IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0384

MICHAEL GILBERT ILK,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

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STATEMENT OF THE ISSUE

Did the district court correctly deny Appellant postconviction relief when Appellant failed to meet his burden of proving his trial counsel performed deficiently by not challenging a prospective juror for cause or removing the prospective juror with a peremptory challenge?

STATEMENT OF THE CASE

I. Criminal proceeding/DC-15-35[1]

On May 6, 2015, the State filed an Information charging Appellant Michael Ilk with numerous offenses, including two counts of Attempted Deliberate Homicide and two counts of Aggravated Assault. (D.C. Doc. 4.)[2] Ilk filed a notice that he would rely on the affirmative defense of justifiable use of force. (D.C. Doc. 18.) The district court held a jury trial on June 13, 2016 through June 16, 2016. (6/13/16-6/16/16 Transcript of Jury Trial [Trial Tr.].)

The jury found Ilk guilty of two counts of Attempted Deliberate Homicide and two counts of Aggravated Assault. (D.C. Doc. 86.) The district court sentenced Ilk to 80 years in prison for each Attempted Deliberate Homicide conviction and

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[1] The district court took judicial notice of the criminal case file and the trial transcripts.

[2] The State moved to dismiss the charge of Partner or Family Member Assault and the charge of Eluding a Peace Officer. (D.C. Doc. 74.)

ordered that the sentences run consecutively. (D.C. Doc. 94.) The district court sentenced Ilk to 20 years in prison for each Aggravated Assault conviction and ordered that those sentences run concurrently to each other and to the Attempted Deliberate Homicide convictions. (*Id*.)

Ilk appealed his convictions. *State v. Ilk*, 2018 MT 186, 392 Mont. 201, 422 P.3d 1219. He argued that the district court erroneously instructed the jury on "mental state" and erroneously concluded that he had not proved his allegation that the State withheld exculpatory evidence. *Id.* ¶ 1. This Court held that the erroneous jury instruction was harmless because Ilk's substantial rights were not affected. *Id.* ¶ 26. The Court also held that Ilk did not prove each element of his alleged violation of *Brady v. Maryland*.[3]

II. Postconviction relief proceeding/DV-19-209

On October 24, 2019, Ilk filed a petition for postconviction relief, raising a claim that defense counsel provided ineffective assistance of counsel by failing to challenge a prospective juror for cause and/or failing to ask the prospective juror follow-up questions. (Docs. 1-2.) The State filed a response and Ilk replied. (Docs. 8, 13.) On May 19, 2020, the district court held an evidentiary hearing on Ilk's ineffective assistance of counsel claim. (5/19/20 Transcript of Evidentiary Hearing [Tr.].)

[3] 373 U.S. 83 (1963).

Following the evidentiary hearing, the district court issued an order denying Ilk postconviction relief. In the order, the district court explained:

> Here Petitioner has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." At the criminal trial, Petitioner presented a justifiable use of force defense. He admitted the elements of the offense but argued his actions were justified self-defense. Petitioner presented evidence attempting to show the relationship with one of the victims was mischaracterized and lasted longer than the victim claimed. Petitioner introduced text messages showing that [one] victim asked the other victim to bring a gun to the meeting that precipitated the shooting. The defense portrayed that victim as a manipulative younger woman who was leading on Petitioner, taking advantage of him, luring him to the scene, where she engineered the confrontation that was the subject to the criminal trial.
>
> Reviewing the totality of Juror Brown's statements during voir dire, including follow-up questions to Juror Brown and the entire panel, the court cannot find Mr. Hinchey's conduct fell "outside the wide range of reasonable professional assistance" in light of the circumstances at the time of trial. Indeed, Juror Brown's statements described a layman's definition of justifiable use of force. It was objectively reasonable for Mr. Hinchey to not challenge Juror Brown.

(Doc. 26, attached to Appellant's Br. as an Appendix.)

STATEMENT OF THE FACTS

I. Criminal case

A. The offenses

At the time of Ilk's trial, Hadassah Pereslete was 24 years old and lived in Eureka, Montana. (Trial Tr. at 688-89.) Prior to Ilk's trial, Hadassah had known 41-year-old Ilk for about four years and had been in a relationship with him

beginning in June 2012 and ending in January 2015. (Tr. at 691, 809.) According to Hadassah, her and Ilk's relationship ended suddenly and on poor terms after Hadassah claimed that Ilk had physically assaulted her. (Tr. at 692, 699.) According to Hadassah, Ilk and his family pressured her to reunite with Ilk. (Tr. at 695.) Ilk sent Hadassah a letter in which he wrote:

> Please accept my apology in regards with anger management and domestic abuse. That cannot ever happen again. That is pathetic and shameful and so many other words. I am getting the help I need to deal with this issue.

(Trial Tr. at 699; State's Ex. 47, admitted at trial.) At trial, Ilk admitted to verbally abusing Hadassah, but denied physically assaulting her. (Tr. at 840.)

Around 10 p.m. on April 14, 2015, Hadassah called 911 because Ilk was at her house and was refusing to leave. Hadassah hung up without speaking to anyone because Ilk finally left. (Trial Tr. at 704-06.) Hadassah acknowledged that she sent Ilk a text that evening that stated, "Not a drop. You weren't here to talk and I want you fucking dead." (Trial Tr. at 703.) Hadassah sent another text to Ilk at 1:29 a.m. on April 15, 2015, which stated, "I hate you so intensely." (Trial Tr. at 704.)

