comparison sample, however, usually obtained through a buccal swab (*id.* at 136). And no buccal swabs were taken from the victims or appellant (*id.* at 143, 147). Nor did the police swab items from the scene of the arrest—including the recovered clothing—for potential DNA (*id.* at 157-58).

This Court affirmed appellant's convictions on direct appeal, rejecting his argument that the trial court should have blocked Investigator Sakulich's identification. Investigator Sakulich's "substantial contact" with appellant "over the nine years" established sufficient familiarity with him for her to testify as a lay identification witness (Direct Appeal MOJ at 4). Further, her testimony was helpful to the jury—given the "poor quality of the video surveillance," her "knowledge of appellant's physical appearance certainly aided the jury in its decision" (*id.*). "For these reasons, appellant failed to demonstrate error, much less plain error, in the trial court's admission of Investigator Sakulich's lay witness identification" (*id.* at 5). "Based on Investigator Sakulich's identification, in addition to appellant being in close proximity to the robbery and wearing the same clothes depicted in the video surveillance, the evidence was sufficient for a jury to fairly infer appellant's guilt beyond a reasonable doubt" (*id.*).

Initial Postconviction Proceedings

In postconviction filings, appellant sought DNA testing and a new trial, contending that trial counsel (James Williams, whom we refer to as "trial counsel" or "counsel" to avoid confusion with appellant) had been

ineffective in failing to have the clothing recovered from the scene of his arrest tested for DNA (20-CO-672 R. 67-76 (23-110 Mot.); *id.* at 116-18 (IPA App.)). Appellant alleged that he had asked counsel before trial to procure testing on the clothes that appellant was wearing when he was arrested (as well as the sweatshirt hanging in the closet a few feet away), and asserted that testing on the arrest clothing would reveal no DNA from the victims and (at least as to the sweatshirt) no DNA from appellant (20-CO-672 R. 74 (23-110 Mot. at 8)). The decision not to test was ineffective, he contended, because there "can be no legitimate strateg[ic] decision not to test the physical evidence for DNA" (*id.*). Judge McKenna denied appellant's requests without a hearing, concluding that even if his allegations were true, they would establish neither the deficiency nor the prejudice needed to support an ineffectiveness claim (20-CO-672 R. 144-47 (First 23-110 Order at 5-8)).

On appeal, this Court remanded for a hearing. First, this Court "conclude[d] that the trial court was premature in concluding that appellant's trial counsel was not deficient" (23-110 MOJ at 9). The Court "well underst[oo]d the trial court's assessment that trial counsel did an able job at trial," as "a review of the trial record shows that counsel

conducted vigorous cross-examination and made arguments . . . urging many reasons why the jury should have reasonable doubt" (*id.* at 6). This Court also recognized that "appellant's trial counsel may have made a not-to-be-second-guessed strategic or tactical decision not to seek DNA testing, and we do not know (and more to the point, the trial court did not know) whether appellant actually asked his counsel to arrange for testing, as appellant's (unverified) motion asserted" (*id.* at 8) (footnote omitted). "But without a hearing at which counsel could explain his rationale and address whether appellant requested that counsel pursue DNA testing, the trial court had no basis for determining whether the non-testing was a strategic decision or an objectively unreasonable omission" (*id.* at 8-9).

As to prejudice, this Court similarly concluded that it could not find a lack of prejudice without a hearing, "at least at the present juncture" (23-110 MOJ at 9). "Appellant's motion and his brief on appeal suggest that at a hearing on his motion, he could present testimony from a DNA expert to the effect that the bloodied victim's DNA could be expected to be on the clothing found on appellant's person or in the nearby closet if appellant was the assailant" (*id.* at 10). Given "the victims' inability to

identify their masked assailant and the poor quality of the video," the Court found that appellant's motion made a "plausible suggestion about how [favorable] DNA testing results could have given the jury reason to doubt that appellant was the masked assailant" (*id.* at 6-7, 9). While appellant had not "offer[ed] specifics about the content of potential expert testimony," this Court found it was appropriate to allow appellant to make such a showing through an evidentiary hearing, "subject to the following":

> As noted, appellant did not submit with his § 23-110 motion an affidavit or declaration to support his assertion that he told his counsel that he wanted DNA testing of the clothing items. In addition, although appellant suggests that a DNA expert could give the testimony he envisions about whether the victims' DNA could be expected to be present on clothing worn by the assailant, we agree with the government that it seems more likely that the relevant expertise would have to come from a blood-splatter expert rather than (or in addition to) a DNA expert. We also agree with the government that appellant has not specifically addressed what trial fact-evidence an expert would rely on for the assumption that Ms. Roberts's blood spattered in a way that would have left traces on the assailant's clothing. We therefore think it may be appropriate for the trial court, before determining whether to set a hearing date, to afford appellant an opportunity to supplement his motion. (*Id.* at 10 (quotation marks omitted).)

