BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CO-1044

JAMES EARL BLACKMON, 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. 2008-CF1-21355

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ISSUES PRESENTED

I. Whether the trial court abused its discretion in denying appellant Blackmon's motion for post-conviction DNA testing under the Innocence Protection Act (IPA), where Blackmon did not meet the statutory requirements for testing, and where the trial court appropriately did not consider ex parte correspondence regarding information protected by the attorney-client privilege in denying the motion.

II. Whether the trial court abused its discretion in denying Blackmon's IPA motion, where the record fails to support that his attorney rendered ineffective assistance of counsel in representing him in the IPA proceedings, and where the trial court was not authorized to conduct a *Monroe-Farrell* hearing as part of the IPA proceedings.

III. Whether the trial court abused its discretion in denying Blackmon's IPA motion, where the record fails to support that his attorney labored under a conflict of interest while representing him in the IPA proceedings.

COUNTERSTATEMENT OF THE CASE

Based on acts that appellant Blackmon committed on February 4, 2008, he was charged by indictment on November 5, 2008, with: (1) three counts of first-degree sexual abuse (D.C. Code § 22-3002); (2) attempted first-degree sexual abuse (D.C. Code §§ 22-3002, -3018) (3) first-degree burglary (D.C. Code § 22-801); (4) kidnapping (D.C. Code § 22-2001); and (5) assault with significant bodily injury (D.C. Code § 22-404(a)(2)) (Record on Appeal (R.) 1-4, 7-8 (Super. Ct. Dkt. pp.1-4, 7-8)).[1] *Blackmon v. United States,* 146 A.3d 1074, 1075 (D.C. 2016) (*Blackmon II*). On March 20, 2009, Blackmon was convicted of all charges at a jury trial before the Honorable Geoffrey M. Alprin (R.14-18 (Super. Ct. Dkt. pp.14-18)), and was sentenced on June 11, 2009, to an aggregate 34 years of incarceration (R.19-22 (Super. Ct. Dkt. pp.19-22)). *Blackmon II,* 146 A.3d at 1075-76. On April 22, 2013, this Court reversed his convictions and remanded for a new trial. *See Blackmon v. United States,* No. 09-CF-702, Mem. Op. & J. (D.C. Apr. 22, 2013) (*Blackmon I*).

Blackmon's second jury trial began on April 21, 2014, before the

[1] Citations to the record and appendix are to the PDF page numbers.

Honorable Jennifer M. Anderson (R.30-31 (Super. Ct. Dkt. pp.30-31)). On April 29, 2014, Blackmon was acquitted of burglary and convicted of all the other charges (R.35-37 (Super. Ct. Dkt. pp.35-37)). On July 11, 2014, he was again sentenced to 34 years of incarceration (R.39-41 (Super. Ct. Dkt. pp.39-41)). *Blackmon II,* 146 A.3d at 1077. This Court affirmed the convictions on September 29, 2016. *Id.* at 1075, 1082.

On January 10, 2017, Blackmon filed pro se a motion pursuant to D.C. Code § 23-110, alleging ineffective assistance of trial counsel due to counsel's erroneous advice regarding a plea offer (R.43 (Super. Ct. Dkt. p.43)). Judge Anderson denied the motion on January 11, 2019 (R.44-47 (Super. Ct. Dkt. pp.44-47)). This Court affirmed that ruling. *Blackmon v. United States,* 215 A.3d 760 (D.C. 2019) (*Blackmon III*).

On June 30, 2021, Blackmon filed a pro se application for post-conviction DNA testing pursuant to D.C. Code § 22-4133 (the Innocence Protection Act (IPA)) (Blackmon Appendix (A.) 13-20). On September 20, 2021, the government opposed the IPA motion (R.145-74 (Gov't Response to Pro Se IPA Mtn. (GR1)), and on October 19, 2020, Blackmon replied (A.22-27). On February 17, 2022, Judge Anderson appointed Rebecca Bloch, Esq. to represent Blackmon and ordered her to "file a

supplemental motion establishing whether there [wa]s any valid basis for post-conviction testing" (R.187-89 (Bloch app't order)). After receiving two extensions totaling 150 days (R.198, 203-04 (ext. orders)), on July 25, 2022, Ms. Bloch filed a supplemental IPA motion (A.30-33). The same day, Judge Anderson ordered the government to respond to this supplemental motion, addressing "whether [Blackmon] [wa]s eligible for DNA testing under D.C. Code § 22-4133," and "what impact, if any, d[id] [his] waiver of DNA testing prior to the first trial and his decision to have some[,] but not all[,] items tested prior to the second trial, have on his right to have the remaining items tested" (R.211-12 (response order)). The government responded on September 23, 2022 (R.213-18 (Gov't Response to Supp. IPA Mtn. (GR2))).

On September 28, 2022, Ms. Bloch filed an unopposed motion for a 30-day extension of time in which to file a reply, which the trial court granted the same day (R.219-23 (ext. mtn. & order)). On November 4, 2022, Ms. Bloch informed the court that she had been "preparing to file a reply by November 4, 2022," but she learned on November 2, 2022, that the Mid-Atlantic Innocence Project (Innocence Project) had accepted Blackmon's case in August 2022, and she believed Blackmon was "likely"

unaware of that fact because he was "in transit between facilities" (R.224 (ext. mtn.)). Thus, Ms. Bloch moved, without opposition, for an additional 45 days to "consolidate [Blackmon's] legal team" (*id.*). On November 7, 2022, the trial court granted Blackmon an additional 45 days to file his reply (R.227-28 (order)). On December 21, 2022, Ms. Bloch filed another unopposed 45-day extension motion, stating that Blackmon had been consulting with the Innocence Project about how to proceed with his DNA testing request, "but the team ha[d] not yet solidified a plan" (R.229 (ext. mtn.)). The court granted that motion the next day (R.232-34 (order)). On February 13, 2023, Ms. Bloch moved for a 90-day extension on grounds that Blackmon had been consulting with the Innocence Project on how to proceed with his DNA-testing request and was "in the process of continued investigation" (R.242 (ext. mtn.)). After confirming that the government did not oppose that motion, the court granted it on February 14, 2023 (R.245-47 (order)).

On May 17, 2023, Ms. Bloch moved to withdraw from Blackmon's case, citing an increase in her pretrial caseload after the easing of COVID restrictions and her inability to dedicate the time needed for a continued investigation of his case (R.248 (first withdrawal mtn. p.1)). On June 14,

2023, at Blackmon's behest, Ms. Bloch retracted her withdrawal motion (R.251 (retraction mtn.)) and continued to represent him.

On July 3, 2023, Ms. Bloch filed a motion for a 180-day extension, asserting that Blackmon "ha[d] been consulting with the Mid-Atlantic Innocence Project about how to proceed with [his] pro se request for testing" (R.252 (ext. mtn. p.1)). The government did not oppose, but on July 10, 2023, the trial court granted only 30 additional days in which to file the IPA reply, noting that Ms. Bloch already had received a total extension of 210 days in which to file it (R.255-57 (order)). The court noted that Blackmon previously had two opportunities to conduct DNA testing, and it was "not unreasonable that the defense be able to articulate why that [third testing opportunity] should be allowed" (R.256 (order p.2)). The court noted that despite being asked to do so, Ms. Bloch had not given it any information, even on an ex parte basis, "as to what further investigation may reveal that necessitates these long delays" (*id.*). The court stated that after the reply was filed, it would address the pending motions in light of the IPA "docketed filings" listed in the order (*id.*). Accordingly, Ms. Bloch filed her reply on August 9, 2023 (A.34-38).

