IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CO-1044

JAMES EARL BLACKMON

Appellant,

v.

UNITED STATES

Appellee.

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

BRIEF FOR APPELLANT

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Superior Court No. 2008 CF1 021355

DISCLOSURE STATEMENT

Appellant, James Earl Blackmon was represented in Superior Court at trial by Public Defender Service attorneys Jason Tulley and Jason Downs and in this collateral matter by Rebecca Bloch and Janai Reed. He is represented on appeal by Mindy Daniels. Appellee, the United States, was represented by Assistant U.S. Attorneys Pamela Satterfield and Joseph Drummy and on appeal by Chrisellen R. Kolb. The Order appealed from was issued by the Honorable Jennifer Anderson.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

QUESTIONS PRESENTED

I. Did The Court Err By Failing To Consider Mr. Blackmon's Request For Retesting Of DNA Biological Material As Not Before The Court?

II. Was Ms. Bloch Ineffective And Did She Have A Conflict of Interest?

III. Did The Court Abused Its Discretion By Failing To *Sua Sponte* Hold A *Monroe-Farrell* Hearing Before Finding Mr. Blackmon Failed To Satisfy the Post-Conviction DNA Testing Statute By Not Setting Forth The Reason The Requested DNA Testing Was Not Previously Obtained?

IV. Should The Court's Order Be Vacated in Full?

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STATEMENT OF THE CASE AND JURISDICTION

James Earl Blackmon was convicted in 2009 of crimes of violence and sentenced to an aggregate term of 34 years incarceration. The District of Columbia Court of Appeals reversed his convictions under the Sixth Amendment right to confrontation on grounds testimony at trial regarding DNA evidence was admitted over his objection through a government witnesses who did not conduct or observe the DNA testing. *Blackmon v. United States*, No. 09-CF-702, Mem. Op. & J. (D.C. April 22, 2013). After a second trial Mr. Blackmon was again sentenced to 34 years and his convictions were affirmed on direct appeal. *Blackmon v. United States*, 146 A.3d 1074 (D.C. 2016). Mr. Blackmon filed an ineffective assistance of counsel motion while his direct appeal was pending which was denied by the trial

court and affirmed on appeal. *Blackmon v. United States*, 215 A.3d 760 (D.C. 2019).

On June 29, 2021 Mr. Blackmon filed *pro se* an Application For DNA Test Pursuant To DC § 22-4133 requesting retesting of biological specimens due to advances in DNA testing (Items 7-10 listed) and testing of items not previously tested by the government or defense but collected at the crime scene (Items 1-6). R. 91-140. [1] The government opposed and after several supplemental pleadings, the court denied Mr. Blackmon's § 22-4133 motion for relief in a written Order issued on December 7, 2023 that is the subject of this appeal. R. 278-87. Under D.C. Code § 22-4133(f), an order denying an application for post-conviction DNA testing "is a final order for purposes of appeal." Mr. Blackmon filed a timely Notice of Appeal on December 12, 2023. R. 288-89. This court appointed undersigned to the appeal.

STATEMENT OF FACTS

Mr. Blackmon was convicted of sexual abuse and related offenses of an adult complainant in her apartment. The complainant did not previously know her attacker he was a stranger, he did not wear a disguise and according to the

[1] "R." refers to the 289-page certified Record on Appeal followed by reference(s) to the PDF electronic page number(s).

government's factual scenario, the attack lasted some time before her attacker finally left her apartment. Notably, the complainant did not identify Mr. Blackmon as her attacker before or during trial. Mr. Blackmon was convicted on DNA evidence alone tested from biological specimens recovered from the complainant (vaginal, rectal, oral).

On June 29, 2021 Mr. Blackmon filed *pro se* an Application For DNA Test Pursuant To DC § 22-4133 stating he was innocent and requesting retesting of the biological specimens due to advances in DNA testing (Items 7-10 listed) and testing of items not previously tested by the government or defense but collected at the crime scene (Items 1-6). R. 91-140. In his *pro se* motion for DNA testing, Mr. Blackmon requested that the DNA evidence used against him at trial be retested (Items 7-10) by specific and improved scientific methods of DNA testing unavailable years ago:

> the new type of DNA testing would have a reasonable probability of providing a more probative result than tests previously conducted and was not previously subjected to DNA testing because it is new evidence as defined in § 22-4131(7)(A), i.e. was not personally known and could not, in the exercise of reasonable diligence, have been personally known to the Applicant at the time of the trial.