Evidentiary Hearing on Remand

At the evidentiary hearing on remand, Judge McKenna heard from appellant, trial counsel, and a DNA expert. Appellant testified that he specifically told trial counsel that he wanted DNA testing: "I wanted my clothes tested for DNA. He failed to do so. He brushed me off and gave me no explanation." (2/14/24 Tr. 58.) Appellant said he made this request "more than once" before trial, but trial counsel "did what he wanted to do" and never discussed DNA testing with appellant (*id.* at 59-60, 76). Appellant also claimed that, before withdrawing from the case, his prior attorney had planned to obtain DNA testing on the clothes (*id.* at 64-65). When pressed as to why he wanted that DNA testing, appellant said it was "[f]or my actual innocence" and "[a] different outcome of the case" (*id.* at 58). Appellant agreed, however, with trial counsel's overall decision to pursue a misidentification defense (*id.* at 61-66). He also acknowledged that he had never publicly protested trial counsel's failure to pursue DNA testing before filing his § 23-110 motion, despite many opportunities to do so, including a pretrial hearing where appellant voiced other complaints about trial counsel (*id.* at 67-76).

Trial counsel (James Williams) gave a different account. Trial counsel had retired by the time of the evidentiary hearing, but at the time that he had represented appellant, he had been practicing in Superior Court for more than three decades, including trying hundreds of criminal cases (2/14/24 Tr. 89-92, 109). He was appellant's third attorney in his case and had been appointed to handle four of appellant's pending felony cases (*id.* at 92-93). In this case, counsel was appointed only one week before the case was scheduled to go to trial, meaning that prior counsel had already handled many pretrial issues like discovery requests (*id.* at 94-95). When counsel inherited the case, appellant had already rejected the government's plea offer (*id.* at 96-97). Trial counsel discussed the case with his predecessor and reviewed the file, but prior counsel never mentioned potential defense DNA testing (*id.* at 96-97, 108-11). The trial was continued to allow counsel to get up to speed (*id.* at 108).

In preparing for trial, counsel spoke to appellant several times about his case and the expected evidence (2/14/24 Tr. 95-96). Appellant "didn't seem to forcefully engage" in conversations about the case and "was a rather passive listener," though he seemed to understand their conversations (*id.* at 96, 106). Trial counsel planned to argue that the

government could not prove the correct identification of the assailant beyond a reasonable doubt, and appellant appeared to be on board with that defense (*id.* at 97-98, 105, 111). As to the DNA evidence, trial counsel was "absolutely certain" that he had talked with appellant about the lack of forensic evidence, including that "there were no fingerprints putting him on the scene. There was no DNA evidence tying him to the scene." (2/14/24 Tr. 96, 115-16.) Counsel planned to use this lack of forensic evidence affirmatively, as it "fed into the misidentification" and was "[s]omething to point out to the jury" in arguing that the government had not met its burden of proof (*id.* at 98). Appellant never asked counsel to obtain DNA testing on certain pieces of evidence (*id.* at 99).

Had appellant requested DNA testing, trial counsel "would have discouraged him pretty strongly" from pursuing it, however, given that "the absence of evidence mitigates in his favor":

> [I]t would have been pretty foolhardy, in my estimation, to try to pursue, because it would have required asking the government, who had not done any DNA testing, who had not taken a swab from my client, who had not taken a swab from the complaining witness, and there were no—as far as I could tell from the crime scene reports and everything, there was no DNA that had been collected at all. If I alerted them to the fact that I wanted to be provided with the clothes that were taken from the closet that [appellant] now thinks might have had DNA on them, and I also wanted a swab taken from Ms.

> Roberts, [the government] probably would have pursued DNA testing . . . on [their] own. (2/14/24 Tr. 99, 103.)

If the government discovered DNA linking appellant to the crime, it would have been "hard to come up with a strategy to explain that. . . . I'm not sure how you defend that case." (*Id.* at 104.) And counsel feared that the government's DNA testing "very well could have been incriminating" (2/14/24 Tr. 104). Trial counsel was "not confident that [appellant] had nothing to do with the offense" (*id.* at 105). In addition to the evidence of guilt introduced at trial, appellant had been on GPS monitoring at the time, and "[t]hat monitor had placed him at the scene of the offense, at the time the offense occurred" (*id.* at 98; see also 16-CF-1190 R. 48 (Gerstein Aff. at 4)). Further, when counsel talked to appellant about the case, appellant "never indicated . . . affirmatively that he hadn't participated in the event" and instead said he "didn't understand why he would possibly have been arrested, which is not really a strong denial, either" (2/14/24 Tr. 100). At one meeting, appellant and counsel also discussed tracking down a potential witness ("Ant"), who was mentioned in the police reports, and appellant said he would try to get more information (*id.* at 100-01). But at the next meeting, appellant "told [counsel] not to pursue that," which counsel viewed as "a bit of a tell": "if

he didn't want me talking to somebody, obviously, hiding something, . . . it was probably incriminatory" (*id.* at 101-02).