On September 15, 2023, Ms. Bloch moved to withdraw and sought the appointment of new counsel because she would "be leaving the CJA Panel at the end of September for a position at the Public Defenders' Office (PDS)," which "c[ould] not absorb [her] cases at this time" (A.44-45). On September 20, 2023, the court granted the motion and appointed Janai Reed, Esq. to represent Blackmon (R.267 (Reed app't order p.1)).

On December 4, 2023, Ms. Reed moved to stay the proceedings for "approximately 180 days," because the Innocence Project was "in the process of assigning" an attorney to Blackmon's case, and the assignment was expected to happen "shortly after the Christmas holiday season" (R.273-74 (stay mtn. pp.1-2)). Ms. Reed asserted that it was necessary to cease the proceedings because "actions could be taken" that might be contrary to how the Innocence Project intended to proceed after its own assessment of Blackmon's case (*id.*). The court denied the motion on December 7, 2023, noting that it had delayed its ruling and granted five continuances, and that a six-month stay would leave the IPA motion pending for three years (R.276-77 (stay-denial mtn.)). The same day, the court denied the IPA motion in a written order (A.3-11). Blackmon noted a timely appeal on December 12, 2023 (R.288-89 (notice of appeal)).

The Trial

The Government's Evidence

On February 4, 2008, 25-year-old Sheila Ho and her husband lived in a basement apartment in the Eastern Market/Capitol Hill area (4/22/14 Tr. 276-78, 282, 289). Just before 10:00 a.m., Ms. Ho—who was 5' l" and weighed 125 pounds—was alone eating breakfast and reading her Bible in her pajamas, when she heard the building's front-door buzzer (*id.* 278-79, 289-90, 328). Because the apartment had no intercom, Ms. Ho stepped into the corridor and saw Blackmon standing outside the building (*id.* 283-84, 290-91). When she "cracked open" the main door to ask whether she "could help him with anything," Blackmon indicated an interest in renting an apartment in the building (*id.* 291-92). Ms. Ho allowed him into the lobby to see the contact information on the management company's sign, and, when he seemed unable to find a pen in his duffel bag, she went down to her apartment to get one (*id.* 293-94). While in her apartment, Ms. Ho was startled to find Blackmon standing at her door uninvited (*id.* 294-95). Blackmon stepped into her apartment and closed the door (*id.* 295-96). Ms. Ho told Blackmon to open the door, and when he refused, she screamed as loudly as she could (*id.* 296).

Blackmon ordered Ms. Ho to be quiet and reached into his jacket as if to retrieve a weapon, which made her stop screaming (4/22/14 Tr. 296-97). The apartment had one door, and all its windows were barred; thus, Ms. Ho focused her hopes on escaping through the front door (*id.* 283, 287-88, 296-97). Blackmon, however, stood directly between her and the door (*id.* 296-98). Ms. Ho obeyed Blackmon's command to sit on the couch, but when he told her to go to the bedroom, she refused (*id.* 297-99).

Blackmon grabbed Ms. Ho by the hair, lifted her off the couch, and "propelled" her down the hall toward her bedroom (4/22/14 Tr. 298-99). Ms. Ho "started screaming and kicking and punching, doing whatever [she] could do to fight back," but Blackmon repeatedly punched her in the head, knocking off her glasses and sending her to the floor, where she struggled to remain conscious (*id.* 300-01).

Blackmon picked Ms. Ho up by the neck and the back of her pajama pants and forced her toward her bedroom, where he pushed her onto the bed (4/22/14 Tr. 302). Blackmon yanked off her pajama pants and underpants, then pulled down his pants and inserted his penis into her vagina several times (*id.* 306-07). He then "made some frustrated noise," backed away, and ordered Ms. Ho to get off the bed (*id.* 308). As she stood

before him, he pulled off her long-sleeved shirt and camisole and touched her breasts (*id.* 290, 308).

Blackmon forced her to perform oral sex (4/22/14 Tr. 309-10). When she stopped and tried to crawl away across the bed, Blackmon dragged her to the edge of the bed and tried to penetrate her anus with his penis (*id.* 310-11). When he was unable to do so, he again forced her to perform oral sex on him (*id.* 311-12).

Blackmon then pulled up his pants and demanded money, and Ms. Ho offered him her wallet (4/22/14 Tr. 313). Staying so close that she could not escape, Blackmon permitted Ms. Ho to retrieve her wallet from the living room (*id.* 313-14). After she gave him her wallet, Blackmon ordered Ms. Ho to go to the bathroom and wash her genitals (*id.* 314-15).

Once Ms. Ho was out of the shower, Blackmon made her lay face down on the bedroom floor (4/22/14 Tr. 317-18). Blackmon left the bedroom, and Ms. Ho heard him leave and quickly re-enter the apartment (*id.* 318-19). Blackmon re-entered the bedroom, and, in a "really threatening" voice, told Ms. Ho, who was still face down on the floor, "[Y]ou better hope you never see me again" (*id.*). She then heard him leave the apartment (*id.* 319-20).

After waiting to ensure that Blackmon was truly gone, Ms. Ho got up, locked her apartment door, and phoned her friend Joan, who she knew would be at her home nearby (4/22/14 Tr. 320-21, 344). Sounding "terrified," Ms. Ho told Joan that she had just been raped (*id.* 321, 343-45). Ms. Ho then called her husband and told him of the rape (*id.* 321).

Joan arrived minutes later with two men from their church (4/22/14 Tr. 321-22, 344-45). They took Ms. Ho to their church, called 911, and Ms. Ho's husband arrived (*id.* 324, 348). Ms. Ho was brought by ambulance to the hospital, where a SANE examination was conducted and vaginal, oral, and anal swabs were collected (*id.* 324-25, 328, 330-32, 348, 353-65).

Ms. Ho did not identify Blackmon before or during trial; he was identified principally by DNA evidence.[2] An FBI forensic examiner testified that the male DNA extracted from Ms. Ho's vaginal swabs belonged to Blackmon (4/23/24 Tr. 507, 530-32; 4/24/14 Tr. 25-27). A

[2] The DNA identification evidence was corroborated by evidence that: (1) Blackmon lived 0.7 miles from Ms. Ho's apartment (4/22/14 Tr. 236-37; 4/24/14 Tr. 11-13); (2) he worked at Results gym on Capitol Hill in 2006 (4/23/14 Tr. 486-90); (3) the perpetrator's sweatshirt, as described by Ms. Ho, looked like the uniform sweatshirt worn by Results gym employees (4/22/14 Tr. 325-26; 4/23/14 Tr. 491-93); and (4) just under a month after the crimes, Blackmon was seen within two blocks of Ms. Ho's apartment (4/23/14 Tr. 476-81).

private forensic examiner from Bode Technology testified that the male DNA extracted from Ms. Ho's anal and oral swabs belonged to Blackmon (4/24/14 Tr. 75, 97-102).

The Defense Evidence

In opening statement, defense counsel acknowledged that Ms. Ho had been physically and sexually assaulted, but he asserted that Blackmon had never been in Ms. Ho's apartment and was not her assailant (4/22/14 Tr. 203-04, 207). Counsel asserted that the DNA results were "suspect, unreliable, and exaggerated" (*id.* 204). The defense was presented largely through cross-examination of the forensic examiners (4/24/14 Tr. 28-44, 102-14).