In April 2015, Hadassah was working as a homebuilder on a project at Eureka Hill Subdivision just outside of Eureka. (Tr. at 707.) On April 15, 2015, Hadassah arrived at her job site around 7:00 a.m. (Tr. at 708.) At some point during the day, Hadassah exchanged text messages with Tyler Wilson (Tyler). Hadassah has known Tyler since she was about 10 years old because Tyler is a

friend of her brother's. Tyler is about five years older than Hadassah. Hadassah had recently reconnected with Tyler. (Tr. at 708-09.) Tyler is a journeyman lineman who works all over the country. Tyler spends blocks of time in Eureka when he is not working. (Tr. at 422, 425.)

In April 2015, Tyler was temporarily in Eureka, but he had been staying with a friend in Kalispell for a few days to celebrate his birthday. (Tr. at 426-27.) On the morning of April 15, 2015, Tyler left his friend's house in Kalispell to return to Eureka to finish his tax paperwork. (Tr. at 427.) Tyler was driving a 2007 black Chevrolet truck. Tyler knew that on April 15, 2015, he had two 45-caliber pistols, a 22-caliber pistol, and a Henry lever action rifle in his truck. The pistols were all in his center storage bin. Tyler's rifle was in the back seat. Tyler's guns were in the truck because he and his friend had gone out on his birthday to shoot gophers while Tyler was in Kalispell. (Tr. at 429, 431.)

On April 15, 2015, through text messages, Hadassah and Tyler agreed to meet at her work site after work that evening. Hadassah sent Tyler a message that said, "[B]ring a gun. Better safe than sorry." Tyler responded, "Ha ha, check." (Tr. at 711.) Hadassah explained that this exchange between her and Tyler was a joke because Tyler always had guns in his truck. (Tr. at 714.)

Tyler arrived at Hadassah's work site shortly after this text exchange. Hadassah was sitting in the entry way of the home on which she had been working.

She walked to Tyler's driver side window and asked if Tyler wanted to stay there or go elsewhere. He wanted to go somewhere else, so Hadassah got into Tyler's truck so he could drive her to her car to lock it up and retrieve her purse. Hadassah's car was parked at the top of the driveway. (Tr. at 718-19.)

As Tyler and Hadassah got to her car, Ilk drove up in his red Dodge pickup. (Tr. at 719.) Hadassah explained that Tyler's truck was stopped and her hand was on the inside passenger door handle of Tyler's truck when Ilk:

> flew in and whipped in at an angle, stopped and I was—had my hand on the door handle to get out of his truck to go to my car and then paused when—I could see the truck coming, and Mike whips in and comes in and stops at an angle in front of us, and his window was already down and, um, probably within fifteen feet of us, maybe less. He looked right at us and pulled a gun up out of his window, or up to window level and began firing as fast as you can fire a weapon.

(Tr. at 721.) Tyler's truck was facing towards the road. Tyler was not holding any of his guns, nor did he take out any of his guns when the red truck appeared. (Tr. at 439.)

The front of the red truck came straight at the front of Tyler's truck. Ilk, the driver of the red truck, turned slightly and blocked the driveway. (Tr. at 443.)

Tyler explained that when the red truck approached:

> I didn't know who it was so I looked over at Hadassah in my passenger seat and asked her who it was. And as I am asking her who it was, the next thing I know is bullets flying through the windshield. I can hear them crack through my front windshield. So I looked for a path to get around him because he was—his truck was blocking the driveway, so I floored it and went the only way I could around him,

> and I ran over whatever was in my way, some stacks of plywood, and [got] around him and he was shooting at me the whole time. I just remember a bunch of loud gunshots and bullets hitting my truck as I am going [past] him. After I passed him I can remember the bullets hitting my tailgate, hitting my truck, I remember the bullets banging off my truck as I am going down the driveway as I turned right down the driveway.

(Tr. at 440-41.) The shooting started within seconds of Ilk using his truck to block the driveway. Tyler had no choice but to drive around the red truck to escape. (Tr. at 444-45.)

Hadassah ducked down and screamed at Tyler to go. (Tr. at 722.) Ilk's truck was partially blocking the driveway, so Tyler drove over a large pile of lumber to get around it. Ilk continued to fire at them. (Tr. at 722-23.) As Hadassah and Tyler attempted to escape, Hadassah could hear gun shots coming at them. (Tr. at 723.)

Tyler turned right from the work site onto the main road towards town. Hadassah immediately knew that she had been shot. (Tr. at 725.) Hadassah called 911 as Tyler headed to the police station, which is roughly in the center of Eureka. (Tr. at 725-26.) Hadassah believed that Ilk was following them. (Tr. at 726.)

As Tyler turned onto the roadway into town, he realized he had been shot in the right hand and was bleeding. His finger was bent over at a 90-degree angle and the bone was sticking out. (Tr. at 446.) Tyler knew he needed to get some medical help before he passed out. He headed for the police station as Hadassah called 911. (Tr. at 446-47.) Tyler was afraid for his life. (Tr. at 448.)

Tyler made it to the police station and got out of the truck to go inside for help. The front door was locked. As Tyler pounded on the door, Ilk pulled into the parking lot. Tyler believed that Ilk was going to shoot him again, so he quickly ran behind the building. (Tr. at 450-51.)

When they arrived at the police station, Hadassah could not get out of the truck because Ilk had shot her in the leg. Tyler immediately jumped out and ran to the first set of doors he could find at the police station. These doors were locked, so he ran to a second set of doors, but was still unable to get inside. When Ilk arrived at the police station, Hadassah thought to herself that she had escaped initially but now Ilk was going to "end" her. (Tr. at 726-28.) Hadassah opened the passenger side door, dropped her body onto the ground and crawled between the two back tires. Hadassah believed that Ilk would continue with his shooting spree and this was her only chance at surviving. (*Id*.) Ilk had already shot Hadassah in her right leg and in her left arm. (Tr. at 731.)