Moreover, counsel doubted the benefits of performing DNA testing on the clothing that appellant was wearing when he was arrested (or the sweatshirt also recovered from the arrest scene, which was not the crime scene). Even if testing failed to detect appellant's DNA on the clothing, that would not have especially helped the defense argument, given that clothing—especially outerwear—would not necessarily have the wearer's DNA (see 2/14/24 Tr. 112-13). And although finding the victim's blood on the clothing would have hurt the defense, *failing* to find the blood on the clothing would not necessarily have helped:

> There's this principle—and I learned about this in a trial the one time that I did put on a blood spatter expert—that absence of evidence is not evidence of absence, which means that the fact that there's no fingerprint or DNA, even in circumstances where that would be expected, does not mean that the accused was not present at the scene.
>
> I learned that in a homicide case where the shooting occurred close enough for—I think it's called stippling, so that the gun barrel is within, like, 18 inches of the decedent, and pictures taken of where the decedent's body was recovered indicated the blood had—I want to say splattered, but I guess they call it spattered about 3 or 4 feet out from where that happened. My client had been arrested within an hour of the shooting and had no blood on his clothing.

> So I thought my blood spatter expert, who did testify that one would have expected, if the blood was that far out on the floor, it would have been on the assailant's person, with the stippling and everything like that. The Government put on an expert who testified as to the reasons why it would be possible that that blood spatter would not get on the defendant.
>
> In talking to the jurors afterwards . . . the prosecutor and I were asking about the blood spatter issue, and all the jurors said, You know, we just disregarded it. You had one guy saying one thing and one guy saying another. It didn't move the needle. (2/14/24 Tr. 113-14.)

Thus, based on his experience, trial counsel believed that the defense was "better off not having any forensic evidence," and, in fact, the lack of testing "was something that augured in [appellant's] favor," a belief that counsel believed appellant "shared" (2/14/24 Tr. 105). Still, if appellant had persisted in requesting DNA testing, trial counsel would have felt duty-bound to pursue it under the IPA (*id.* at 99, 118-20). *See* D.C. Code § 22-4132 (defendant charged with crime of violence must be informed of right to conduct DNA testing prior to trial). In conversations with trial counsel, appellant never mentioned DNA, let alone expressed concern about the lack of testing (2/14/24 Tr. 105-06). Nor did appellant voice other dissatisfaction with the defense or counsel's performance during trial (*id.* at 106-07).

Trial counsel agreed that, based on the docket, it appeared that no IPA hearing had been held under D.C. Code § 22-4132 to obtain a formal waiver of appellant's right to DNA testing, and counsel never recalled discussing IPA rights with appellant (2/14/24 Tr. 107; see also *id.* at 13-18). But counsel's appointment had come a week before trial, months after the IPA hearing should have been conducted (*id.* at 107, 120).

Finally, forensic biology specialist Arthur Young, who worked at a DNA testing lab, testified as an expert in forensic biology and analysis of forensic DNA (2/14/25 Tr. 19-35).[2] In preparing for his testimony, Young had only reviewed court documents from the § 23-110 litigation: Judge McKenna's original decision, this Court's remand order, the appellate briefing, and some of the trial-court § 23-110 pleadings (*id.* at 42-43,

[2] The government objected to qualifying Young as an expert. Young had been fired from two previous laboratories where he worked, before he started his own company (2/14/25 Tr. 26-28). And two New York courts had declined to qualify Young as an expert in other cases, with one court expressing concern about Young's misleading description of his college major (his most advanced educational degree) (*id.* at 24-25). But Judge McKenna cut off further voir dire on Young's qualifications, given the "limited scope of his testimony," emphasizing that Young was "just going to be testifying as to whether or not it is reasonable to believe that DNA could have been recovered from the items of clothing that we've talked about," and he was "not going to be testifying to his analysis of any DNA test results" (*id.* at 29-35).

50-52). Young had not reviewed the crime-scene photographs, although he agreed that those would provide more "objective" evidence (*id.* at 43, 50-52). Nor had he reviewed the trial transcripts or the police paperwork (*id.* at 43-45). In total, he spent "about four hours, maybe five" on his expert affidavit (*id.* at 46).

The defense announced that Young would not testify that DNA "would have likely been recovered, [but] that it could have been recovered" (2/14/24 Tr. 31). Consistent with that representation, Young testified that "[i]f the [identified] items had been used in the attack, then it would be fairly reasonable to expect that there *could be* blood that was transferred to the perpetrator onto those particular items" (*id.* at 40) (emphasis added). He had not examined the clothing, however, so he could not say whether there was blood on these items (*id.* at 53-54). Young added that he believed that a crime lab would have been able to find appellant's DNA on the sweatshirt if he had worn it (*id.* at 41). Young acknowledged, however, that DNA recovery would be less likely if the person had worn another shirt underneath the sweatshirt, and studies show that people often leave no detectable DNA on items that they have handled (*id.* at 48-50; see also *id.* at 38-39).

Trial Court's Ruling on Remand

After hearing further argument from the parties (2/26/24 Tr. 4-34), Judge McKenna denied the § 23-110 and IPA motions, concluding that appellant had failed to establish deficient performance by trial counsel.

Factually, Judge McKenna found that appellant "never requested trial counsel to arrange for DNA testing of the items of clothing at issue" (2/26/24 Tr. 40). On this point, the court credited trial counsel over appellant, pointing to: (a) the witnesses' demeanors; (b) the lack of contemporaneous records supporting appellant's account; (c) appellant's inability during the evidentiary hearing to offer specific details about how and why he allegedly requested DNA testing; (d) trial counsel's concrete and credible testimony about his approach to the case, and how he would have reacted to a request for DNA testing, which undermined appellant's assertion that trial counsel "simply blew him off"; and (e) the testimonial motivation of each witness, given that appellant was trying to get out of jail, whereas trial counsel was now retired and had no incentive to curry favor with the court (*id.* at 40-46).