The IPA Proceedings

Blackmon's Pro Se Motion

In his pro se IPA motion for post-conviction DNA testing, Blackmon claimed that the biological material in this case "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" (A.13). Thus, he sought

DNA testing of Ms. Ho's vaginal, rectal, and oral swabs, and her husband Jay Ho's blood sample (Items 7-10) (A.15-16).[3] Blackmon further asserted that retesting of the vaginal, rectal, and oral swabs was necessary because in 2015, the "D.C. Crime Lab," which he believed had conducted the DNA testing his case, was suspended from performing DNA testing due to inadequate lab practices, which he claimed had begun in the early 2000s (A.16-18). He sought three types of testing: (1) "Autosomal Str. Test."; (2) "DNA Testing by True Allele"; and (3) "DNA-17" (A.16). Blackmon averred that he was innocent (A.16, 18).

Blackmon also alleged that some biological material "was not

[3] Blackmon accurately noted that the trial court had found the government negligent for losing the vaginal swab (A.16, 18). The court made that finding in a hearing the day before Blackmon's second trial began because in 2013, after the first trial, the Metropolitan Police Department (MPD) was unable to locate the vaginal swab when it sought to retrieve it from storage (4/21/14 Tr. 101-18, 173). At the second trial, however, the FBI forensic examiner testified that a small amount of extract from the vaginal swab was left over after the DNA testing conducted before the first trial (4/24/14 Tr. 28). She testified that it might be possible to test that extract (*id.*). Indeed, at the pretrial hearing at which it found the government negligent for losing the vaginal swab, the trial court stated that before the second trial, defense counsel had asserted Blackmon's right to DNA testing under the IPA and "was allowed to test the extract" and "the other items," although the court did not know the result of those tests (4/21/14 Tr. 174-75).

previously subjected to DNA testing because it [wa]s new evidence as defined in § 22-4131(7)(A)" (A.13, 15). Thus, Blackmon sought DNA testing on six items belonging to Ms. Ho: (1) her comforter; (2) her towel; (3) her pajama pants; (4) her panties; (5) her long-sleeved shirt; and (6) her camisole (A.15). He further asserted that his attorney had never sought DNA testing on those items (Items 1-6) (A.16).

The Government's Opposition

The government's opposition explained that the D.C. Department of Forensic Services (DFS) (which Blackmon had called the "D.C. Crime Lab") had not performed any DNA testing in Blackmon's case (R.145, 154, 156 (GR1 pp.1, 10, 12)). Instead, the FBI Laboratory had performed the initial DNA testing, and before the second trial, some, but not all, of the items of evidence collected in this case were sent to Bode Technology (R.152 (GR1 p.8)).

Furthermore, the government explained that on August 15, 2013, before the second trial, the Honorable Herbert B. Dixon, Jr. granted Blackmon's motion for independent DNA testing and had authorized that the testing be done by the DNA Diagnostic Center in Ohio, to which the government consented (R.152-53, 174-77 (GR1 pp.8-9 & Exh.3)). Among

the evidence the court ordered the government to transfer to the DNA Diagnostic Center were Items 1-6, and the vaginal, rectal, and oral swabs that had already been tested by the FBI and/or Bode (Items 7-9) (R.153, 161-77 (GR1 p.9 & Exhs.1-3)).[4] The government noted that emails between the prosecutor and defense counsel indicated that the DNA Diagnostic Center received the evidence (R.154, 178-79 (GR1 p.10 & Exh.4)). Thus, the government asserted, Blackmon was incorrect insofar as he claimed that his attorney had never made a DNA-testing request for Items 1-6 (R.153-54, 156 (GR1 pp.9-10 n.1, p.12)).

The government explained that at the second trial, forensic examiners from the FBI and Bode Technology testified for the government about the results of DNA testing of items of evidence performed by their laboratories, but that the defense presented no DNA evidence despite receiving authorization to send evidence to the DNA Diagnostic Center for testing or retesting (R.154 (GR1 p.10)).

The government asserted that to obtain post-conviction DNA

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[4] As noted supra at p. 12 n.3, MPD could not subsequently locate the vaginal swab (Item 7), but an extract from the vaginal swab was made available for independent DNA testing. For simplicity, however, this brief refers to the "vaginal swab" and "Item 7" instead of the extract.

testing, Blackmon needed to demonstrate a reasonable probability that the testing would produce non-cumulative evidence that would help establish his actual innocence, and this required more than a mere possibility that the test results would do so (R.155 (GR1 p.11)). The government acknowledged that Blackmon had met the IPA's requirements that he assert his innocence and identify the items he wanted tested (R.156 (GR1 p.12)). It argued, however, that Blackmon had failed to meet the IPA's requirements to show that "new types" of DNA testing had not been done previously, and to explain how additional DNA testing would help establish his actual innocence (*id.*). The government explained in detail that the three alleged types of DNA testing that Blackmon sought to use in retesting items of evidence were not new in any meaningful way (R.156-59 (GR1 pp.12-15)).

Blackmon's Pro Se Reply

In his pro se reply Blackmon asserted that Items 1-6 did not undergo previous DNA testing because his prior trial counsel did not request it (A.22-24). Blackmon claimed that this failure to seek DNA testing of Items 1-6 constituted ineffective assistance of counsel (A.24).

Blackmon also argued that to satisfy D.C. Code § 22-4133(b)(4), he

merely needed to "give a good reason why this testing might prove his innocence" (A.24). He acknowledged, based on exhibits attached to the government's opposition, that DNA testing had been conducted on the oral and rectal swabs (*id.*). He argued, however, that because the assailant had forced the victim to shower after the assault, a "combination of the hot water, and soaps and astringents used" likely would have corrupted any DNA evidence that remained on the victim's body and thus would have "affected the results" obtained from those swabs (A.24-25). Therefore, Blackmon sought "testing of items uncontaminated by this act," specifically mentioning the victim's comforter, camisole, panties, and pajama pants (A.25).[5] He asserted that "[t]his [wa]s also the reason [he] [sought] the newer, more accurate testing methods available today," which would "provide a significantly more reliable idea of who actually committed this heinous crime" (*id.*).

Defense Counsel's Supplemental Motion

After her appointment, Ms. Bloch filed a supplemental IPA motion (A.30-33). She listed all 10 items of evidence that Blackmon had sought

[5] The reply did not mention the vaginal swab, long-sleeved shirt, or towel.

to test in his pro se motion, and stated that after investigation, it was discovered that Items 7-9—the vaginal, anal, and oral swabs—"were previously subjected to DNA testing and [we]re therefore not at issue in this motion" (A.31).[6] She also noted that Blackmon was "not seeking testing of Jay Ho's blood sample" (Item 10) (A.31 n.1). Ms. Bloch stated that Blackmon was requesting DNA testing on Items 1-6—the comforter, towel, pajama pants, panties, long-sleeved shirt, and camisole—because they had not been tested by the government or the defense before either trial (*id.*).