R. 91; Appendix "B" Declaration of James Blackmon at 1-3.

Mr. Blackmon specifically requested three different DNA tests, "Autosomal Str. Test . . . DNA testing by True Allele . . . DNA-17." R. 94. Mr. Blackmon stated under penalty of perjury that retesting of items 7-10 he listed and new first testing of items 1-6, the latter in possession of the government but not tested by the government or defense, would prove his innocence. *Id*. at 93-96. The government opposed the application and Mr. Blackmon filed a *pro se* response. *Id*. at 145-79; 180-86. On February 17, 2022, Mr. Blackmon was assigned Rebecca Bloch as counsel to "file a supplemental motion establishing whether there in any valid basis for post-conviction testing." *Id.* at 187.

Ms. Bloch filed a Supplemental Motion and Application for DNA Testing Pursuant to Innocence Protection Act D.C. Code on July 25, 2022. *Id*. at 206. In that motion Ms. Bloch waived Mr. Blackmon's request for retesting of items and set forth reasons for the court to grant testing of previously untested items 1-6. *Id.* at 207-10. On September 23, 2022 the government filed a response in opposition to the supplemental motion. *Id.* at 213-17. On May 17, 2023, Ms. Bloch sought to withdraw, citing her inability due to caseload to further investigate, asked for new counsel and for new counsel to be given an enlargement of time to file a supplement to the § 22-4133 motion. *Id.* at 248. On June 14, 2023 Ms. Bloch filed a Notice of Intent To Withdraw Motion To Withdraw As Counsel of Record. *Id.* at

251. Ms. Bloch continued to represent Mr. Blackmon and on July 3, 2023, stated that she needed an additional extension of time to reply to government's opposition. *Id*. at 252.

On July 10, 2023 the court granted an additional 30 days to file a reply to the government's opposition and that the court would then address the merits of the motions "with the docketed filings listed above." *Id.* at 256. On August 9, 2023 Ms. Bloch filed a reply to the government's opposition for new testing of Items 1-6. *Id*. at 259-63. She withdrew, "without prejudice the request for retesting of Items 7-10 while Mr. Blackmon works with more specialized counsel on that issue. Since the initial testing was completed, new technologies have allowed for more sensitive separation of otherwise undetectable alleles and can exclude contributors and discern mixtures more accurately." *Id*. at 260.

On September 15, 2023 Ms. Bloch withdrew as counsel and asked for appointment of alternative counsel for him to pursue his motion under § 22-4133 because she had been offered at position of employment with the Public Defender Service that was to begin at the end of the month. *Id.* at 264. She added, "[b]riefing is now complete with respect to testing of items 1-6; Mr. Blackmon is seeking leave to file pleadings on the retesting of items 7-9." *Id*. On September 20, 2023, the court granted Ms. Bloch's motion to withdraw and appointed Jania Reed as

newly appointed counsel. *Id.* at 267. The court did not address the request for leave to file pleadings on the retesting of biological material. On December 4, 2023, Ms. Reed requested an additional 6 months and the court denied that the same day. Id. at 273, 277.

The Court's Ruling [2]

The court issued its Order denying Mr. Blackmon relief on December 7, 2023. R. 278-87. The court only addressed Mr. Blackmon's application in part, that part of his application under D.C. Code § 22-4133 for DNA testing of items of evidence in the government's possession recovered from the victim's bedroom where the sexual attack took place but not tested for DNA previously (Items 1-6 listed by Mr. Blackmon): comforter, towel, pajama pants, panties, long sleeve shirt, camisole. *Id*. at 278-280. The court stated that, "[n]otably, the Defendant does not seek retesting of the very swabs that are powerful evidence of his guilt." *Id*. at 280. The court found that while Mr. Blackmon originally requested vaginal, rectal and oral swabs be tested for DNA, "[c]ounsel withdrew the Defendant's request". *Id*. n.3.

[2] The court's Order deny Mr. Blackmon relief under D.C. Code § 22-4133 is reproduced in Appellant's Limited Appendix "A".

The court concluded that Mr. Blackmon failed to meet the requirements of § 22-4133 for post-conviction DNA "because DNA testing was readily available at the time and because the items the Defendant wishes to test were not previously tested. *See* D.C. Code § 22-4133(a)." *Id.* at 285. The court also concluded Mr. Blackmon failed "to provide a reason the requested DNA was not previously obtained" under § 22-4133(b). *Id*. Finally, the court concluded that even if he satisfied those statutory requirements, he failed to "satisfy the statutory requirement of D.C. Code § 22-4133(d)." *Id.*

OVERVIEW

Mr. Blackmon appeals the court's denial of his post-conviction request for DNA testing under the Innocence Protection Act and submits that this Court should reverse the court's order. Mr. Blackmon argues on appeal the court abused its discretion in failing to rule on all the issues before it. He also contends that counsel appointed to aid him in his post-conviction claims was ineffective and had an undisclosed conflict of interest. In addition, he claims the court's failure to *sua sponte* hold a hearing before ruling was error. He submits that this Court should reverse the court's order denying post-conviction DNA testing in full because its findings were based on factual errors relied upon by the court.