Yvonne Letien, a Eureka dispatcher, received Hadassah's 911 call between 8:00 and 8:30 p.m. on April 15, 2015. (Tr. at 231-33.) Officer Jeffcock, the Eureka Chief of Police, overheard the 911 call. (Tr. at 250, 253.) Officer Jeffcock left the station headed in the general direction of where he believed the vehicle carrying the 911 caller was located. Officer Jeffcock activated his lights. On the way, he drove by a black truck heading towards town that started to pull over. About 15

seconds later he drove by a red truck also headed towards town. The driver of the red truck was trying to pass a vehicle on the wrong side of the roadway, so Officer Jeffcock made a U-turn and followed the red truck with his lights activated. (Tr. at 260-62.) The driver of the red truck, later identified as Ilk, refused to yield, so Officer Jeffcock activated his sirens. Ilk still did not pull over. Officer Jeffcock pulled alongside Ilk and motioned for him to pull over. Ilk refused to pull over. (Tr. at 263-64.)

Ilk seemed to be headed for the police station. As Ilk pulled into the parking lot of the police station, Officer Jeffcock radioed the dispatcher about the situation. As Officer Jeffcock was driving, he removed his seatbelt and put his weapon in his hand before he came to a stop. Ilk opened his door before he came to a complete stop and jumped out of the truck. Officer Jeffcock jumped out of his vehicle and ordered Ilk to the ground. Officers subdued and handcuffed Ilk. (Tr. at 266-67.) Ilk told officers that he had not suffered any injuries. (Tr. at 330.) Ilk did not have an excited or frantic demeanor. (Tr. at 321.)

As soon as Officer Jeffcock had Ilk secured in handcuffs, he heard a woman screaming. He found Hadassah sitting on the ground behind a black truck. He and another officer initiated first aid. (Tr. at 267.) Hadassah told Officer Jeffcock that Ilk had shot her. (Tr. at 295.) The officers put tourniquets on her leg and arm and gave her oxygen until she was transported to the hospital. (Tr. at 730-31.)

Officer Heintz of the Eureka Police Department also administered first aid to Hadassah before the ambulance arrived. (Tr. at 299, 307-10.) As he was doing so, a male, later identified as Tyler, sat down next to the black truck. Tyler was holding his arm and was bleeding. Officer Heintz tended to Tyler until the ambulance arrived. (Tr. at 311-12.)

After tending to Hadassah, Officer Jeffcock returned to Ilk's truck and looked through the window into the cab. Officer Jeffcock observed a black semi-automatic pistol. (Tr. at 269.) Officers towed Ilk's truck and Tyler's truck to a secured impound lot and placed evidence tape around the doors of both vehicles. (Tr. at 415-17.)

Officer Duram of the Montana Highway Patrol (MHP) found and secured the crime scene. (Tr. at 322, 334-37.) As Officer Duram walked down the driveway of the house under construction where the shootings had occurred, he saw acceleration marks in the driveway. He followed those tracks and saw that they went over a pile of two by fours and over a short pile of OSB lumber. (Tr. at 343.) Officer Duram observed shell casings close to the lumber pile with tire tracks over it. (Tr. at 344, 351.)

Detective Rhodes of the Lincoln County Sheriff's Office was dispatched to the scene of the shooting, but by the time he arrived it was quite dark. (Tr. at 509, 519.) Officer Duram had kept the scene secure. Detective Rhodes observed thirteen

9-millimeter shell casings that were somewhat together in a clump. He also observed one 45-caliber shell casing in a different area. (Tr. at 519-22, 670.) Detective Rhodes marked and photographed the location of all the shell casings and collected the casings as evidence. He also took some general photographs of the scene. (Tr. at 526; State's Exs. 10-26.)

The next day, Detective Rhodes interviewed Tyler and Hadassah at the hospital. Tyler gave Detective Rhodes permission to search his truck. (Tr. at 427-28.) Detective Rhodes observed and photographed numerous bullet holes in Tyler's truck, including the windshield. (Tr. at 531-36, 545, 551-53.) There were two shots through the windshield of Tyler's truck that appeared to have happened as his truck was moving. There was a shot into the tailgate and a shot into the roof area that appeared to have happened as Tyler's truck was following the curve of the road. (Tr. at 551-53.)

Tyler had four guns inside of his truck. Two were in the center console and two were in the back. (Tr. at 554.) None of these guns were loaded, meaning none of the guns had a round in the chamber (Tr. at 563.) There were empty 22- and 45-caliber shell casings all over the inside of Tyler's truck. (Tr. at 539-40.)

Detective Rhodes obtained a search warrant authorizing a search of Ilk's truck. (Tr. at 553-54.) Detective Rhodes photographed Ilk's truck. (Tr. at 557, 582.) There were no bullet holes anywhere on Ilk's truck. (Tr. at 559.) Detective

Rhodes seized a 9-millimeter handgun from inside Ilk's truck as well as a box of 9-millimeter ammunition. The box had originally contained 50 rounds of ammunition, and there were 11 rounds missing from the box. (Tr. at 560, 568.) Detective Rhodes also found Hadassah's passports under the driver's side floor mat. (Tr. at 560.) The handgun was on the center hump of the vehicle on the passenger side, within the reach of the vehicle's driver. There was a round in the chamber ready to be fired. (Tr. at 565-66.)