Ms. Bloch asserted that Blackmon's pro se IPA motion had met the requirements of D.C. Code § 22-4133(b)(1)-(2) (A.31-32). In elaborating on the requirement of § 22-4133(b)(3)—the reason that the requested DNA testing was not previously obtained—Ms. Bloch stated that "[g]overnment counsel [had] indicated to the defense that the government had never sought to have [Items 1-6] tested because [it] did not feel the

[6] Ms. Bloch noted that the court had granted her May 26, 2022, request for an additional 60 days in which to file this motion for "her expert to finish his evaluation" (A.30). Ms. Bloch's May 26, 2022, extension motion stated that she had been investigating the case and planned to consult an expert, Dr. Maher Nourredine, who would need more time to review the case (R.200 (motion p.1)).

evidence had much probative value" (A.32). She stated that Blackmon's prior counsel "did not recall why they did not have the items tested and the file does not contain any explanation" (*id.*).

Regarding the requirement of § 22-4133(b)(4)—to explain how the DNA evidence would help establish Blackmon's actual innocence—Ms. Bloch stated that Blackmon did "not recall ever having been consulted about the items he now requests be tested" (A.32). She stated that given the victim's description of the assault, the attacker's DNA would likely have been left on "the sheets" and the victim's clothing (A.32-33). She asserted that "[h]ad the defense elected to test [Items 1-6] and had Mr. Blackmon been excluded, it would have been a significant fact for the defense to use in crafting their theory of the case," and "[n]o matter the reason, Mr. Blackmon needs to know the result of the items in order to determine the avenue for further post-conviction litigation" (A.33). She asserted that if Blackmon were excluded as a contributor to the DNA on Items 1-6, then it would be "a significant gap in the evidence of guilt beyond a reasonable doubt" (A.32).

The Government's Opposition to the Supplemental Motion

In its opposition, the government noted that it was responding to

the supplemental IPA motion and to the court's July 25, 2022, order, which instructed it to address what impact, if any, Blackmon's waiver of DNA testing before the first trial, and his decision to have some, but not all, of the items tested before the second trial, had on "his right to have the remaining items tested" (R.213 (GR2 p.1); R.211 (response order p.1)). In response to the latter, the government asserted that although Blackmon's IPA waiver before the first trial arguably undercut his eligibility for post-conviction DNA testing pursuant to § 22-4132(c), the court did not need to resolve that issue because Blackmon's IPA motion was "so clearly defective" (R.215 n.2 (GR2 p.3 n.2)).

Addressing the merits of the supplemental IPA motion—and the court's question about the effect not testing Items 1-6 before the second trial had on Blackmon's post-conviction right to test them—the government explained that Blackmon's decision to decline testing of Items 1-6 before the second trial made them ineligible for post-conviction testing because they did not fit any of the four categories of biological material set forth in § 22-4133(a)(3)(A)-(D) (R.214 (GR2 p.2)). First, Blackmon could not satisfy § 22-4133(a)(3)(A) because DNA testing was readily available in 2013, and thus he could have tested Items 1-6 before

his second trial (*id.*).[7] Second, because Blackmon did not previously test Items 1-6, the type of DNA testing he now sought could not "have a reasonable probability of providing a more probative result than tests previously conducted" pursuant to § 22-4133(a)(3)(B) (R.214-15 (GR2 pp.2-3)). Third, the government noted that Blackmon was not alleging ineffective assistance of trial counsel related to the DNA testing or any other reason falling under § 22-4133(a)(3)(C)" (R.215 (GR2 p.3)).[8] Fourth, Items 1-6 were "not new for purposes of § 22-4133(a)(3)(D)" because they were available for defense testing before the second trial (*id.*).

Furthermore, the government asserted that even if Items 1-6 were eligible for post-conviction DNA testing, the supplemental IPA motion failed to satisfy § 22-4133(b)(3)-(4) (R.215-17 (GR2 pp.3-5)). Regarding § 22-4133(b)(3), the government noted that Blackmon had not explained why the defense declined to previously test Items 1-6 (R.216 (GR2 p.4)). The government asserted that "[w]hatever the limits of trial counsel's

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[7] The government noted that the defense had subjected other items of evidence to DNA testing, noting Ms. Bloch's supplemental motion indicating that Items 7-9 had been tested (R.214 (GR2 p.2)).

[8] This appears to have addressed Ms. Bloch's supplemental IPA motion, not Blackmon's pro se filings.

present recollection of the issue, the evidentiary records ma[de] clear that such a declination was reasonable" (*id.*). It explained that its testing had already revealed Blackmon's DNA on the victim's oral, anal, and vaginal swabs, which would not be altered by the results of DNA testing on Items 1-6 (*id.*). Thus, the government argued, "it made little sense to seek independent testing" of Items 1-6 (*id.*).

Regarding § 22-4133(b)(4), the government asserted that Blackmon had failed to explain how the DNA evidence would help to establish his actual innocence (R.216 (GR2 p.4)). It argued that Blackmon's claims—including that any test results excluding him as a contributor to DNA found on Items 1-6 would create a "significant gap" in the evidence of his guilt, and that testing was needed "to determine the avenue for further post-conviction litigation"—were not arguments that testing would establish his actual innocence (R.216 & n.4 (GR2 p.4 & n.4)). Thus, the government argued, Blackmon had not provided a valid reason for post-conviction DNA testing (*id.*).

Defense Counsel's Reply

Ms. Bloch's reply reiterated that Blackmon sought DNA testing on Items 1-6 (A.35). She indicated that in his pro se IPA motion, Blackmon

had requested retesting of Items 7-10 "due to advancements in DNA technology since his initial trial" (A.35-36). Ms. Bloch stated, however, that "[a]t this time, undersigned counsel withdraws without prejudice the request for retesting of items 7-10 while Mr. Blackmon works with more specialized counsel on that issue" (A.36). She asserted that "[s]ince the initial testing was completed[,] new technologies have allowed for more sensitive separation of otherwise indetectable alleles and can exclude contributors and discern mixtures more accurately" (*id.*).

In response to the government's argument that Blackmon had not satisfied § 22-4133(b)(3), Ms. Bloch asserted that the reasons for prior trial counsel's failure to test Items 1-6 "were unknown" (A.36-37). She asserted, however, that despite consulting with Blackmon and PDS, she was unaware of a strategic reason that Items 1-6 had not been tested (A.37). She asserted that the failure to test Items 1-6 "may ultimately become the basis for" an ineffectiveness claim, and that "an ineffective, poor decision by prior counsel must satisfy [§ 22-4133(b)(3)]" (*id.*).

Regarding § 22-4133(b)(4), Ms. Bloch stated that Blackmon continued to assert his innocence (A.37). She repeated that the assault likely would have left the attacker's DNA on "the sheets" and the victim's

clothing (*id.*). She reiterated that Blackmon needed to know the test results for Items 1-6 "to determine the avenue for further post-conviction litigation" (A.37-38). She further claimed that if Blackmon's prior counsel had chosen to test Items 1-6 and those tests had excluded Blackmon, "it would have pointed toward his innocence, been a relevant factor for the jury to consider, and would have been a significant fact for the defense to use in . . . crafting their theory of the case" (A.37).

Blackmon's Pro Se Letter

On August 30, 2023, the Clerk of the Superior Court filed under seal a pro se letter that Blackmon had written to the Clerk, which attached a letter Blackmon had written to Ms. Bloch (A.40-41; R.52 (Super. Ct. Dkt. p.52)). Blackmon stated that he sought to file his attached letter to Ms. Bloch "to preserve any arguments appointed [c]ounsel Bloch may have waived" (A.40).