Further, Judge McKenna concluded that trial counsel had made a "reasoned" and "sound" "strategic decision not to seek DNA testing of these items of evidence":

> [Trial counsel] testified to his thought process that as the defendant's lawyer, he believed that, in his own words, it would have been foolhardy to pursue testing because of the risk that such a request could trigger the Government to conduct its own testing, potentially resulting in further incriminating evidence against [appellant] that could not have been effectively attacked at trial, thus substantially weakening, if not destroying, the misidentification defense on behalf of [appellant]. (2/26/24 Tr. 40, 46.)

Given that "there was otherwise no visible blood on any of the items of clothing at issue that would have supported the Government's theory that it was [appellant] who had engaged in a bloody struggle with one of the victims," DNA testing could have upended an otherwise strong defense misidentification claim (*id.* at 46-47). Indeed, in trial counsel's view, "the absence of such forensic evidence, in fact, weighed in [appellant's] favor" (*id.* at 44). Because counsel's strategy was reasonable, appellant "ha[d] not met his burden to demonstrate deficient performance [by] trial counsel" (*id.* at 47).

"[I]n an effort to avoid yet a further remand," Judge McKenna also "briefly address[ed]" the prejudice prong of the ineffectiveness inquiry

(2/26/24 Tr. 47-48). While recognizing that appellant cannot "state with certainty what DNA testing results would have demonstrated in the absence of such testing," the court concluded that *if* "DNA testing excluded the defendant as a contributor to any DNA on the hoodie or if such testing detected no evidence of the victim's DNA on the hoodie, shoes or pants, . . . this could have created a reasonable probability of a different outcome at trial" (*id.*).

Judge McKenna rejected (see 2/26/24 Tr. 36-39) a separate theory for ineffectiveness that she had raised, sua sponte, after the evidentiary hearing: that the failure to ensure that an IPA inquiry was conducted might itself constitute ineffectiveness (2/14/24 Tr. 124-25). Appellant conceded that the lack of an IPA hearing would not independently constitute ineffective assistance by his trial counsel (2/26/24 Tr. 5-6, 16), and Judge McKenna agreed (*id.* at 36-37). The trial judge (not counsel) had responsibility for ensuring that the IPA inquiry was conducted, particularly in the "unique factual circumstances surrounding [counsel's] appointment" (*id.* at 38-39). "[W]hile it is unfortunate and regrettable that the trial judge in this case failed to ensure that the IPA inquiry was conducted," that failure did not render counsel ineffective (*id.*).

SUMMARY OF ARGUMENT

At the evidentiary hearing, appellant failed to establish that his lawyer rendered ineffective assistance by deciding to forego DNA testing of evidence recovered at the time of arrest.

As to deficiency, the motions court found that appellant had not asked counsel to pursue DNA testing, and on appeal, appellant does not challenge that credibility-based finding. Moreover, the trial court reasonably credited trial counsel's persuasive explanation for his strategic decision to forgo DNA testing. The lack of DNA testing allowed the defense to argue that the government's failure to test created reasonable doubt, while avoiding any risk of incriminating appellant.

As to prejudice, appellant did not show that DNA evidence would have created a reasonable probability of a different outcome. Appellant sponsored an expert who based his opinion on the trial testimony that this Court already deemed insufficient and who did not address the predicate factual questions concerning blood spatter that this Court had identified in remanding the case. Indeed, the expert's testimony was far weaker than the defense proffer in the prior appeal. In any event, without

knowing the actual results of the DNA testing—which might still inculpate appellant—there can be no showing of prejudice.

Appellant's alternative theory fares no better. As appellant rightly conceded below, under this Court's case law, counsel's failure to secure an IPA inquiry does not independently constitute ineffectiveness meriting reversal of a long-settled conviction.

ARGUMENT

I. Appellant Failed to Establish that Counsel Rendered Ineffective Assistance with Respect to DNA Testing.

A. Standard of Review and Applicable Legal Principles

To establish ineffective assistance of counsel, a defendant must show both that (1) counsel was constitutionally deficient, meaning that "counsel's representation fell below an objective standard of reasonableness," and (2) the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). In evaluating claims of deficiency, "[j]udicial scrutiny of counsel's performance must be highly deferential, and a court

must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Turner v. United States*, 166 A.3d 949, 953 (D.C. 2017) (quotation marks omitted). To establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 689.

"Both prongs of an ineffective assistance claim are mixed questions of law and fact." *Dugger v. United States*, 295 A.3d 1102, 1111 (D.C. 2023). On appeal, this Court "defer[s] to the trial court's factual determinations unless they are unsupported by the record, [but] its ultimate deficiency and prejudice determinations are legal in nature and are reviewed de novo." *Id.*

"The mandate of an appeals court precludes the trial court on remand from reconsidering matters which were either expressly or implicitly disposed of upon appeal." *Willis v. United States*, 692 A.2d 1380, 1382 (D.C. 1997) (cleaned up). Further, the "law of the case precludes reopening questions resolved by an earlier appeal in the same case." *Thompson v. Armstrong*, 134 A.3d 305, 309 (D.C. 2016) (quotation marks omitted); *see also, e.g.*, *Campbell v. United States*, 224 A.3d 205,

211 n.2 (D.C. 2020); *Graham v. United States*, 895 A.2d 305, 308 n.5 (D.C. 2006); *Willis*, 692 A.2d at 1383.