B. Defense theory

In contrast to Hadassah's testimony, Ilk testified that the couple broke up in January for about a month, but then reunited until sometime in April. (Trial Tr. at 812.) Ilk had photographs documenting the time he and Hadassah spent together during the period that Hadassah claimed that they were no longer together. (Trial Tr. at 815-17.) Around March 25, 2015, the couple spent three days together in Missoula. (*Id*. at 817-18.) According to Ilk, he and Hadassah camped with friends on Saturday, April 11, 2015. (Trial Tr. at 821-22.) Shortly after that, Ilk learned that Hadassah had been seeing Tyler. (Trial Tr. at 823.) Ilk called several other witnesses who had spent time with Ilk and Hadassah as a couple, and who testified about their seemingly happy relationship. (Trial Tr. at 885-922.) One of the witnesses testified that Hadassah often acted immature and dramatic. (Trial Tr. at 921.)

At trial, Ilk admitted that he went to Hadassah's job site at about 8 p.m. on April 15, 2015, "just to get some closure like, just something." (Trial Tr. at 829.) Ilk had texted Hadassah in advance that he planned to come to the job site that evening. (Trial Tr. at 826.) Ilk stated that he got to the job site, parked his truck, and shut it off after seeing Hadassah's car. Ilk then noticed a black Chevrolet truck driving from near the house towards where he was parked. He just assumed it was one of the other workers. (Tr. at 832.) Ilk maintained that suddenly the driver of the black truck accelerated rapidly in his direction. (Tr. at 833.) He could see that Hadassah was a passenger in the truck. Ilk stated that a male was driving the truck, but the male also had a gun in his right hand. (Tr. at 834.)

At this point, Ilk said, he knew what was going to happen, so he reached for his gun. Ilk claimed he had already heard gunshots before he got his gun pulled out. Ilk stated that the black truck was coming directly at him. (Tr. at 834-35.) He estimated the truck was about 10 feet away when he panicked, got as far down in his seat as he could, and "just started shooting." (Tr. at 836.) Ilk said his truck was turned off, so he was "stuck," (*Id*.) Ilk admitted that he "just kept pulling the trigger" because he thought the driver of the black truck was going to kill him. (Tr. at 837.)

Ilk maintained that the driver of the black truck then left the work site. After Ilk was sure the truck was gone, he headed straight to the police station. He denied

that he was following or chasing the black truck. (Tr. at 837.) He said he headed to the police station for safety. (Tr. at 838.) Ilk intended to report this incident to the local police. Instead, he was immediately arrested. (Tr. at 841.)

Ilk admitted that he passed a police officer on the way into town but did not stop and ask for help. (Tr. at 843.) Ilk further acknowledged that he did not stop for the police car following behind him with lights and sirens even when the officer pulled alongside Ilk and signaled for him to pull over. (Tr. at 847.) Ilk said he thought the police officer was trying to pull him over for a speeding ticket. Ilk did not stop because he thought his life was on the line. (Tr. at 848.)

During closing argument, defense counsel rebuffed the State's theory that Ilk had physically abused Hadassah:

> What do we have between January and April? We have pictures of her and Mike going to Missoula for a weekend getaway. We have pictures of the two of them in Cochrane, Alberta at hockey practice. We have the two of them boating at the reservoir.
>
> I guess the implication the State wants to make is that this is an issue of jealousy and that is what is motivating this. But the problem with that, just like the problem with the rest of the State's case is, none of it fits the evidence. I hate you so intensely, Ms. Pereslete tells Michael. I want you fucking dead, she tells him. What does Mike tell her? If that's the guy you want then you have chosen. That's not a jealous man.

(Trial Tr. at 1010-11.) Defense counsel detailed for the jury how the physical evidence did not match the State's theory of the case, and how Ilk acted in self-defense. (Trial Tr. at 1011-39.)

C. Jury selection

The first time Juror Brown spoke during jury selection was to answer to a question to the venire about any physical problems that could interfere with serving on the jury. Juror Brown stated that "when I've got to go to the restroom I've got to go. I ain't got time to mess around." (Trial Tr. at 59.) After the district court assured Juror Brown that it would take frequent breaks, he responded, "Not a problem, sir." (Trial Tr. at 60.) Juror Brown later disclosed that he knew two of the other prospective jurors because they were neighbors, but he did not think that would create any problem for him. (Trial Tr. at 114-15.)

Defense counsel asked if any of the prospective jurors had "been around folks, people you believe may have been physically abused?" (Trial Tr. at 140.) The following exchange occurred:

> MR. BROWN: Yeah, my wife come from a very abusive marriage, not with me, of course. She's been at bliss with me.
>
> MR. HINCHEY: You are the silver lining out of all that.
>
> MR. BROWN: Yeah, but I mean she was, her ex would come in drunk and beat her and knock her teeth out, kicked her in the belly when she was pregnant, lost her kid, tried to molest her two daughters. It was a bad situation.
>
> MR. HINCHEY: Oh my goodness.
>
> MR. BROWN: Yeah, I was going to kill the SOB, but uh, he would only mess with me one time and that was over the phone and I never seen him since—never seen him. But, yeah, I am very prejudiced against people that abuse other people, whether they are

male or female and they should be took out and shot as far as I am concerned.

MR. HINCHEY: Okay. So you wouldn't have any trouble doing that? Defending . . .

MR. BROWN: I don't think I'd have any problem pulling the trigger on somebody like that to tell you the damn truth about it.

MR. HINCHEY: That's what I am asking.