Defense Counsel's Motion to Withdraw

In moving to withdraw as counsel on September 15, 2023, Ms. Bloch stated without further explication that briefing on the testing of Items 1-6 was complete, and "Blackmon [wa]s seeking leave to file pleadings on

the issue of retesting of items 7-9" (A.44). She sought the appointment of new counsel to continue pursuing the testing request (*id.*).

The Trial Court's Response to Blackmon's Pro Se Letter

In a September 22, 2023, letter, Judge Anderson informed Blackmon that the Clerk had docketed his correspondence under seal on August 30, 2023, but because that correspondence contained privileged attorney-client communications, Judge Anderson had not read it (A.41). Judge Anderson stated that Blackmon's correspondence remained under seal on the docket, and it would "not be read or considered by [her] at any point" (*id.*). Judge Anderson notified Blackmon that "this material" was being forwarded to his new counsel, Ms. Reed, and the judge's letter copied Ms. Reed and Ms. Bloch, noting that the letter was being served on both "via CaseFileXpress" (A.41-42).

The Trial Court's Ruling

On December 7, 2023, the trial court denied Blackmon's pro se and supplemental IPA motions (A.3-11). The court noted that Blackmon had raped a stranger, attempted to sodomize her, and forced her to wash herself to destroy any evidence, but that effort was unsuccessful because

his "DNA was found in oral, anal, and vaginal swabs recovered from the victim" (A.4-5). The court noted that although in his pro se IPA motion, Blackmon had initially sought testing of those swabs, his attorney's supplemental motion withdrew that request "as they were already tested before the second trial" (A.5 & n.3).[9] The court noted that Blackmon had "conducted independent DNA testing at the DNA Diagnostic Center in Ohio" (A.6 n.4). Thus, Blackmon did "not seek retesting of the very swabs that are powerful evidence of his guilt" (A.5).[10]

The court recognized that Blackmon's IPA filings continued to request that six other items of evidence belonging to the victim be tested for DNA: (1) her comforter; (2) her towel; (3) her pajama pants; (4) her panties; (5) her long-sleeved shirt; and (6) her camisole (A.5). It noted that the government did not test those items, but had made them available to the defense, which also chose not to test them (*id.*). The court found that nine years after the second trial, Blackmon's trial counsel did

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[9] The court also noted that Blackmon had initially asked for DNA testing of a blood sample from the victim's husband, but his attorney withdrew that request (A.5 n.3).

[10] The court noted that insofar as Blackmon questioned the validity of the DNA test results due to issues at DFS (which he called the "D.C. Crime Lab"), DFS conducted none of the DNA testing in this case (A.6 & n.4).

not recall the reason for not testing those six items (*id.*). It found, however, that "strategic choices [were] made" regarding DNA testing (*id.*). For example, "although the defense tested the swabs that identified [Blackmon] as the perpetrator," the defense did not present trial evidence about those test results, which led the court to conclude "that such results would not be helpful to [Blackmon's] case" (*id.*).

The court summarized Blackmon's argument as a claim that testing Items 1-6 would be probative of his innocence because if he was excluded as a contributor to the DNA on those items, it would raise doubt about the "veracity" of the discovery of his DNA on the vaginal, anal, and oral swabs (A.5). The court found this argument unpersuasive (*id.*). It agreed with the government that any probative value of DNA testing on Items 1-6 would be dwarfed by the evidence that Blackmon's DNA was found inside the victim (*id.*). The court found that Blackmon had not challenged the DNA evidence at the second trial insofar as he had asked very few questions of the lab technicians, called as government witnesses, who were involved with the samples during the testing process (A.6).

The court found that Blackmon had failed to satisfy D.C. Code § 22-4133 because the evidence he sought to test was ineligible for post-

conviction DNA testing under § 22-4133(a) and his application for DNA testing was insufficient under § 22-4133(b) (A.7-8). First, the court found it undisputed that DNA testing was readily available at the time of Blackmon's second trial, and thus Items 1-6 were ineligible for post-conviction testing under § 22-4133(a)(3)(A) (A.8). Second, because Items 1-6 had not been previously tested, the court found them ineligible for testing under § 22-4133(a)(3)(B) (*id.*). It further found that even if Items 1-6 had been previously tested, Blackmon had failed to show, pursuant to § 22-4133(a)(3)(B), "that the new type of DNA testing would have a reasonable probability of providing a more probative result than tests previously conducted" (*id.*). The court agreed with the government that the most probative DNA evidence arose from the testing done on the oral, vaginal, and anal swabs (*id.*). The court found that the probative value of Items 1-6 was "minimal in comparison to the evidence of [Blackmon's] DNA found inside the victim and would not undermine confidence in the trial's outcome" (*id.*).

The court found that Blackmon's application for post-conviction DNA testing did not satisfy § 22-4133(b)(3) because it failed to provide a reason why the requested DNA testing on Items 1-6 was not previously

done (A.8-9). In particular, the court found that although Blackmon's prior trial counsel admitted that those items were available for DNA testing and were not previously tested, he could give no reason why that decision was made (A.9). The court recognized that Ms. Bloch had argued that an "ineffective" poor decision by prior defense counsel satisfied § 22-4133(b)(3) because the IPA's intent was to "reach the truth underlying convictions, and to facilitate the kind of investigation that may ultimately lead to exonerations" (*id.*).[11] The court, however, found that the premise of that argument was misplaced because testing Items 1-6 would not exonerate Blackmon because the other items that had been tested for DNA clearly identified him as the perpetrator (*id.*).

Additionally, the court found that even if Blackmon had met the requirements of § 22-4133(a) and (b), he had not satisfied § 22-4133(d) because there was no reasonable probability that DNA testing would "produce non-cumulative evidence that would help establish that [he]

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[11] The court noted that Ms. Bloch had argued that prior trial counsel's failure to test Items 1-6 "may ultimately become the basis for a claim of ineffective assistance of counsel" (A.9 n.7). The court found, however, that such a claim was not currently before it, and that Blackmon had previously raised an unrelated ineffectiveness claim against his former trial counsel (*id.*). *See Blackmon III,* 215 A.3d at 761.

was actually innocent" (A.9). The court recognized that Blackmon was required to show more than a mere possibility that the test results would help to prove his actual innocence despite all the evidence of his guilt (A.10 (citing *Hood v. United States,* 28 A.3d 553, 564 (D.C. 2011)). It found that Blackmon's claim that if he was excluded as a contributor to DNA on Items 1-6, it would raise doubts about "the veracity of [I]tems 7-9," did not meet the reasonable-probability standard (*id.*).

SUMMARY OF ARGUMENT

The trial court properly denied Blackmon's motion for post-conviction DNA testing under the IPA because he did not meet the statutory requirements for testing. In doing so, the court appropriately refused to consider ex parte, pro se correspondence from Blackmon regarding information protected by the attorney-client privilege, and instead forwarded a copy to his new counsel.

Additionally, contrary to Blackmon's claim, the record fails to demonstrate that that the attorney appointed to represent him in the IPA proceedings rendered ineffective assistance of counsel. Instead, the record reflects that IPA counsel made informed decisions to withdraw a claim for DNA retesting made in Blackmon's original pro se filings, and

not to allege that Blackmon's prior trial counsel rendered ineffective assistance by not seeking to conduct DNA testing on other items of evidence before trial. Relatedly, the trial court did not abuse its discretion by not conducting a *Monroe-Farrell* hearing sua sponte before denying Blackmon's IPA motion to investigate whether Blackmon's trial counsel had been ineffective in this manner.