B. The Record Shows that Counsel's Performance Was Not Deficient.

Appellant failed to establish that his trial counsel rendered deficient performance. This Court remanded for an evidentiary hearing to determine whether counsel's failure to seek DNA testing was a "a not-to-be-second-guessed strategic or tactical decision not to seek DNA testing," or was instead an "objectively unreasonable omission" that violated appellant's express request for testing (as his motion asserted) (23-110 MOJ at 8-9 (citing *Brown v. United States*, 934 A.2d 930, 943 (D.C. 2007); *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996)).

The hearing provided the answer: experienced counsel's decision not to seek DNA testing was a "sound" and "reasonable" strategic decision (2/26/24 Tr. 40, 46), that is "not-to-be-second-guessed" by courts (23-110 MOJ at 8). *See Strickland*, 466 U.S. at 690-91 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that

reasonable professional judgments support the limitations on investigation").

Specifically, Judge McKenna found that appellant "never requested trial counsel to arrange for DNA testing of the items of clothing at issue" (2/26/24 Tr. 40). Appellant does not challenge this credibility-rooted factual finding on appeal (see Appellant's Brief (Br.) 7 & n.1). *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Without a request from the client, trial counsel reasonably decided that the defense was "better off not having any forensic evidence," and indeed judged that DNA testing would have been "pretty foolhardy" (2/14/24 Tr. 103, 105). The absence of DNA testing helped the defense, in counsel's view, whereas pursuing DNA testing would have brought little potential benefit and carried substantial risks.

Counsel reasonably assessed that the lack of testing "augured in [appellant's] favor" at trial (2/14/24 Tr. 105; see *id.* at 96, 115-16). Indeed, at closing arguments, counsel contended that the lack of DNA testing exposed a bungled investigation that should itself give the jury reasonable doubt:

> The investigation in this case by the crime scene folks was Keystone Cop worthy. You had the crime scene investigator who went out and did the DNA swabbing. Didn't do any fingerprint testing. And he said, well, I can't do the same on the same surface. But you know what you can do? You can say I'll try for DNA over here and I'll dust over here for fingerprints because that might give me a better picture.
>
> And then to top off leaving the fingerprints analysis out of this, doesn't even bother to get comparison DNA from the person who's arrested, Robert Williams, to see if any of the DNA that—the biological material that he recovered from the scene of the crime matches Robert Williams; or, we know this woman, Ms. Roberts . . . . [T]hey could have gotten a buccal swab from her. And if that gun's recovered, they'd be able to say, well, this is her blood on the gun. And if the gun's recovered in his pocket, government's got a pretty tight case. But they don't have it, do they?
>
> So you have no forensic evidence linking Mr. Williams to the crime. (8/23/16 Tr. 238-39.)

Counsel also reasonably suspected that defense DNA testing would have "probably" led the government to test (2/14/24 Tr. 103), thereby precluding counsel's ability to make a reasonable-doubt argument based on shoddy government investigation. Nor did the case call out for defense DNA testing. Counsel already had a reasonable argument for why the jury should doubt that appellant had worn the black-hooded sweatshirt hanging in the closet at appellant's arrest:

> Investigator Sakulich conceded that [appellant] doesn't live there and that the hoody was recovered hanging outside of a closet with other garments . . . . Now, I don't know about you,

> but my garments, I hang in my closet back in my house. When I go to visit somebody at their place, I generally don't hang my clothing inside their closet. If I'm visiting somebody, I'm pretty much of a slob so I just put it in back of a chair or something. But I don't hang my clothes inside their closets. (8/23/16 Tr. 240.)

By contrast, in counsel's view, the proposed DNA testing carried little potential upside. Because the clothing had all been recovered at the scene of the arrest (instead of the scene of the crime), this was not a situation where DNA testing could potentially reveal an alternative suspect. Instead, the best possible result for appellant would be if DNA testing failed to detect the victim's blood on the clothing (or failed to detect appellant's DNA on the hoodie). But that would prove little (see 2/14/24 Tr. 112-14). As counsel explained, the "absence of evidence is not evidence of absence, which means that the fact that there's no fingerprint or DNA, even in circumstances where that would be expected, does not mean that the accused was not present at the scene" (*id.*). *See Crocker v. United States*, 253 A.3d 146, 158 & n.36 (D.C. 2021) ("[f]or a variety of reasons, . . . fingerprints and DNA often are not recoverable from objects that people certainly have handled"). Indeed, when counsel had obtained similar results in a murder trial, defense and government splatter experts had given competing opinions on whether the lack of blood on the

defendant's clothing was probative of guilt, and the jury ultimately disregarded the blood-splatter issue entirely (*id.*).