MR. BROWN: Okay, that's the truth.

(Trial Tr. at 142-44.) Defense counsel continued to question the jury venire on the topics of split-second decision making and justifiable use of force. (Tr. at 144-55.)

Hinchey ended his questioning of the jury venire by asking the prospective jurors if they were asking themselves whether, "[I]f I was Mike, I would not want me on his jury." (Trial Tr. at 177.) None of the remaining prospective jurors answered affirmatively. (Trial Tr. at 178.)

II. Postconviction evidentiary hearing

Trial defense counsel Sean Hinchey (Hinchey) has been a criminal defense attorney for 35 years and has conducted about 45 to 50 trials. (Tr. at 81.) Prior to the evidentiary hearing, Hinchey reviewed the State's response to Ilk's postconviction petition and the portion of the voir dire trial transcript related to Juror Brown. (Tr. at 10.) At the beginning of the hearing, the following exchange occurred between Ilk's postconviction counsel and Hinchey:

> Q. And, Mr. Hinchey, would you agree with me that generally speaking an individual discharging a weapon at an ex-girlfriend or an ex-boyfriend would constitute an act of domestic violence?
>
> A. I would not if the theory of the defense is self-defense.
>
> Q. I am just speaking in general terms, if someone—an individual fires a handgun at their ex-girlfriend, would you consider that to be an act of domestic violence?
>
> A. It could be, yes.
>
> Q. It could be? And in this case Michael's conduct as alleged, again, he was alleged to have discharged a weapon at his ex-girlfriend. Would you agree with me that that act in and of itself would constitute an act of domestic violence?
>
> A. I wouldn't necessarily agree with you because I think that if you are looking at legal defenses then that would come into play what as to violence (audio cut out). I think your question implies that Mr. Ilk is the perpetrator of the domestic violence in shooting the gun and I don't necessarily agree with that.

(Tr. at 14-15.)

Hinchey testified that before jury selection at Ilk's trial he studied all the juror questionnaires. Hinchey's law office is in Kalispell, but he has practiced criminal defense in Lincoln County for several years. Hinchey explained that his practice is to consult with local attorneys and other members of the community about prospective jurors. (Tr. at 20-21.) When Hinchey is selecting a jury, he keeps his case theory in mind, which generally informs him about the traits he is looking for in a juror. (Tr. at 22.)

Hinchey raised the topic of domestic violence during voir dire because the district court had denied his motion in limine to exclude other acts evidence. (Tr. at 26.) Hinchey explained:

> I didn't see it that way. I didn't see it as interfering with a right to a fair trial. But that was information that was coming in, despite my request of Judge Wheelis to exclude it, and so I knew it was [an issue] that I had to deal with in the theory of our self-defense case.

(Tr. at 27.)

When postconviction counsel questioned why Hinchey did not challenge Juror Brown, who had expressed a bias against people who commit acts of domestic violence, Hinchey explained:

> Yes. I was aware of that. But you are looking at it now in terms of a few different, a different lens than I was looking at it. You are looking at it, first of all, that Ms. Pereslete was being truthful. I was looking at it in terms of that there was no evidence to support those allegations, and that she was using the situation to manipulate Mr. Ilk. And her manipulation was shown on April 15th when all this went down, when she was working with Mr. Wilson to meet up at the construction site and texted Mr. Wilson to bring a gun.
>
> And so, in the context of my theory of the case, the allegations I thought the jury would see as not particularly plausible given the fact that she is not particularly forthright and had been manipulative towards Mr. Ilk. And so at the end of the day, the issue for me was whether I could have jurors on the panel [who] would be sympathetic to Mr. Ilk, and that would have to include folks that were familiar with firearms and willing to use firearms.

(Tr. at 32.) Hinchey later elaborated:

> I don't know about you, but I take what people tell me in voir dire, and then I filter it through who I think would be the best juror to leave on and the best juror to exclude.

(Tr. at 40.)

Hinchey did his best to explain his use of peremptory challenges by reviewing information in the transcript, but he also added:

> Then again, part of voir dire is not just from a full transcript, but it is also reading people and looking at people's actions, and voices, and mannerisms and things like that. And as we sit here today, I can't tell you anything about any of those jurors relative to those issues.

(Tr. at 53.) Hinchey offered that "picking a jury always comes with some level of speculation." (Tr. at 57.)

Hinchey's impression of Juror Brown was that he was experienced with firearms, believed in justifiable use of force, and would pull the trigger of a gun if he felt he needed to do so. (Tr. at 58.) Hinchey believed that Juror Brown would be amenable to Ilk's justifiable use of force defense:

> Yes, because Mr. Brown clearly indicated to me that he was a gun owner. He was comfortable with firearms and would be comfortable using them in an appropriate situation. And that is what I needed was jurors that were comfortable with those facts because those are the facts I was dealing with. I had a defendant who was accused of attempted deliberate homicide and our theory of the case was self-defense, because there was really no question that Mr. Ilk fired his weapon six times in the direction of the vehicle of Ms. Pereslete and Mr. Wilson. And our theory relied less about prior domestic violence allegations and more about the fact that she was manipulating him, and that those allegations in large part were not true, and that she was creating this situation. So on that day of April 15th Mr. Ilk had to be the victim of that offense for us to be successful at trial.

(Tr. at 60.) Hinchey knew that he would be able to present evidence to call Hadassah's credibility into question. (Tr. at 62.)