Finally, the record fails to show that Blackmon's counsel labored under a conflict of interest while representing him in the IPA proceedings. Thus, the conflict that Blackmon alleges provides no valid basis to reverse the trial court's denial of the IPA motion.

ARGUMENT

The Trial Court Did Not Abuse Its Discretion in Denying Blackmon's IPA Motion for DNA Testing.

A. Standard of Review and Legal Principles

"To the extent that the statute affords the trial court discretion in its application of the IPA, [this Court] review[s] for abuse of discretion." *Mitchell v. United States,* 80 A.3d 962, 971 (D.C. 2013) (applying abuse-of-discretion review to trial court's denial of DNA-testing request).

To obtain post-conviction DNA testing under the IPA, a defendant

must first establish that the biological material is still available, D.C. Code § 22-4133(a)(2), and that it was not previously subjected to the testing being requested. D.C. Code § 22-4133(a)(3)(A)-(D).[12] Second, the defendant must assert, by affidavit, his actual innocence, identify the evidence sought to be tested and the reason why testing was not previously obtained, and explain how the evidence would help to show his actual innocence. D.C. Code § 22-4133(b). Thereafter, the trial court must afford the government an opportunity to respond, unless the files and records conclusively establish that the defendant is entitled to no relief. D.C. Code § 22-4133(c). Finally, the defendant must show that "there is a reasonable probability that testing will produce non-cumulative evidence that would help establish that the [defendant] was actually innocent of the crime for which [he] was convicted." D.C. Code

[12] The IPA provides four ways by which evidence can meet this first requirement: (A) if DNA testing was not readily available in criminal cases at the time of conviction; (B) if the evidence was not previously subjected to the same type of DNA testing requested, and the new type of testing would have a reasonable probability of providing a more probative result; (C) if the evidence was not tested for reasons that would entitle the defendant to relief under D.C. Code § 23-110; and (D) if the evidence was not previously tested because it is "new evidence." D.C. Code § 22-4133(a)(3)(A)-(D).

§ 22-4133(d); *see Hood,* 28 A.3d at 564 (referring to reasonable-probability factor as "the IPA's materiality requirement"). Whether a defendant has demonstrated such a reasonable probability is typically a mixed question of law and fact. *Id.* This Court "defer[s] to the trial court's reasonable determination of disputed facts," and reviews de novo the legal question of "[w]hether the established or uncontested facts suffice to demonstrate the requisite degree of materiality." *Id.*

B. Blackmon Failed to Meet the IPA Requirements for DNA Testing.

Blackmon proffered to the trial court only conjecture that conducting DNA testing on the items listed in his motion would yield exculpatory evidence. *See Cuffey v. United States,* 976 A.2d 897, 899 (D.C. 2009). The trial court was not required to grant Blackmon's motion for DNA testing in these circumstances. *Id.*

Blackmon had already done independent DNA retesting on the swab evidence before the second trial, as the trial court recognized in denying the IPA motion (A.6 n.4). Because as the court noted, Blackmon did not challenge the swab evidence in any meaningful way during the second trial (A.6), and did not present the results of the defense's

independent DNA testing at his second trial (A.5), it is reasonable to conclude, as the trial court did (*id.*), that the independent testing of the swabs failed to produce favorable defense evidence. For that reason, Blackmon was not harmed by Ms. Bloch's withdrawal of his retesting request for the swabs. Blackmon made no showing, even in his pro se IPA filings, that the new type of DNA testing he sought to use in retesting the swab evidence would have a reasonable probability of providing a more probative result than the tests employed during the independent defense testing before his second trial in 2014. *See* D.C. Code § 22-4133(a)(3)(B).

Furthermore, given that Blackmon's prior trial counsel could not recall why he had not tested Items 1-6 before the second trial, Blackmon failed to show that those items were not previously tested due to circumstances that would entitle him to relief under D.C. Code § 23-110, namely ineffective assistance of counsel. Thus, Blackmon failed to satisfy § 22-4133(a)(3)(C). Likewise, he failed to satisfy § 22-4133(b)(3) because he did not set forth the reason that the requested DNA testing on Items 1-6 was not previously obtained. In any event, the trial court correctly concluded that Blackmon had failed to satisfy § 22-4133(d) because he had not shown a reasonable probability that testing Items 1-6 would

produce non-cumulative evidence that would help establish that he was actually innocent. Blackmon could not do so given that the repeated DNA testing of the swab evidence clearly identified him as the perpetrator. *See Hood,* 28 A.3d at 564 (defendant must show more than mere possibility that test results would help him prove actual innocence despite the evidence of his guilt).

C. The Trial Court Did Not Abuse Its Discretion By Not Considering Blackmon's Correspondence.

Blackmon errs in claiming (at 17-19) that the trial court abused its discretion by not considering his August 18, 2023, letter to Ms. Bloch in which he indicated disagreement with her waiver of his request for retesting of the swabs and Jay Ho's blood sample (Items 7-10) (Sealed Record (SR.) 2-3). The court appropriately refused to consider Blackmon's letter to Ms. Bloch, because, as the trial court stated in responding to Blackmon's letters (A.41), that correspondence indeed contained attorney-client privileged information (SR.2-3). *Cf. Patterson v. United States,* 479 A.2d 335, 340 (D.C. 1984) (refusing on appeal to consider defense counsel's testimony about defendant's statement to him; noting that instead of counsel testifying in regard to plea-withdrawal motion

that defendant told him before accepting plea that he possessed the drugs at issue, "the proper response . . . would have been to assert the attorney-client privilege").[13] It was also appropriate for the court to refuse to consider the letter because it was an ex parte communication. *See* District of Columbia Courts, Code of Judicial Conduct, Rule 2.9(A): Ex Parte Communications (2021 Supp.) (generally "[a] judge shall not . . . permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter").

Blackmon asserts that at the very least, the trial court abused its discretion by not reading his cover letter to the Clerk of Court which asked the Clerk to file under seal a copy of his letter to Ms. Bloch "to

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[13] Although Blackmon suggests (at 17-18) that by sending the letter he was "apparently" waiving the privilege "for court purposes," he does not brief, and has thus abandoned, any claim that the trial court was required to treat his letter as a limited waiver of the privilege "for court purposes." *See Bardoff v. United States,* 628 A.2d 86, 90 n.8 (D.C. 1993) (general assertions in brief without supporting argument are deemed abandoned); *cf. Adams v. Franklin*, 924 A.2d 993, 999 (D.C. 2007) (privilege waived by disclosure to third party). In any event, unlike in *Adams*, where, when the defendant disclosed the information, he "knew and intended that the information be published," 924 A.2d at 1000, here Blackmon filed the letter ex parte under seal, thereby manifesting an intent that the information remain confidential.

preserve any a[r]guments appointed [c]ounsel Bloch may have waived" (A.40). But this letter too amounted to an improper ex parte communication. Thus, the trial court appropriately did not read it. *See* District of Columbia Courts, Code of Judicial Conduct, Rule 2.9(A): Ex Parte Communications (2021 Supp.). It was also appropriate for Judge Anderson not to consider the cover letter because it was directed at the Clerk, not her.