On the other side of the ledger, the proposed DNA testing risked catastrophic harm to appellant's defense. Finding the victim's DNA on appellant's clothing would prove his involvement in the crime (2/14/24 Tr. 104), transforming a seemingly winnable case about mistaken identity into a clear conviction. *See Davis v. United States*, 641 A.2d 484, 494 (D.C. 1994) ("While tests performed on the missing sex kit might have exculpated appellant, it is equally plausible that the test results might have sealed the government's case against appellant, or produced no conclusive evidence whatsoever."). Further, counsel had good reason to fear that DNA testing "very well could have been incriminating," given the evidence presented at trial, the GPS data putting appellant at the crime scene, and appellant's own evasive statements that seemed incriminatory to experienced counsel (2/14/24 Tr. 98, 100-02, 104-05).

Given the upsides to trying the case without DNA testing, the limited benefits of "good" DNA results, and the devastating risks of "bad" DNA results, counsel's pretrial decision to forgo DNA testing is the sort of strategic litigation decision that is "entitled to a strong presumption of

reasonableness." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (quotation marks omitted). Indeed, the Supreme Court upheld a similar strategic decision in *Harrington v. Richter*, 562 U.S. 86 (2011). There, Richter contended that his counsel should have pursued serology testing and expert testimony on a pool of blood found at the murder scene, where favorable testing could have corroborated the defendant's version of events. *See id.* at 108. But the Supreme Court disagreed, emphasizing the "serious risks" of testing: "If serological analysis or other forensic evidence demonstrated that the blood came from Johnson alone, Richter's story would be exposed as an invention. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Id.* The Supreme Court also acknowledged defense counsel's legitimate concern that "making a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on the blood pool's origins and composition; and once matters proceeded on this course, there was a serious risk that expert evidence could destroy Richter's case." *Id.* And "[e]ven apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from

whether Johnson was telling the truth, or transform the case into a battle of the experts." *Id.* at 108-09. Notably, the rationale for testing in appellant's case is even weaker than it was in *Richter*, because the lack of testing itself offered an argument for reasonable doubt that the defense vigorously pursued (see 8/23/16 Tr. 238-39). *See generally Richter*, 562 U.S. at 109 ("To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.").[3]

Employing reasoning similar to *Richter*, many circuits have upheld similar decisions not to test for DNA as reasonable strategic choices. *See, e.g.*, *United States v. Roberts*, 417 F. App'x 812, 823 (10th Cir. 2011)

[3] The reasoning of the lone decision that Williams cites (at 16-17)—*State v. J.A.L.*, 262 P.3d 1 (Utah 2011)—is directly contrary to *Richter*, which *J.A.L.* does not cite. The Utah court in *J.A.L.* saw "little to lose" in counsel asking the state crime lab to test a rape kit, and the court rejected the notion "that trial counsel reasonably could have concluded that asking the state crime lab to test the [rape] kit would have undermined Defendant's consent defense because if the results came back positive it would have constituted irrefutable proof that J.A.L. lied about not having oral sex." 262 P.3d at 9. But *Richter* reversed the Ninth Circuit for similar reasoning, explaining that when forensic testing could "expose[ ]" the defendant's story "as an invention," avoiding that "serious risk" of adverse results rendered the choice to forgo testing reasonable and not deficient. 562 U.S. at 108.

(unpublished) ("Roberts' counsel made an informed, strategic decision that further DNA testing posed more of a risk than being able to argue the absence of such evidence and we will not second-guess that choice."); *see also, e.g.*, *Skinner v. Quarterman*, 528 F.3d 336, 341 (5th Cir. 2008); *Stewart v. Att'y Gen.*, No. 23-1572, 2023 WL 10554917, at *1 (3d Cir. July 14, 2023) (unpublished); *Armstrong v. Lumpkin*, No. 21-40130, 2022 WL 2867163, at *7 (5th Cir. July 21, 2022) (unpublished); *Smith v. Chapdelaine*, 774 F. App'x 468, 476 (10th Cir. 2019) (unpublished); *Brown v. United States*, No. 18-5810, 2018 WL 11301388, at *2 (6th Cir. Dec. 6, 2018) (unpublished).

Appellant nonetheless claims (at 16) that his lawyer "simply decline[d] a path of investigation based on the belief that the client is guilty, where the client indicate[d] to the contrary." But counsel never testified that appellant claimed to be innocent or that counsel believed his client to be guilty:

> THE WITNESS: He had never indicated to me—
>
> MR. WINOGRAD: That's correct, Your Honor.
>
> THE WITNESS: —affirmatively that he hadn't participated in the event. I believe he, when I asked him open-ended questions when we first met to discuss it, didn't understand

> why he would possibly have been arrested, which is not really a strong denial, either. (2/14/24 Tr. 100.)

In other words, appellant did *not* affirmatively deny participating in the event. Appellant's bewilderment at being *arrested*—in a case involving a masked intruder—certainly was not a proclamation of innocence. Thus, counsel could reasonably interpret appellant's statement as "not really a strong denial."