ARGUMENT

The Innocence Protection Act

The Innocence Protect Act D.C. Code §22-4133 provides that a defendant convicted of a crime of violence and at any time thereafter may apply to the court for DNA testing of seized evidence in a case for biological material if the application can any of four circumstances. § 22-4133(a) (3) provides for post-conviction testing of biological material that:

> (A) Was not previously subject to DNA testing because DNA testing was not readily available in criminal cases in the District of Columbia at the time of conviction or adjudication as a delinquent;
>
> (B) Was not previously subjected to the type of DNA testing being requested and the new type of DNA testing would have a reasonable probability of providing a more probative result than tests previously conducted;
>
> (C) Was not previously subjected to DNA testing because of circumstances that would entitle the applicant to relief under § 23-110 or Rule 32 of the Superior Court Rules of Criminal Procedure; or
>
> (D) Was not previously subjected to DNA testing because it is new evidence as defined in § 22-4131(7)(A) or (B).

Under § 22-4133(b), the defendant's application for DNA testing shall:

> (1) Include an affidavit by the applicant, under penalty of perjury, stating that the applicant is actually innocent of the crime that is the subject of the application…;
> (2) Identify the specific evidence for which DNA testing is requested;
> (3) Set forth the reasons that the requested DNA testing was not previously obtained; and

> (4) Explain how the DNA evidence would help establish the applicant is actually innocent…

The statute authorizes the court to appoint counsel to an applicant for DNA testing if the individual cannot financially afford to obtain adequate representation. §22-4133(e)(2).

I. The Court Erred In Failing To Consider Mr. Blackmon's Request For Retesting Of DNA Biological Material As Not Before The Court.

An order denying a motion under the Innocence Protection Act is reviewed for abuse of discretion. *Richardson v. United States*, 8 A.3d 1245, 1248-49 (D.C. 2010). Mr. Blackmon was convicted of sexual abuse and related offenses of an adult complainant in her apartment. According to the government's evidence this was a stranger upon stranger attack, it lasted some time and the complainant was able to clearly view the man who assaulted her. [3] Notably, the complainant did not identify Mr. Blackmon as the perpetrator before or during trial. Mr. Blackmon was convicted after a second trial on DNA evidence alone from biological specimens

[3] In its opposition to Mr. Blackmon's application for DNA testing, the government recounts the facts and complainant's lengthy time with her assailant. See R. 147-151.

recovered from the complainant. Those DNA tests were conducted in 2008 by the FBI and then by Bode in 2013. R. 161, 164, 166, 169. [4]

On June 29, 2021 Mr. Blackmon filed *pro se* an Application For DNA Test Pursuant To DC § 22-4133. *Id.* at 91-140. [5] He asserted his innocence and identified biological specimens for retesting due to advances in DNA testing and the possibility of prior faulty lab work or contamination (Items 7-10 listed as vaginal, oral, rectal swabs and blood sample from complainant's husband) and testing of items not previously tested by the government or defense but collected from the bedroom where the attack took place that could, according to the rendition of facts of the attack, contain the attacker's DNA (Items 1-6 listed as comforter, towel, pajama pants, panties, long sleeve shirt, camisole) and therefore exclude him. *Id.* at 93-94. In his *pro se* motion for DNA testing Mr. Blackmon proffered:

> the new type of DNA testing would have a reasonable probability of providing a more probative result than tests previously conducted and was not previously subjected to DNA testing because it is new evidence as defined in § 22-4131(7)(A), i.e. was not personally known and could

[4] The lab results show a vaginal swab from complainant tested for DNA in 2008 was said to match Mr. Blackmon but that swab appears to have been lost by the government by 2013 and only oral and rectal swabs remained for testing. *Id.*

[5] Mr. Blackmon's lengthy *pro se* motion and attachments are at R. 91-140. The body of his *pro se* motion and Declaration is reproduced in Appellant's Limited Appendix "B".

> not, in the exercise of reasonable diligence, have been personally known to the Applicant at the time of the trial.

Id. at 91.