Furthermore, contrary to Blackmon's claim (at 17), the cover letter to the Clerk did not "specifically stat[e] to the court that he did not waive his *pro se* arguments regarding DNA retesting." The cover letter was much vaguer, asking the Clerk to file a copy of his letter to Ms. Bloch under seal "as to preserve any a[r]guments appointed [c]ounsel Bloch may have waived" (A.40). This statement did not make clear that he was preserving his original pro se request for retesting of Items 7-10.

In her September 15, 2023, motion to withdraw from the case, Ms. Bloch stated that briefing was complete regarding the testing of Items 1-6 and that Blackmon "is seeking leave to file pleadings on the issue of retesting of [I]tems 7-9" (the swabs) (A.44). Thus, Ms. Bloch requested the appointment of new counsel "to continue pursuing the request for

testing" (*id.*). Ms. Bloch did not ask the court to allow Blackmon to file pleadings regarding retesting of Items 7-9 at that time. Nor did she file any such pleadings.

The trial court appointed Ms. Reed to represent Blackmon on September 20, 2023 (R.267 (Reed app't order p.1)). Two days later, the court sent a letter to Blackmon explaining that it would not consider the correspondence he had sent to the Clerk of Court and that it was forwarding that material to Ms. Reed (A.41). The court copied Ms. Reed and Ms. Bloch on its letter, noting their email addresses and that it was serving them "via CaseFileXpress" (*id.*). Thus, Blackmon could have renewed his original pro se claim for retesting of Items 7-10 through Ms. Reed. But as of December 7, 2023, neither Ms. Reed nor Blackmon filed any pleadings renewing a claim for retesting Items 7-10. Thus, the trial court did not err in finding that Blackmon was not making such a retesting request. For the same reasons, Blackmon was not prejudiced by any error in failing to read the letter.

D. The Record Does Not Reflect Ineffective Assistance of IPA Counsel.

Contrary to Blackmon's claim (at 19-22) Ms. Bloch did not render

ineffective assistance of counsel by waiving his request for retesting Items 7-10 and by not requesting a hearing on his pro se claim that his former trial counsel provided ineffective assistance by failing to test Items 1-6 before his second trial.[14]

First, contrary to Blackmon's claim, Ms. Bloch did not ignorantly withdraw his retesting request on Items 7-10.[15] Ms. Bloch's supplemental IPA motion stated her reason for doing so and reflected that she investigated the issue and made an informed decision not to seek retesting of Items 7-10. In particular, Ms. Bloch stated that after investigation, it was discovered that Items 7-9—the vaginal, anal, and

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[14] Relatedly, Blackmon claims (at 27-28) that the trial court erred in not conducting a "*Monroe-Farrell* hearing" on his pro se IPA claim that his trial counsel rendered ineffective assistance by not testing Items 1-6 before the second trial. This claim lacks merit. Only where a defendant raises an ineffectiveness claim before trial is a *Monroe-Farrell* hearing authorized, under which the trial court would assess whether defense counsel's pretrial representation was "within the range of competence demanded of attorneys in criminal cases." *Johnson v. United States,* 746 A.2d 349, 353 (D.C. 2000) (quoting *Monroe v. United States,* 389 A.2d 811, 819 (D.C. 1978)). After jeopardy has attached, a *Monroe-Farrell* hearing is no longer available, and the *Strickland* standard applies. *Johnson,* 746 A.2d at 353.

[15] Nor is the government aware of Ms. Bloch admitting "incompetence" or "having little specialized training" regarding DNA testing, as Blackmon claims she did (at 20-21).

oral swabs—"were previously subjected to DNA testing and [we]re therefore not at issue in this motion," and that Blackmon was "not seeking testing of Jay Ho's blood sample" (Item 10) (A.31 & n.1).

The record further reflects that Ms. Bloch undertook an investigation before withdrawing Blackmon's pro se request for retesting of Items 7-10. On April 18, 2022, Ms. Bloch moved for the trial court "to issue an Order for production of records prepared by [the] DNA Diagnostic Center" (Sealed Ex Parte Record (SEPR.) 1 (production mtn. p.1)). Ms. Bloch explained that she had already communicated with the DNA Diagnostic Center about its "involvement with [Blackmon's] 2014 trial," and the Center had requested a court order before disclosing information to her (*id.*). The trial court granted this motion the same day (SEPR.3-4 (production order)). Also, Ms. Bloch's May 26, 2022, extension motion stated that she had been investigating the case and planned to consult an expert, Dr. Maher Nourredine, who would need more time to review the case (R.200 (mtn. p.1)). In her July 25, 2022, supplemental IPA motion, Ms. Bloch noted that the court had granted her May 26, 2022, request for an additional 60 days in which to file her IPA motion for "her expert to finish his evaluation" (A.30). Accordingly, when Ms.

Bloch further stated in her supplemental IPA motion that after investigation, it was discovered that Items 7-9 "were previously subjected to DNA testing and [we]re therefore not at issue in this motion," there is no basis to conclude that her statement was unsupported by a proper investigation (A.31).

Against this backdrop, Ms. Bloch's statement in her August 9, 2023, supplemental IPA reply that she was "withdraw[ing] without prejudice the request for retesting of Items 7-10" while Blackmon "work[ed] with more specialized counsel on that issue" did not reflect ineffective assistance of counsel (A.36). The record indicates that Ms. Bloch investigated Blackmon's request for retesting Items 7-10, and found it inappropriate because Items 7-9 (the swabs) "were previously subjected to DNA testing" (A.31). Furthermore, Blackmon's pro se IPA motion and reply provide no reason for seeking to retest Item 10 (Jay Ho's blood sample).[16] Even on appeal, Blackmon fails to explain why retesting of Item 10 is warranted.

[16] Blackmon's pro se IPA motion listed Item 10 as an item he wanted tested, and stated generally, without specifying particular items, that further DNA testing was needed due to "D.C. Crime Lab" misconduct (continued . . .)

Second, contrary to Blackmon's claim (at 22, 25-27), Ms. Bloch did not render ineffective assistance of counsel by failing to directly claim that Blackmon's former trial counsel was ineffective in failing to test Items 1-6 before his second trial. Nor was Ms. Bloch ineffective by failing to "shore up" Blackmon's pro se ineffectiveness claim against his trial counsel with an affidavit or an evidentiary-hearing request. Ms. Bloch's supplemental IPA motion showed that she had communicated with Blackmon's former trial attorney, who could not recall why he had not independently tested Items 1-6, and the file did not contain an explanation (A.32). It was well within the trial court's discretion to rely on Ms. Bloch's representations in her filings without an affidavit. *Cf. Torney v. United States,* 300 A.3d 760, 777 (D.C. 2023) (court has discretion to rely on representation by officer of the court about their future conduct); *Shepherd v. United States,* 296 A.3d 389, 398 (D.C. 2023) (defendant's assertions within § 23-110 motion itself may constitute credible proffer even without formal affidavit); *Beatty v. United States,* 956 A.2d 52, 57 & n.5 (D.C. 2008) (trial court entitled to accept

(A.16-17). His pro se IPA reply recognized, however, that he "may have been mistaken about the involvement of the 'D.C. Crime Lab'" (A.24).

representations by prosecutor, who is an officer of the court). Also, given trial counsel's lack of memory, and the absence of information in the trial file, a hearing lacked any prospect of developing relevant evidence and thus would have been futile.