In any event, even if appellant had clearly denied participation in the offense, strategic decisionmaking requires a defense attorney "to question the truth of his client's [exculpatory] account" and consider the "serious risk that expert evidence could destroy [the defendant's] case." *Richter*, 562 U.S. at 108. *Strickland* itself recognized that a defendant may give "counsel reason to believe that pursuing certain investigations would be . . . harmful." 466 U.S. at 691. That was the case here, where the full evidence—including appellant's "own statements [and] actions," *id.*—made counsel fear that DNA testing "very well could have been incriminating" (2/14/24 Tr. 104). Therefore, even if appellant had

proclaimed his innocence, counsel could reasonably decline to pursue forensic testing as a strategic choice. *See Richter*, 562 U.S. at 108-09.[4]

Counsel also did not forgo DNA testing because he judged appellant to be certainly guilty (cf. Br. 8-13, 15-21). Rather, counsel permissibly thought the risks of DNA testing outweighed the speculative benefits. Judge McKenna correctly recognized that strategic decisionmaking was "sound" and "reasonable" (2/26/24 Tr. 40, 46). Because an "appellate court will not second-guess trial counsel's strategic choices," *Gaulden v. United States*, 239 A.3d 592, 600 (D.C. 2020) (citation omitted), Judge McKenna rightly concluded that appellant failed to prove deficiency.

[4] A defense attorney cannot *concede* his client's guilt at trial over a defendant's objection. *See McCoy v. Louisiana*, 584 U.S. 414 (2018). But "[t]rial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Id.* at 422 (cleaned up). An attorney does not need his client's approval to make these sorts of strategic legal decisions about how best to secure an acquittal (cf. Br. 11-12, 19). And as *Richter* illustrates, in making decisions about whether to pursue forensic analysis, counsel may consider the possibility that his client is guilty.

C. The Record Shows that the Lack of DNA Testing Caused No Prejudice.

Appellant also failed to establish prejudice. On remand, appellant repeatedly failed to supply the sort of expert testimony that this Court said he was likely needed.

This Court's prior opinion explained that, "although appellant suggests that a DNA expert could give the testimony he envisions about whether the victims' DNA could be expected to be present on clothing worn by the assailant, we agree with the government that it seems more likely that the relevant expertise would have to come from a blood-splatter expert rather than (or in addition to) a DNA expert" (23-110 MOJ at 10). Yet on remand, appellant persisted in offering only a DNA expert, whose testimony (understandably) focused almost entirely on whether DNA could be recovered if blood had splattered on the clothing (*id.* at 35-40). Appellant failed, however, to establish the likelihood that the crime would have left blood on the assailant's clothing in the first place (see *id.* at 40, 50-51).

Nor did the expert have the necessary factual basis for his testimony. In the previous appeal, this Court "agree[d] with the government that appellant has not specifically addressed what trial fact-

evidence an expert would rely on for the assumption that Ms. Roberts's blood spattered in a way that would have left traces on the assailant's clothing" (23-110 MOJ at 10). However, on remand, the expert reviewed only the pleadings that excerpted the same trial testimony that this Court had already found insufficient (see 2/14/24 Tr. 42-45). Indeed, the expert here examined far *less* than the parties and this Court had considered in the prior appeal, basing his decision only on the § 23-110 pleadings, without examining the underlying trial testimony or crime-scene photos, and spending at most five hours with the case (2/14/24 Tr. 42-45, 50-51, 54).

Most crucially, the expert did not offer the testimony that the § 23-110 motion proffered and that provided the basis for the remand: "that the bloodied victim's DNA could be *expected* to be on the clothing . . . if appellant was the assailant" (23-110 MOJ at 10) (emphasis added). Instead, at the hearing below, the expert asserted only that the victim's DNA "*could have* been recovered" from the assailant's clothing, not that DNA "would have *likely* been recovered" (2/14/24 Tr. 31) (emphasis added); see also *id.* at 40 ("it would be fairly reasonable to expect that there could be blood that was transferred to the perpetrator onto those

particular items"). That diluted testimony undercut any showing of prejudice. If the assailant's clothing *would likely* have the victim's blood on it, the failure to detect the victim's blood on appellant's clothing would be somewhat exculpatory. But if blood on the assailant's clothing was merely *possible*, the failure to detect blood would prove little. Put another way, if (as the expert's testimony suggested) the failure to detect the victim's blood was fully consistent with the government's case—and, indeed, the expected outcome of forensic testing—that result would not "undermine confidence" in the verdict. *Strickland*, 466 U.S. at 694.

The motions court did not focus on the expert-related guidance in this Court's remand order about the likely need for a blood-spatter expert to establish prejudice. Instead, the motions court relied primarily on "common sense" that DNA results excluding appellant as a contributor to DNA on the hooded sweatshirt or failing to detect the victim's DNA on his clothing "could have" created a reasonable probability of a different verdict (2/26/24 Tr. 48). *But cf.* 23-110 Order at 5, 9 (explaining that prejudice requires showing that counsel's error actually did create—not "could have" created—a "reasonable probability of a different outcome"). But the motions court and this Court are both bound by this Court's

rulings in the prior appeal with respect to the need for some foundational expert testimony about the likelihood of locating blood spatter or other material likely to contain DNA on the clothing. *See Willis*, 692 A.2d at 1382-83. Particularly given the expert's questionable qualifications (see *supra* note 2), his testimony was insufficient to establish the required "reasonable probability" that favorable DNA testing results would have led to a different verdict.