When postconviction counsel pushed Hinchey about his decision not to disqualify Juror Brown because there was nothing in Juror Brown's statements to indicate that he would have been sympathetic to Ilk's position, Hinchey responded:

> I think it is hard to know for certainty—your question implies that I could know for certain which of my twelve jurors are going to be sympathetic and rule in my favor and I never can know that. I took the information that I received from Mr. Brown and did what I thought was best for our theory of the case.

(Tr. at 70.) Hinchey was also relying on other nonverbal cues in making his juror challenges. Such as rolling of eyes and nodding of heads. (Tr. at 77, 80.) Hinchey factors in these nonverbal cues every time he performs jury selection. (Tr. at 80.)

Hinchey explained that Ilk did not fit the perceived profile of an abuser. He was friendly, pleasant, soft spoken, and cooperative. (Tr. at 82.) Hinchey presented evidence at trial that Hadassah, on the other hand, was manipulative and had used Ilk for material items. (*Id*.) Hinchey felt confident that when Ilk testified at trial, the jurors would observe all of Ilk's positive characteristics. (*Id*.) Also, there were facts to show that Hadassah was not a victim. She had arranged for the meeting with Tyler at her job site, and she had instructed Tyler to bring a gun. (Tr. at 83-84.)

Hinchey noted that Juror Brown never expressed any bias against Ilk. Also, Juror Brown acknowledged that either a male or female could be an abuser, making him receptive to the possibility that Hadassah had been manipulating the situation. (*Id*. at 88.) Hinchey believed Juror Brown would be receptive to what Hinchey thought the defense would be able to show: "that this was not a domestic violence situation, this manipulative woman setting up a scene where Mr. Ilk was forced to use a firearm in self-defense." (Tr. at 86.) Juror Brown did not have a preconceived notion that an abuser could only be a male, having recognized that a female could abuse a male. (Tr. at 89.)

Ilk testified that Hinchey consulted with him about exercising peremptory challenges. (Tr. at 102.) Ilk stated, "Uhm, there was a couple of people I had thought were odd that were on the juror selection." (Tr. at 102.) He added, "Well one was a previous school teacher, and the other one she was working at the—wherever she was working, I'm not sure." (*Id*.) Ilk had no recollection of Juror Brown. (*Id*.)

SUMMARY OF THE ARGUMENT

Ilk failed to meet his heavy burden under *Strickland* to prove that Hinchey performed deficiently during jury selection when he did not: challenge Juror Brown for cause; ask Juror Brown more questions so he could challenge him for

cause; or remove Juror Brown from serving on the jury with a peremptory challenge. Hinchey made an informed, strategic decision to leave Juror Brown on the jury because, based on all the considerations in evaluating a prospective juror, he believed Juror Brown would be receptive to Ilk's defense of justifiable use of force, which was Ilk's only available defense. To the extent that Juror Brown expressed disdain for any person, male or female, who would repeatedly subject another person to physical abuse, he never expressed any bias against Ilk. Hinchey planned on Ilk testifying and believed that Ilk would do well on the witness stand. Also, part of the defense theory included evidence that one of the victims, Ilk's former girlfriend, was manipulative and not credible. In Hinchey's estimation, all this evidence would play well with Juror Brown.

Ilk's claim of ineffective assistance of counsel is based upon a speculative theory that another attorney would have viewed things differently during jury selection. But this is only speculation gained through the distorting lens of hindsight. Neither speculation nor hindsight is sufficient to overcome the strong presumption that defense counsel performed within prevailing professional norms. Defense counsel had a clear defense theory, which he kept in mind during jury selection. Also defense counsel considered the prospective jurors' nonverbal cues as an important part of his decision-making, even if he could not specifically remember the details of those nonverbal cues at the evidentiary hearing. Also,

based on the questions defense counsel asked of all the prospective jurors, he had no reason to believe that Juror Brown could not serve fairly and impartially.

Based on the record, defense counsel did not have grounds to challenge Juror Brown for cause. Based on defense counsel's experience, preparation, and defense theory, he did not have a strategic reason to either build a record to challenge Juror Brown for cause or to remove Juror Brown with a peremptory challenge. Ilk himself cannot recall a reason why he would have wanted Juror Brown removed from the jury panel because there was nothing about Juror Brown that stood out to him.

The district court correctly concluded that Ilk failed to overcome the presumption that his defense counsel performed reasonably. Ilk was entitled to a fair trial, not a perfect trial. Ilk received a fair trial. This Court should affirm the order of the district court denying Ilk postconviction relief. To hold otherwise would invite defense counsel to second-guess their decision-making during every jury selection, to wonder if another attorney might make choices differently and thereby support a claim of ineffective assistance of counsel.

ARGUMENT

I. The standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether its factual findings are clearly erroneous and whether its legal conclusions are correct. *Garding v. State*, 2020 MT 163, ¶ 12, 400 Mont. 296, 466 P.3d 501.

II. The district court properly denied Ilk postconviction relief because Ilk failed to meet his heavy burden of proving his ineffective assistance of counsel claim.

A. Introduction

A person seeking postconviction relief bears the burden to show, by a preponderance of the evidence, that the facts justify relief. *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. An allegation in a postconviction petition does not constitute evidence. *State v. Hanson*, 1999 MT 226, ¶ 22, 296 Mont. 82, 988 P.2d 299.

In considering IAC claims in postconviction proceedings, Montana courts apply the two-pronged test the United States Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Rose v. State*, 2013 MT 165, ¶ 22, 370 Mont. 398, 304 P.3d 387, quoting *Hagen v. State*, 1999 MT 8, ¶ 10, 293 Mont. 60, 973 P.2d 233. To prevail on an IAC claim, Ilk must prove both

Strickland prongs: (1) that counsel's representation fell below an objective standard of reasonableness and (2) that this deficient performance prejudiced the defense. *State v. Bekemans*, 2013 MT 11, ¶¶ 29-30, 368 Mont. 235, 293 P.3d 843.