Mr. Blackmon specifically requested three different types of DNA tests, "Autosomal Str. Test . . . DNA testing by True Allele . . . DNA-17." *Id*. at 94. Mr. Blackmon stated under penalty of perjury that retesting of biological specimens under these more refined tests than those conducted previously would prove his innocence and first testing of items found in the bedroom would be further proof as to exclude him as the perpetrator. *Id.* at 93-96. Defense counsel did not have the items recovered from the bedroom tested. *Id*. at 94. [6]

The government did not dispute Mr. Blackmon's application satisfied the requirements of § 22-4133(b)(1) and (b)(2) in that he claimed he was actually innocent and had specified the items he wanted tested. The government opposed his request on the basis he had not satisfied (b)(3) or (b)(4) in that he failed to set forth a reason the DNA testing was not previously obtained and how testing would prove his innocence. *Id.* at 145-79. Mr. Blackmon filed a *pro se* response to the government's opposition. *Id.* at 180-86. [7] In that response Mr. Blackmon conceded

[6] On August 15, 2013 Judge Dixon had ordered the government to make available to the defense all items recovered. *Id.* at 175.

[7] Mr. Blackmon's *pro se* response to the government's opposition is reproduced in Limited Appendix "C".

he was mistaken in stating the DC Crime Lab conducted DNA testing (*id*. at 182), but his application met all the requirements of § 22-4133 and asked the court to liberally construe his *pro se* motion given his limited access to legal materials. *Id*. at 180-81. In support thereof of a liberal reading, he cited to *Griffith Consumer Co. v. Spinks*, 608 A.2d 1207, 1210 (D.C. 1992), *Haines v. Kerner*, 404 U.S. 519, 520 (1972) and *Erickson v. Parda*, 551 U.S. 89, 94 (2007). R. 180.

Mr. Blackmon proffered that the failure of his trial lawyer to test the items recovered from the bedroom "rises to the level of Ineffective Assistance of Counsel and serves as a valid explanation to satisfy the requirement of § 22-4133(b)(3)", why the items were not tested. *Id*. at 182. He added that he met the requirement of (b)(4) by explaining the tests he was requesting were "newer, more accurate testing methods available today" than the testing done years ago. *Id.* at 183. He added that since the victim was made to shower after the attack, it was also possible DNA taken from the victim was "corrupted" and that the items not tested and found in the bedroom where the attack took place and that he now sought to be tested were not potentially similarly compromised. *Id.* Finally, Mr. Blackmon contended that the government was holding him to a higher standard of explanation why new testing would prove his innocence than required by this Court, citing to *Mitchell v. United States*, 80 A.3d 962, 972 (D.C. 2013) in that

"§ 22-4133(b)(4) requires an applicant . . . not to explain adequately or sufficiently, just explain." R. 182. He concluded he met that standard by giving "good reason" how the retesting and testing would exonerate him, even if not in technical legal jargon given his "inarticulateness" as a *pro se* applicant. *Id.*

On February 17, 2022, Judge Anderson assigned Rebecca Bloch as counsel for Mr. Blackmon to aid him in filing "a supplemental motion establishing whether there in any valid basis for post-conviction testing." *Id.* at 187. Ms. Bloch filed a Supplemental Motion and Application for DNA Testing Pursuant to Innocence Protection Act D.C. Code on July 25, 2022. *Id*. at 206-10. [8] In that motion and in support of Mr. Blackmon's application to test items that had not been tested, Ms. Bloch proffered that trial counsel could not recall why he did not have the evidence from the bedroom tested, his file contained no explanation, and that "[t]he complainant described an assault that, by her description, would have likely left the attacker's DNA all over the sheets and clothing she said she was wearing [and said attacker touched]." *Id*. at 208-09. She correctly concluded that if the items had been tested and Mr. Blackmon was excluded as a contributor to any DNA on them, it would have had a significant impact on his defense. *Id.* at 209.

[8] Ms. Bloch's supplemental pleadings are reproduced in Limited Appendix "D".

At the same time, Ms. Bloch said she was waiving Mr. Blackmon's request for retesting of biological specimens (listed by Mr. Blackmon as items 7-9) as "previously subjected to DNA testing and are therefore not at issue in this motion." *Id.* at 207. On September 23, 2022 the government filed a response in opposition to the supplemental motion. R. 213-17. On May 17, 2023, Ms. Bloch sought to withdraw, citing her inability due to caseload to further investigate and asked for new counsel and for that new counsel to be given enlargement of time to file a supplement to the § 22-4133 motion. R. 248. On June 14, 2023 Ms. Bloch filed a Notice of Intent To Withdraw Motion To Withdraw As Counsel of Record. R. 252. Ms. Bloch continued to represent Mr. Blackmon and on July 3, 2023 stated that she needed an additional extension of time to reply to government's opposition and "file a supplemental motion under D.C. Code § 22-4133", trying to determine "how to proceed with Mr. Blackmon's pro se request for testing." R. 252.