Moreover, Ms. Bloch's investigation revealed no evidence upon which to assert that Blackmon's trial counsel was ineffective. Thus, in turn, Ms. Bloch did not perform deficiently by not making an unsubstantiated ineffectiveness claim against trial counsel or seeking an evidentiary hearing simply to present that trial counsel had no recollection of the matter. *See Zanders v. United States,* 678 A.2d 556, 569-70 (D.C. 1996) ("there must be some basis for filing a motion; there is no professional obligation to file a motion that may have no merit"). Likewise, *Strickland* prejudice does not arise from failure to file a motion that "would not have been successful." *Washington v. United States,* 689 A.2d 568, 572 (D.C. 1997).

Furthermore, because the trial court ultimately, and correctly, found that even if Items 1-6 had undergone DNA testing, the results would not exonerate Blackmon (A.9), there was no reason for the court to hold a hearing regarding whether his former trial counsel was deficient

in failing to have those items tested. Even assuming arguendo that such a claim was squarely before the trial court,[17] Blackmon would be unable to show that any allegedly deficient performance in failing to test Items 1-6 was prejudicial. *See Strickland v. Washington,* 466 U.S. 668, 688, 694 (1984) (to establish ineffective assistance of counsel, defendant must show attorney's representation fell below objective standard of reasonableness, and a reasonable probability that, but for attorney's unprofessional errors, the trial outcome would have been different). The trial court appropriately found that Blackmon had not shown, pursuant to § 22-4133(d), that there was a reasonable probability that DNA testing on Items 1-6 would "produce non-cumulative evidence that would help establish that [Blackmon] was actually innocent" (A.9). As this Court has recognized, this IPA "reasonable probability" standard is "borrowed from constitutional jurisprudence," and when a defendant is required to show a "reasonable probability" of prejudice to obtain post-conviction relief for

[17] Notably, although the trial court found that Ms. Bloch had not squarely presented an ineffectiveness claim against Blackmon's trial counsel (A.9 n.9), the court recognized that Ms. Bloch had presented an argument that "an ineffective, poor decision by prior counsel must satisfy [D.C. Code § 22-4133(b)(3)]" (A.9).

a violation of his constitutional rights, such as in an ineffective-assistance claim, the prejudice "must be significant enough that it 'undermines confidence' in the trial's outcome." *Hood,* 28 A.3d at 564 (quoting *Kyles v. Whitney,* 514 U.S. 419, 434 (1995)). Thus, the trial court's finding regarding § 22-4133(d) was equivalent to a finding that any allegedly deficient performance by Blackmon's trial counsel in failing to test Items 1-6 did not cause *Strickland* prejudice.

E. Blackmon Fails to Show That IPA Counsel Had a Conflict of Interest.

Blackmon claims (at 22-27) that Ms. Bloch labored under a conflict of interest while representing him, and thus did not zealously pursue his IPA motion. He cites (at 25-26) Ms. Bloch's September 15, 2023, motion to withdraw, which indicated that she would be leaving the CJA panel at the end of September for a position at PDS. Blackmon thus claims (*id.*) that this conflict caused her to omit from her earlier supplemental IPA motion and reply an ineffectiveness claim against Blackmon's former PDS trial counsel for failing to seek pretrial DNA testing of Items 1-6. Blackmon further summarily claims (at 25) that Ms. Bloch's waiver of his

pro se claim for retesting of Items 7-10 reflected the conflict. This claim lacks merit.

Blackmon did not raise his conflict claim in the trial court, even after Ms. Reed began representing him in the IPA proceedings, and he fails to show that the trial court erred in failing to find a conflict *sua sponte*. Blackmon must demonstrate not merely that there was a potential conflict of interest, but an actual conflict, i.e., that Ms. Bloch "actively represented conflicting interests" and that this "actual conflict of interest adversely affected [her] performance." *Cuyler v. Sullivan,* 446 U.S. 335, 349-50 (1980); *Malede v. United States,* 767 A.2d 267, 270 (D.C. 2001). To establish an "actual conflict," Blackmon must show that Ms. Bloch was "required to make a choice advancing [her own or PDS's] interests to the detriment of [Blackmon's] interest," *Malede,* 767 A.2d at 270, and must also identify specific instances in the record where a *plausible* defense strategy or tactic was not pursued because of this conflict of interest. *McCrimmon v. United States,* 853 A.2d 154, 156 (D.C. 2004) (emphasis added). Blackmon has failed to do so, particularly given the valid reasons not to seek retesting of Items 7-10 or to bring an ineffectiveness claim for failure to test Items 1-6, discussed supra at pp.

38-44. *See Andrews v. United States,* 179 A.3d 279, 294 (D.C. 2018) ("An alleged conflict of interest that obstructs the use of a particular strategy or defense is not significant unless the defense is plausible."). Thus, the alleged conflict based on Ms. Bloch's impending employment with PDS provides no grounds to reverse the trial court's denial of the IPA motion.[18]

What is more, beyond the fact that Ms. Bloch had accepted a job at PDS as of September 15, 2023, as noted in her withdrawal motion (A.44), there is no evidence in the record as to when Ms. Bloch was offered a job at PDS, or how that offer came about. Blackmon (at 24-25) merely speculates that Ms. Bloch may have wanted to work at PDS the entire time she served on the CJA panel, and he acknowledges that the record does not reflect when Ms. Bloch began negotiating for employment with PDS. Thus, there is no evidence that Ms. Bloch had even a potential conflict of interest when she filed her earlier supplemental IPA pleadings, much less that an actual conflict caused her to forgo a plausible defense strategy to benefit PDS. *See Gaulden v. United States,*

[18] Even if Ms. Bloch had a conflict when she filed her supplemental IPA reply, there is no record evidence as to whether Blackmon chose to waive the conflict, which he was free to do. *See Douglas v. United States,* 488 A.2d 121, 144-45 (D.C. 1985).

239 A.3d 592, 597 (D.C. 2020) ("Conflicts that are merely speculative or hypothetical are not *actual* conflicts." (emphasis in original; citation and internal quotation marks omitted).

Notably, Ms. Bloch's August 9, 2023, supplemental IPA reply, filed more than five weeks before she sought to withdraw, was consistent with her earlier positions regarding Blackmon's DNA testing and retesting requests (A.36-37). In her supplemental IPA motion, filed over a year earlier, Ms. Bloch withdrew Blackmon's pro se retesting request for Items 7-10 and made no ineffectiveness claim against trial counsel (A.30-31, 36). Thus, there was no material change of position contemporaneous to Ms. Bloch announcing her impending employment with PDS. Also, there is no reasonable basis to conclude, let alone any record evidence, that Ms. Bloch had negotiated for employment with PDS on or before July 25, 2022, when she filed her supplemental IPA motion.

Furthermore, in moving to withdraw, Ms. Bloch notified the court that "Blackmon [wa]s seeking leave to file pleadings on the issue of retesting of items 7-9," thus presenting Blackmon's own contemporaneous thoughts on the retesting issue, and she sought the appointment of new counsel to continue pursuing the testing request

(A.44). Thus, even on the brink of leaving the case, Ms. Bloch continued to represent his interests.[19]

CONCLUSION

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

Respectfully submitted,

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[19] Contrary to Blackmon's assertion (at 29), the fact that Judge Anderson is no longer an active Superior Court judge provides no independent basis to vacate her decision on grounds that it "makes more sense" to permit a new judge to rule on the IPA motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Mindy Daniels, Esq., on this 24th day of September, 2024.

_____/s/_____
KATHERINE M. KELLY
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