In evaluating whether counsel's performance was deficient under *Strickland*, this Court indulges "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Whitlow v. State*, 2008 MT 140, ¶ 15, 343 Mont. 90, 183 P.3d 861, quoting *Strickland*, 466 U.S. at 689. To overcome this presumption, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Whitlow*, ¶ 16, quoting *Strickland*, 466 U.S. at 690. This Court "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Whitlow*, ¶ 16, quoting *Strickland*, 466 U.S. at 690. The Court makes every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Whitlow*, ¶ 15, quoting *Strickland*, 466 U.S. at 689.

The focus of this Court's analysis under the prejudice prong of *Strickland* is whether counsel's deficient performance renders the trial result unreliable or the proceedings fundamentally unfair. *State v. Miner*, 2012 MT 20, ¶ 12, 364 Mont. 1, 271 P.3d 56. To establish prejudice the defendant must show that, but for counsel's

errors, a reasonable probability exists that the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.*

Because Ilk must prove both prongs of *Strickland*, if he fails to prove either prong, this Court need not consider the other. *Whitlow*, ¶ 11.

B. Ilk failed to meet his heavy burden of proving defense counsel's performance was deficient.

Defense counsel has a duty to ensure a defendant's right to a fair trial by a panel of impartial jurors. *State v. Lamere*, 2005 MT 118, ¶ 15, 327 Mont. 115, 112 P.3d 1005. "The purpose of voir dire in a criminal proceeding is to determine the existence of a prospective juror's partiality, that is, his or her bias and prejudice." *State v. Herrman*, 2003 MT 149, ¶ 23, 316 Mont. 198, 70 P.3d 738. Adequate questioning enables counsel to exercise his or her peremptory challenges intelligently. *Herrman*, ¶ 23; *Lamere*, ¶ 15. Adequate questioning also enables counsel to properly raise a challenge for cause pursuant to Mont. Code Ann. § 46-16-115(2)(j). *Lamere*, ¶15.

Montana Code Annotated § 46-16-115(2) provides that:

> A challenge for cause may be taken for all or any of the following reasons or for any other reason that the court determines: . . . having a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party.

Dismissal for cause is only favored when voir dire examination raises a serious question about a prospective juror's ability to be fair and impartial. *State v. Heath*, 2004 MT 58, ¶ 10, 320 Mont. 211, 89 P.3d 947. "Disqualification based on a juror's alleged prejudice is necessary only where jurors form fixed opinions on the guilt or innocence of the defendant which they would not be able to lay aside and render a verdict based solely on the evidence presented in court." *State v. Freshment*, 2002 MT 61, ¶ 12, 309 Mont. 154, 43 P.3d 968 (internal quotation marks omitted).

In *State v. Johnson*, 2019 MT 68, 395 Mont. 169, 437 P.3d 147, this Court explained that, when considering the bias of a prospective juror, the proper inquiry is:

> not whether a prospective juror has: (1) expressed a bias or fixed opinion of fact or law pertinent to a case; (2) a common or similar experience or connection that would or could give rise to such bias or fixed opinion; (3) specialized or extraordinary knowledge or interest in a matter pertinent to a case; or (4) expressed doubt or concern about the juror's ability to be fair and impartial. The dispositive question is whether the totality of the juror's statements and referenced circumstances raise a serious question or doubt about his or her willingness or ability to set aside any such matter to fairly and impartially render a verdict based solely on the evidence presented and instructions given.

Johnson, 2019 MT 68. Ilk has alleged that his counsel was ineffective for failing to recognize Juror Brown's bias and either challenge him for cause, ask him

follow-up questions, or use a peremptory challenge to strike him. Ilk's juror bias claim must be viewed through the lens of ineffective assistance of counsel caselaw.

Here Hinchey testified that he reviewed the jury pool's questionnaires and talked with locals about those selected for the jury venire. Hinchey observed the prospective jurors for nonverbal cues. Hinchey also made decisions about what questions to ask the prospective jurors and how to exercise his challenges with the defense strategy in mind. While Ilk insists that this was a case about domestic violence, Hinchey did not view it that way. Rather, the defense relied on justifiable use of force and attacked Hadassah's credibility by presenting evidence that, although Hadassah claimed that Ilk had previously physically abused her, there was no evidence to support her claim. Also, Ilk admitted that he and Hadassah had some heated verbal exchanges, which is why Ilk pursued counseling and wanted Hadassah to participate in counseling with him.

Hadassah claimed that she and Ilk broke up for good in January 2015, but Ilk presented photographs and testimony that showed they were together as a couple in March 2015. Additionally, Hadassah texted Ilk that she intensely hated him and wanted him dead. Hadassah knew Ilk planned to visit her at her job site the evening of April 15, 2015, which is same the evening she had arranged a meeting with Tyler at the job site and told him to bring a gun. One of Ilk's witnesses testified that Hadassah was immature, dramatic, and manipulative. This was not a

domestic violence case where the State presented evidence of repeated instances of physical abuse that Ilk inflicted upon Hadassah.

It is within this factual framework that Hinchey decided that Juror Brown might be a favorable juror for Ilk because Ilk's only defense was justifiable use of force—that he was baited to Hadassah's job site where Hadassah had instructed Tyler to bring a gun after she texted Ilk that she hated him and wanted him dead. Juror Brown owned a gun and was not afraid to pull the trigger to defend another person or, presumably, himself.