On July 10, 2023 the court granted an additional 30 days to file a reply to the government's opposition and that the court would then address the merits of the motions "with the docketed filings listed above." R. 256. On August 9, 2023 Ms. Bloch filed a reply to the government's opposition for new testing of Items 1-6. R. 259-63.[9] She withdrew, "without prejudice the request for retesting of Items 7-10 while Mr. Blackmon works with more specialized counsel on that issue. Since the

[9] Appendix "D".

initial testing was completed, new technologies have allowed for more sensitive separation of otherwise undetectable alleles and can exclude contributors and discern mixtures more accurately." R. 260.

In an *ex parte* cover letter Mr. Blackmon sent to the court docketed August 30, 2023, Mr. Blackmon stated that he wanted a letter he sent to Ms. Bloch filed under seal in his case file "to preserve any arguments appointed Counsel Bloch may have waived." SR 2. [10] In that letter to Ms. Bloch, Mr. Blackmon expressed his dissatisfaction with Ms. Bloch's supplemental pleadings in that they appeared to waive his *pro se* arguments for retesting biological material, and that he never gave her permission to do that. *Id*. at 3-4.

On September 15, 2023 Ms. Bloch again withdrew as counsel and asked for appointment of alternative counsel for him to pursue his motion under § 22-4133 because she had been offered at position of employment with the Public Defender Service at the end of the month. R. 264. She added, "[b]riefing is now complete with respect to testing of items 1-6; Mr. Blackmon is seeking leave to file pleadings on the retesting of items 7-9." R. 264. On September 20, 2023, the court granted Ms. Bloch's motion to withdraw and appointed Jania Reed as newly

[10] "SR" refers to the Sealed Record certified and docketed with this Court as part of the Record on Appeal.

appointed counsel. R. 267. The court did not address the request for leave to file pleadings on the retesting of biological material.

On September 22, 2023 the court sent a letter addressed to Mr. Blackmon in response to his correspondence stating he was not waiving any arguments about retesting, that was signed by Judge Anderson and copied to the United States Attorneys Offices, Ms. Bloch and Ms. Reed. Judge Anderson's letter stated that his correspondence:

> contains privileged attorney-client communications and therefore, was not read by Judge Anderson. The correspondence remains under seal on the docket and will not be read or considered by Judge Anderson at any point.

SR. 6. [11]

The record does not indicate whether Mr. Blackmon actually received the court's correspondence at the Bureau of Prisons institution where he was incarcerated.

Mr. Blackmon filed his letter to the court under seal because it contained an attorney-client communication as proof he disputed any waiver of his *pro se* arguments. Mr. Blackmon complains on appeal that the court did not consider Mr. Blackmon's cover letter specifically stating to the court that he did not waive his *pro se* arguments regarding DNA retesting. Even if the court chose not to read the

[11] Mr. Blackmon's cover letter to the court and Judge Anderson's letter to Mr. Blackmon in reply are reproduced in Limited Appendix "E".

attorney-client communication attached to his cover letter (although he was apparently waiving attorney-client privilege for court purposes by sending the letter to the court), the court should have taken into consideration his statement to the court that he was preserving all of his *pro se* arguments and was not waiving any argument Ms. Bloch may have indicated she was waiving. In failing to do so, the court abused its discretion by failing to consider all the facts on the record before it.

In its ruling denying relief, the court erred in finding that, "[n]otably, the Defendant does not seek retesting of the very swabs that are powerful evidence of his guilt." R. 280. The court found that while Mr. Blackmon originally requested vaginal, rectal and oral swabs be tested for DNA, "[c]ounsel withdrew the Defendant's request". *Id*. n.3. When a ruling by a trial judge is discretionary, to determine if there was an abuse of that discretion, this Court will review the lower court's actions to determine: 1) whether the court exercised its discretion or applied a uniform policy in its decision-making; 2) whether the court employed the correct legal standard or principle to the claim; and 3) whether there was a firm factual foundation on the record to support the trial court's ruling. *Johnson v. United States*, 398 A.2d 354, 363-64 (D.C. 1979). Given the fact that Mr. Blackmon told the court he preserved his arguments after counsel stated he was

waiving them, and he did not give counsel permission to do so, there was no firm factual foundation on the record for the court to have determined he withdrew his request for DNA retesting of the most powerful evidence against him at trial and rely on that in its findings. *Id.* The issue was before the court, and the court's failure to rule on his application for retesting was an abuse of discretion and his case should be remanded for further findings.

