IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0143

JILL MARIE LOTTER,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly dismiss four of Appellant's postconviction ineffective assistance of counsel (IAC) claims without an evidentiary hearing?

2. Did the district court correctly deny Appellant postconviction relief on her fifth IAC claim after an evidentiary hearing.

STATEMENT OF THE CASE

I. Criminal proceeding/Cause No. CDC 2010-348

The State charged Appellant Jill Lotter (Lotter) with attempted deliberate homicide of her husband, Michael Lotter (Mike) after Lotter struck Mike in the head with the claw foot of a hammer approximately 20 times. (Docs. 18, 20.) Lotter filed notice of her intent to rely upon good character and upon the affirmative defense of justifiable use of force. (Docs. 15, 23.)

Lotter moved to exclude as hearsay testimony from a volunteer firefighter, who responded to the Lotter home on November 9, 2010, that Mike uttered, "This is the third time she's tried to kill me." (Docs. 32, 33.) The State responded that the statement was admissible as a prior inconsistent statement since Mike could not recall making the statement. (Doc. 46.) The district court held that the statement

was admissible as a prior inconsistent statement under Mont. R. Evid. 801(d)(1)(A). (Doc. 52.)

Lotter filed a notice she intended to call Dr. Stratford and Dr. Jeffres to testify about battered woman syndrome (BWS) and post-traumatic stress disorder (PTSD), stating that Dr. Stratford might testify "regarding behavior of individuals in abusive relationships, the behavior of individuals involved in traumatic events, the behavior of individuals diagnosed with epilepsy, the effects of anti-seizure medications and his evaluation of Ms. Lotter." (Doc. 56 at 2.) Lotter stated that Dr. Jeffres might testify "regarding the behavior of individuals involved in abusive relationships and her diagnosis and impressions/opinions regarding Ms. Lotter and her behavior." (*Id.*)

The State moved to exclude any testimony as to Lotter's state of mind at the time she was alleged to have committed the offense. (Doc. 71.) Lotter responded that expert testimony regarding her behavior in an "emotionally abusive relationship" was necessary for the jury to properly evaluate the evidence. (Doc. 88.)

On December 2, 2011, the district court issued an order observing that Lotter was not relying upon a mental disease or defect defense, and Lotter indicated she did not intend to offer evidence that she did not have a particular state of mind that was an element of the charged offense. (Doc. 96 at 2.) The district court correctly

noted that the determinations of whether the defendant acted reasonably and whether she was justified in the force used under the circumstances were issues for the jury to resolve. (*Id.*)

The district court concluded, assuming Lotter established the proper foundation, she could present expert testimony about BWS and its characteristics, but she could not "present expert testimony to the effect that she was a battered spouse or any opinions related to her credibility that [might] derive from battered spouse characteristics." (*Id.* at 3-4.)

The State filed supplemental briefing supporting its motion in limine. (Doc. 104.) The State had learned from Dr. Stratford that, if allowed to testify, he would expound upon "Battered Women's Syndrome," although he acknowledged that the defendant never told him she was physically assaulted by the victim at any time during their relationship and he could not recall any specific instances of conduct by the victim that the defendant characterized as emotional battering. He acknowledged that his notes did not reflect anything he could rely upon to refresh his memory as to instances of emotional battering, but he spoke to several people, primarily Lotter's divorce lawyer, Ron Waterman, who told him about the victim's emotional treatment of the defendant. (*Id*.)

Dr. Jeffres was unable to recall a single specific instance that Lotter had disclosed to her of the victim's alleged emotional battering of Lotter. (*Id.* at 2.)

During a trial break, the district court considered the defense experts' proposed testimony. (12/5/11-12/12/11 Transcript of Jury Trial [Tr.] at 762-72.) After Lotter testified, the court concluded that she had not laid sufficient foundation to present testimony on BWS. (Tr. at 1021.)

The district court instructed the jury on justifiable use of force. (Doc. 107, Instrs. 11-13.) The jury convicted Lotter of attempted deliberate homicide. (Doc. 108.)

At sentencing, Dr. Jeffres opined that Lotter suffered from PTSD because Mike emotionally abused her. Dr. Jeffres acknowledged that Lotter had underlying mental health issues, including depression and anxiety, prior to her marriage to Mike. These conditions had manifested into physical symptoms prior to Lotter's marriage to Mike. (Sent. Tr. at 42, 45.) Dr. Jeffres surmised that, because of Lotter's anxiety, depression, and PTSD resulting from spousal abuse, her mental capacity was impaired when she attacked Mike. (*Id*. at 52-53.)

Dr. Jeffres did not provide specific instances of Mike physically or emotionally abusing Lotter. (Sent. Tr. at 56-57, 59, 60.) Dr. Jeffres explained that Lotter had a difficult time recognizing and recalling any specific instances. (*Id*. at 57.)

Prior to imposing sentence, the district court recalled the trial testimony about Lotter's attack on Mike lasting around three hours, during which at no time

did Lotter go to get help for Mike, including after the attack ended. (Sent. Tr. at 105.) The district court further stated:

> I listened, frankly, to excruciatingly detailed testimony about her relationship, recounting what happened; I heard no testimony of what I'd characterize as abuse in this relationship. Dr. Jeffres, again, gave no specifics today. It was evidence of an unhappy marriage.
>
> There was also evidence presented at trial that Ms. Lotter reaped the financial benefits of her marriage to Mike Lotter for 10 years. She was $25,000 in debt at the time of this offense, and she has already borrowed close to $15,000—or not borrowed, but gotten, from her ex-husband and her mother, money before that.
>
> I find that the victim in this case is Mike Lotter.