Juror Brown did express bias against people who abuse other people, but he never expressed a bias against Ilk. Juror Brown also expressed his opinion that an abuser could be either male or female, which benefited Ilk. Part of Ilk's defense was that Hadassah had used Ilk for material reasons, and that when she was ready to discard him, despite his love for her, she lured him into a dangerous situation where he believed he had to defend himself. Finally, Juror Brown expressed a willingness use a gun in defense of another or, presumably, himself. Based upon all these factors, the jury questionnaires, and Hinchey's personal observations that he could not specifically recall, he concluded that Juror Brown would be a favorable juror.

Although Ilk insists the contrary is true, he testified at the evidentiary hearing that he could not recall *anything specific* about Juror Brown, although he

did have some concerns about other prospective jurors. While Ilk testified that he did not recall asking Hinchey to keep Juror Brown on the panel, he also apparently did not advocate for removing Juror Brown from the panel. In other words, it is only through the distorting lens of hindsight that postconviction counsel now advocates that Hinchey performed deficiently. He argues that Hinchey's *interpretation* of Juror Brown's statements was "unreasonable and speculative." (Appellant's Br. at 25.) But selecting a jury will always involve some amount of speculation on the part of defense counsel. Defense counsel must rely upon their own experience and the defense theory to help read the tea leaves.

Here, Juror Brown never expressed a bias against Ilk. For example, in *State v. Normandy*, 2008 MT 437, 347 Mont. 505, 198 P.3d 834, Normandy argued on appeal that the district court erred in refusing to dismiss a prospective juror for cause after the juror indicated he was biased against the crime of domestic violence because his wife had experienced domestic violence in a previous marriage. *Normandy*, 2008 MT 437, ¶ 23. In affirming the district court, this Court observed, "At no time during the voir dire did the juror state or infer that he had a fixed opinion on the guilt or innocence of Normandy." *Id*.

Ilk accuses Hinchey of performing deficiently because he did not sufficiently follow up with Juror Brown to make a record that might have supported a challenge for cause. In *Whitlow*, Petitioner Whitlow made a similar

argument when a prospective juror in Whitlow's child sexual abuse trial expressed some concerns about remaining impartial because he had three young daughters and had read about the case in the newspaper. *Whitlow*, ¶ 27. Whitlow argued that his trial counsel had a duty to ask the juror follow-up questions. In concluding that Whitlow failed to prove that his defense counsel performed deficiently, this Court warned against the distorting effects of hindsight and cautioned that a reviewing court must consider counsel's conduct based on the entire record. *Id*. ¶ 31. This Court concluded that defense counsel's performance was not objectively unreasonable. *Id*. Here, like in *Whitlow*, Ilk offers only hindsight and speculation to support his assertion that Hinchey's conduct fell below an objective standard of reasonableness.

Importantly, at the beginning of jury selection, the district court and the prosecutor emphasized the importance of selecting a fair and impartial jury. (Trial Tr. at 29-30, 35.) The prosecutor explained the difference between the trial and sentencing phases of a case and the jurors' role in deciding the facts based on the evidence presented and the court's jury instructions. (Trial Tr. at 105-06.) Hinchey asked the prospective jurors, including Juror Brown, if they could find Ilk not guilty if they believed the State had not proven the elements of the charges. (Trial Tr. at 155.) Defense counsel also asked the jurors to put themselves in Ilk's place to evaluate whether they could serve impartially on the jury. (Trial Tr. at

177.) Juror Brown did not indicate a concern about his ability to serve impartially at any of these junctures. Presumably, every prospective juror had a bias against domestic violence. Juror Brown merely articulated it bluntly.

Finally, there is an inherent danger in applying hindsight to the jury selection process in a case such as this. Here, Hinchey did not, for example, overlook important information in the jury questionnaires that he should have covered during voir dire. Hinchey prepared for voir dire by considering the defense theory, by reviewing the questionnaires, and most likely by reviewing the jury venire with other attorneys and locals. Hinchey watched the prospective jurors throughout voir dire for things like a head nod, an eye roll or a prospective juror's willingness to look directly at Ilk. None of these things are captured on the record, but they are a quintessential part of jury selection decision making.

Juror Brown expressed disdain for his wife's ex-husband who routinely physically abused her, and he expressed disdain for anyone who would abuse another person in that manner. But Juror Brown did not express disdain for Ilk or for Ilk's defense of justifiable use of force. Ilk has failed to meet his burden of showing that Hinchey performed deficiently when he did not challenge Juror Brown for cause, did not ask Juror Brown more probing questions about domestic violence, and/or did not use a peremptory challenge to remove Juror Brown from the jury. "The Sixth Amendment guarantees reasonable competence, not perfect

advocacy judged with the benefit of hindsight." *Whitlow*, ¶ 32, quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Ilk himself could not recall anything about Juror Brown that stood out to him.

Since Ilk has failed to prove the deficient performance prong of the *Strickland* test, this Court does not need to consider the prejudice prong of the *Strickland* test. *Whitlow*, ¶ 39. The State, however, does not concede to Ilk's argument that *if* defense counsel performed deficiently in failing to challenge Juror Brown for cause then this Court would have to presume prejudice.

CONCLUSION

Since Ilk failed to meet his heavy burden to overcome the presumption that defense counsel performed within prevailing professional norms during jury selection, the State requests that this Court affirm the order of the district court denying Ilk's petition for postconviction relief.

Respectfully submitted this 15th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,566 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

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I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-15-2021:

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