II. Ms. Bloch Was Ineffective And Had A Conflict of Interest.

Ms. Bloch was appointed to aid Mr. Blackmon in supplementing his *pro se* pleadings and claims, not to detract from them as she did, and as he has demonstrated in Argument I, *supra.* The waiver Ms. Bloch claimed is especially disturbing because Mr. Blackmon was convicted on DNA evidence alone, the complainant did not identify him as the perpetrator before or during trial and there were no other witness that inculpated him. "When claiming ineffective assistance of counsel, a defendant must establish that his counsel's performance was deficient and that the deficiency resulted in prejudice." *Strickland v. Washington*, 466 U.S. 668, 687, (1984)). In order to show *Strickland* prejudice, Mr. Blackmon must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court must determine whether counsel's strategic choices were

reasonable given plausible options, whether a line of defense was not pursued, the materiality of the omission, and the potential of the conceivable effect on the outcome in determining prejudice. *Smith v. United States*, 686 A.2d 537 (D.C. 1996), *cert. denied*, 522 U.S. 839 (1997). [12]

Mr. Blackmon was manifestly prejudiced by counsel's error, because had Ms. Bloch not summarily torpedoed Mr. Blackmon's request for DNA testing - - which was at the heart of his *pro se* motion and claim of actual innocence -- the court would have ruled on that claim and just as importantly would not have held it against him and used it for the underlying reasons to deny his remaining claim.

Further, Ms. Bloch admitted to her own incompetence to aid Mr. Blackmon in his quest for retesting of the evidence against him at trial. Mr. Blackmon claimed in his *pro se* application that new and improved DNA testing methods were available that were not available at the time of his trial and specifically requested retesting by three different DNA tests, "Autosomal Str. Test . . . DNA testing by True Allele . . . DNA-17." R. 94. He sought to show these were new and improved tests. *Id.* at 91-140. He made this claim to meet the statutory requirement

[12] Although the Sixth Amendment right to counsel may not attach to a motion for post-conviction testing, once the judge appointed counsel, Mr. Blackmon had a statutory right to effect assistance of counsel under the Criminal Just Act. D.C. Code § 11-2601 *et. seq*. *Williams v. United States*, 783 A.2d 598 (D.C. 2001); *McCrimmon v. United States*, 853 A.2d 154 (D.C. 2004); *Pearsall v. United States*, 859 A.2d 634 (D.C. 2004).

of D.C. Code § 22-4133(a)(3)(B) which provides for post-conviction testing of biological material that "[w]as not previously subjected to the type of DNA testing being requested and the new type of DNA testing would have a reasonable probability of providing a more probative result than tests previously conducted".

Ms. Bloch stated in her supplemental pleading that she was withdrawing his claim "without prejudice" so Mr. Blackmon could confer "with more specialized counsel on that issue. Since the initial testing was completed new technologies have allowed for more sensitive separation of otherwise undetectable alleles and can exclude contributors and discern mixtures more accurately." R. 261. [13] She went no further because she admitted to having little specialized training in this arena to aid in his argument and instead waived his claim. By waiving it, albeit without prejudice, she not only prejudiced Mr. Blackmon by denying him a timely ruling on his claim but also allowed for the court to note in its ruling that it was significant to the court Mr. Blackmon waived retesting of the most "powerful evidence of his guilt." R. 280. The court relied on this throughout its Order denying relief to testing the previously untested items, rationalizing that even if testing would exclude him from those items found in the bedroom and the

[13] At one point Ms. Bloch indicated she was consulting with the Mid-Atlantic Innocence Project "about how to proceed with Mr. Blackmon's pro se request for testing." R. 252.

complainant said were touched by her attacker, that exclusion would be of minimal value compared to the previously tested items establishing his guilt, and he was now not seeking retesting of those. *Id.* at 280, 282-84. As a result, Ms. Bloch was guilty of "blotting out" a substantial part of Mr. Blackmon's claim and that affected Mr. Blackmon's remaining claim. Angarano v. United States, 312 A.2d 295 (D.C. App. 1973) (

In addition, Ms. Bloch was ineffective in failing to request a hearing on Mr. Blackmon's claim that his trial counsel was ineffective pretrial by failing to test for DNA the items that Mr. Blackmon now sought to be tested. Mr. Blackmon made clear in his *pro se* pleading and in response to government argument that was the reason the items were not previously tested. *Id*. at 180-86. The Order denying Mr. Blackmon relief stated in accordance with government argument that he failed to give a reason why the requested DNA testing was not previously obtained as required to satisfy § 23-4133(b)(3). Mr. Bloch did not give Mr. Blackmon any opportunity by virtue of a court hearing to air or shore up his indispensable *pro se* claim his counsel was ineffective.