In any event, a finding of prejudice here requires knowing the results of the DNA testing. *See, e.g., Robinson v. United States,* 797 A.2d 698, 708 (D.C. 2002) (no showing of prejudice where defendant "never submitted any affidavit, or even an unsworn statement, summarizing the expected testimony of such an expert"); *Tafoya v. Tansy,* 9 F. App'x 862, 871 (10th Cir. 2001) (defendant did not show prejudice from counsel's failure to present DNA and serology experts where the record "does not indicate what the experts' testimony would have been, and speculation does not satisfy his obligation to demonstrate a reasonable probability that the outcome would have been different"); *Edwards v. Miller*, 756 F. App'x 680, 681 (9th Cir. 2018) ("Edwards cannot establish prejudice

because his assertion that an expert could have established that the evidence was cross-contaminated is speculative").

Indeed, the very premise of appellant's request for post-conviction DNA testing is that he has a right to testing because favorable results "*would* entitle [him] to relief under § 23-110." D.C. Code § 22-4133(a)(3)(C) (emphasis added). *See also* 20-CO-672 R. 116-18 (IPA App.). Given the strong evidence of appellant's guilt, DNA testing is far more likely to prove inculpatory than exculpatory. And obviously if testing inculpates appellant, counsel's failure to test before trial caused no prejudice. Likewise, if testing proves inconclusive, appellant cannot show that the lack of testing was prejudicial. Thus, even assuming that appellant could show that counsel's strategic decision was deficient under *Strickland*, appellant at most would be entitled to another remand to pursue DNA testing.

II. Appellant Correctly Conceded Below that the Lack of IPA Inquiry by the Court Does Not Itself Constitute Ineffectiveness.

Finally, appellant failed to establish that counsel was ineffective in failing to ensure that the trial court conducted an IPA inquiry under D.C. Code § 22-4132 (cf. Br. 21-25). Appellant had never suggested such a

theory for ineffectiveness in his pleadings. And after Judge McKenna floated the legal theory at the close of the evidentiary hearing (see 2/14/24 Tr. 124-25), appellant disclaimed it, "agree[ing] that [*Teoume-Lessane v. United States*, 931 A.2d 478 (D.C. 2007),] says that there is no standalone right to overturn a conviction and get a new trial simply because an IPA hearing was not conducted" (2/26/24 Tr. 16; see also *id.* at 5-6). Instead, appellant contended, the lack of IPA inquiry supported his larger argument that counsel had failed to consider DNA testing (*id.*).

Because appellant at the remand proceedings intentionally relinquished the theory that the lack of IPA inquiry itself constituted ineffective assistance of counsel, he has waived the theory, and he cannot raise it on appeal. *See United States v. Olano*, 507 U.S. 725, 733-34 (1993); *Poth v. United States*, 150 A.3d 784, 789 n.8 (D.C. 2016). Moreover, even if appellant were deemed merely to have forfeited the claim, this Court has questioned whether the plain-error standard applies in the unique context of § 23-110 proceedings. *See Thompson v. United States*, 322 A.3d 509, 514-15 (D.C. 2024).

In any event, Judge McKenna correctly explained that the lack of IPA inquiry did not itself render trial counsel ineffective. As to deficiency,

it was the trial judge—not trial counsel—who was "ultimately responsible for seeing to it that the required information [was] given to a defendant in open court." *Veney v. United States*, 936 A.2d 811, 822-23 (D.C. 2007), *as modified by* 936 A.2d 809 (D.C. 2007). Moreover, given trial counsel's appointment just before the scheduled trial date, he acted "reasonabl[y] in assuming that the IPA inquiry had predated his appointment" (2/14/24 Tr. 38-39). To the extent that any attorney bore blame for the lack of IPA inquiry, it was prior counsel, who was not the target of the ineffectiveness claim and never testified below.

As to prejudice, this Court has already held that the IPA inquiry is a "procedural, rather than substantive," right that aims to ensure that any DNA testing requests are made "in a timely fashion." *Teoume-Lessane*, 931 A.2d at 489. On direct appeal, "[t]he IPA does not require reversal as a matter of law, regardless of a defendant's failure to object at trial, when a trial judge has failed to comply with the pre-trial notification requirements." *Id.* As appellant conceded, the same rule follows in postconviction proceedings: the failure to conduct an IPA inquiry cannot alone justify granting postconviction relief. Nor was there any credible evidence showing that appellant would have pursued DNA

testing if informed of his IPA rights. Judge McKenna discredited appellant's testimony that he had requested pretrial DNA testing (2/26/24 Tr. 40-46). And he offered no other evidence suggesting that he would have invoked his IPA rights—particularly over the advice of trial counsel, who "would have discouraged him pretty strongly" from pursuing DNA testing (2/14/24 Tr. 99, 103-04, 118-20). Finally, a finding of prejudice would again require conducting the DNA testing and obtaining exculpatory results. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (to show counsel was ineffective in failing to file motion, defendant must prove both that motion "is meritorious and that there is a reasonable probability that the verdict would have been different" if the motion were granted). Because appellant has failed to show either deficiency or prejudice, the ineffectiveness claim doubly fails.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Tom Engle, on this 14th day of May, 2025.

/s/
ERIC HANSFORD
Assistant United States Attorney