In addition, Mr. Blackmon argues he is entitled to relief because Ms. Bloch did not disclose she had an inherent conflict of interest in representing him. To reiterate for purposes of this argument, Mr. Blackmon, in his *pro se* response to

that part of the government's opposition to his application for testing of items previously untested and the government's claim Mr. Blackmon had no reason for failing to test the previously untested items he now sought to test, Mr. Blackmon claimed that those items were not tested by his trial counsel because his trial counsel was ineffective and that constituted "a valid explanation of why those items were never tested" to satisfy the statute. R. 182. That was a circumstance entitling him to relief under § 22-4133(a)(3)(B): "items not previously subjected to DNA testing because of circumstances that would entitle the applicant to relief under § 23-110".

Mr. Blackmon was represented at his second trial by D.C. Public Defender Service Attorney Jason Downs. When Ms. Bloch withdrew from Mr. Blackmon's case on September 15, 2023 and requested alternate counsel after submitting her supplemental pleadings, she stated that she was withdrawing because "counsel will be leaving the CJA panel at the end of September for a position at the Public Defenders' Office (PDS)". R. 264.[14] The record does not indicate when Ms. Bloch

[14] Ms. Bloch's September 25, 2023 Motion to Withdraw is reproduced in Appendix "F". Upon learning Ms. Bloch withdrew, on September 25, 2023 Mr. Blackmon wrote to the court and requested that it recommend Georgetown Law legal clinic represent him, stating he had spoken to an attorney there several months earlier and that it was his understanding the court had to recommend the clinic in order for them to represent him. He added the matter had "been dragging on for several years and I can use the help." R. 271.

contemplated working for PDS (a position she may have coveted her entire time on the CJA panel) or when she was in negotiations for that position during the course of her representation of Mr. Blackmon. Ms. Bloch was on notice. Two years earlier in October 2021 and before Ms. Bloch was assigned, he claimed his PDS trial counsel was ineffective in failing to test items of evidence available to him, making him eligible for the relief he testing he was seeking. *Id.* at 180.

D.C. Bar Rule of Professional Conduct 1.7 (b)(4) provides that a lawyer may not represent a client if "[t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." Rule 1.7(b)(11) provides "when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could adversely affect the lawyer's representation of the client. *See* D.C. Bar Legal Ethics Committee Opinion No. 210 (defense attorney negotiating position with United States Attorney's Office)."

Mr. Blackmon's claim that PDS did not effectively represent him as the reason for why the items that were made available pretrial were not tested caused PDS to become an opponent. Ms. Bloch's representation of Mr. Blackmon was less

than ardent. She failed to request a timely hearing on his ineffectiveness claim as it related to his quest to be eligible under the Innocence Protection Act. She failed to argue ardently in support of his key reason for not testing available evidence sooner and waived his claim for retesting.

In Mr. Blackmon's case, the remedy is that he is entitled to have Judge Anderson's Order vacated and new counsel appointed to him in Superior Court to aid him in supplementing his *pro se* pleadings for eligibility of testing all the items he has sought to test under the Innocence Protection Act and request a hearing to air out his ineffective assistance of counsel claim as key to satisfying the statute under which he sought DNA test evidence.

While Ms. Bloch proffered in her first supplemental motion filed July 25, 2022 that she had conferred with trial counsel, he could not remember why he did not have the items Mr. Blackmon now sought to have tested, his file did not indicate why and he gave no strategic reason, and therefore Mr. Blackmon satisfied § 22-4133(a)(3) as to reasons why the DNA was not previously tested. R. 208. However, she did not offer an affidavit from trial counsel or shore up Mr. Blackmon's *pro se* claim he was ineffective to entitle him to relief under § 22-4133(a)(3)(B): "items not previously subjected to DNA testing because of circumstances that would entitle the applicant to relief under § 23-110". On August

9, 2023 when she filed a reply to the government's opposition to testing under the Innocence Protection Act and much closer to her stated impending employment with PDS at the end of September 2023, Ms. Bloch proffered that trial counsel's failure to test the items at issue "may ultimately become the basis for a claim of ineffective assistance of counsel against Mr. Blackmon's prior attorney." R. 261. But she never made that timely claim. Ms. Bloch had adequate notice and time to file an ineffective assistance of counsel claim and request a hearing to develop Mr. Blackmon's claim for purposes of eligibility under the Innocence Protection Act for the previously untested items but didn't. Mr. Blackmon claimed ineffective assistance of counsel as why the items were not tested on October 19, 2021 (*id*. at 91) and Mr. Bloch was appointed in February 17, 2022. *Id*. at 187.

Ms. Bloch did not specifically claim Mr. Blackmon was prejudiced by trial counsel's omission to support a claim of ineffective assistance, but stated had trial counsel tested the items in the complainant's bedroom and he was excluded as an originator of DNA on those items, it would have been "significant" to the defense. *Id*. at 261. Mr. Blackmon contends that counsel's omission in failing to directly allege ineffective assistance of counsel or request a timely hearing prejudiced him. In her final Order denying relief, Judge Anderson noted, "[d]efense counsel notes that the failure to test these items may ultimately become the basis for a claim of

ineffective assistance of counsel against trial counsel. But that is not before the Court. " *Id.* at 284 n.7. It was not before the court because Ms. Bloch did not support Mr. Blackmon's claim in an ardent and meaningful way to make his request for testing eligible under the Act and allowed the court to find Mr. Blackmon had not given a reason for failing to test the requested item previously.

Judge Anderson's Order should be vacated and Mr. Blackmon be given new counsel to pursue his application for DNA testing.

III. The Court Abused Its Discretion By Failing To *Sua Sponte* Hold A *Monroe-Farrell* Hearing Before Finding Mr. Blackmon Failed To Satisfy The Post-Conviction DNA Testing Statute By Not Setting Forth The Reason The Requested DNA Testing Was Not Previously Obtained.

When a defendant alleges his counsel was ineffective at the pretrial stage of proceedings as Mr. Blackmon did in the context of his post-conviction claim, "the Sixth Amendment imposes an affirmative duty on the trial court to conduct an inquiry into the complaint." *Farrell v. United States*, 391 A.2d 755, 760 (D.C. 1978) (citation omitted). "This inquiry has come to be known as a '*Monroe-Farrell* inquiry' or a '*Monroe-Farrell* hearing." *Portillo v. United States*, 62 A.3d 1243, 1252 (D.C. 2013) (citations omitted). "The nature of such inquiry is within the trial court's discretion." *Forte v. United States*, 856 A.2d 567, 574 (D.C. 2004).

Mr. Blackmon alleged early on that the reason he did not previously test the items was because his counsel was ineffective pretrial. R. 180-86. The court did

not give Mr. Blackmon any opportunity to support his claim of inadequate representation. Trial counsel did not supply an affidavit and Ms. Bloch only proffered trial counsel could not remember why he did not have the items tested. Mr. Blackmon should not have been faulted by the court for failing to give reasons that the items were not tested when he was not given an opportunity to do so. Since the court failed to conduct a *Monroe-Farrell* inquiry, this Court should reverse the denial of Mr. Blackmon's motion for post-conviction DNA testing. In the alternative, this Court should remand the matter to the Superior Court. *McFadden v. United States*, 614 A.2d 11, 16-18 (D.C. 1992).

IV. The Court's Order Denying Relief Should Be Vacated In Full.

As already demonstrated, there are multiple reasons why the court's Order must be vacated and not merely vacated in part and remanded for further proceedings for the court's failure to consider Mr. Blackmon's claim he should be entitled to retesting of DNA already tested. The trial court's Order denying Mr. Blackmon relief was not only an abuse of discretion for failing to consider all his claims, which he did preserve and the court stated was not before it because counsel waived it; the Order was dependent on its wrongly asserted fact Mr. Blackmon did not seek to have the previously tested DNA retested, as the most potent evidence of his guilt, and that he failed to show how new testing of items not previously tested

could show his actual innocence in light of that more potent evidence. The Order is inextricably intertwined with and replete with demonstrated references to court assertions Mr. Blackmon waived his claim to retest items 7-10 and all other requests pale in comparison to that and therefore denied.

It is the undersigned's understanding that Judge Anderson has retired. As a result, it makes that much more sense to vacate her Order based on any or all of the aforementioned reasons and arguments and permit a new judge to rule on Mr. Blackmon's application in full as to retesting DNA and testing previously untested evidence, after adequate supplemental pleadings are filed by new counsel well versed in DNA testing.

CONCLUSION

For all these reasons, and any other this Court deems appropriate, Mr. Blackmon respectfully submits that the Superior Court's denial of his motion for post-conviction DNA testing should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 31st day of May, 2024 I have caused to be served a copy of the foregoing Brief for Appellant electronically through this Court's Appellate E-Filing System on counsel for appellee, Chrisellen R. Kolb, Chief, Appellate Division, U.S. Attorneys Office.

/s/: *Mindy Daniels*

Mindy Daniels