(*Id*. at 105-06.) The district court sentenced Lotter to 40 years in prison. (*Id*. at 106.)

Lotter appealed, arguing that the district court erred when it excluded her proposed expert witness testimony about BWS and her PTSD diagnosis, and by admitting Mike's prior inconsistent statement to a volunteer firefighter responding to Mike's medical emergency. *State v. Lotter*, 2013 MT 336, ¶ 2, 372 Mont. 445, 313 P.3d 148. This Court concluded that Lotter failed to produce an adequate evidentiary foundation for admission of her proposed expert testimony: "Lotter presented no evidence other than demeaning or degrading comments Mike may have made, from prior to November 9; nor did her vague testimony about rages establish the multiple cycles of violence necessary to provide a foundation for battered woman syndrome." *Id*. ¶ 19.

This Court also concluded that the district court did not err in admitting Mike's prior inconsistent statement, but declined to consider Lotter's due process argument regarding the hearsay statement raised for the first time on appeal. *Id.* ¶¶ 29-32.

II. Postconviction case/Cause No. CDV 2014-155

On February 26, 2014, Lotter filed a pro se Petition for Postconviction Relief and a form memorandum. (Docs. 1-2.) Lotter alleged her trial counsel, Greg Jackson and Chad Wright, provided IAC in preparation for and during her trial, and that the State failed to disclose/withheld material evidence favorable to the defense. (Doc. 1 at 4-5.) The district court ordered the State to respond. (Doc. 7) Trial counsel both submitted affidavits. (Docs. 11-12, attached to Appellant's Br. as Apps. C-D.) The State responded. (Doc. 19.)

On November 15, 2015, attorney Colin Stephens filed a notice of appearance on Lotter's behalf. (Doc. 26.) On August 9, 2017, Lotter filed an Amended Petition and Brief (Docs. 31-32), alleging that defense counsel were ineffective: in their investigation and presentation of a BWS defense; for failing to preserve a due process challenge to Mike's hearsay statement; for failing to properly investigate and present blood spatter evidence; and for failing to prepare Lotter for her

cross-examination. Lotter alleged appellate counsel was ineffective for failing to raise these claims on direct appeal. (Doc. 31 at 16-17.)

Appellate counsel, Jennifer Hurley, filed an Affidavit. (Doc. 39, attached as App. A.) The State responded to the Amended Petition. (Doc. 42.) Lotter replied. (Doc. 47.)

On February 22, 2019, the district court denied Lotter relief on her claim that her trial attorneys were ineffective in their investigation and presentation of the BWS defense. (Doc. 48, attached as Appellant's App. A, at 6-8.) The district court explained that Lotter did not present *any* additional facts, only those she presented at trial, that she was a battered woman. The Montana Supreme Court had already concluded that those facts were insufficient to allow the admission of expert testimony on the topic of BWS. (*Id*. at 7.)

The district court elaborated:

> The undersigned sat through the pretrial hearings, the trial and sentencing, and observed the numerous questions asked, and opportunities provided, by defense counsel to elicit from Lotter any testimony to substantiate her claims of emotional abuse. Lotter failed to offer facts to support a foundation—and that failure continues in her amended petition. Defense attorneys are not ineffective for failing to present non-existent evidence. She has met neither prong of the *Strickland* standard. Lotter has presented no facts supporting the basis for relief.

(*Id*. at 7-8.)

The court denied Lotter relief on her claim that her attorneys were ineffective for failing to challenge the admissibility of a prior inconsistent statement on due process grounds because the cases Lotter relied upon were easily distinguishable:

> The *White Water* decision refers to *California v. Green*, 399 U.S. 149, 163-64 (1970), and its holding that "due process considerations may prevent convictions where a reliable evidentiary basis is totally lacking." *White Water*, 194 Mont. at 90, 634 P. 2d at 639. That is not the case here. Both Mike Lotter and the firefighter testified at trial and were available for cross-examination. Substantial evidence regarding the reliability (or unreliability) of the statement was presented to the jury. The jury was made aware that Mike could not recall making the statement and of his condition at the time it was made. The evidence before the jury established a financial motive for the crime. It also established that, in the month before the hammer attack, there had been two prior incidents involving serious injury to Mike Lotter. Each time, Jill Lotter discovered Mike, and Mike had drugs prescribed to Jill Lotter in his system. There was also evidence presented that showed a lack of concern for Mike's health on the part of Jill. When coupled with the circumstances of the third incident—her attack on Mike, striking him in the head twenty times with the claw end of a hammer, and then preparing to leave him in the home with no way to reach help—the reliability of the evidentiary basis of the statement has been sufficiently established to comply with due process. There is no reasonable probability that any failure to preserve the due process claim altered the outcome of the trial because admission of the statement did not violate due process.

(*Id*. at 12-13.)

The district court also denied Lotter relief on her claim that her trial attorneys were ineffective for failing to sufficiently prepare her for trial testimony, including cross-examination:

> This stunning allegation in a brief is not supported by an affidavit or any evidence. As discussed in the Court's discussion of issue 1, a petition for postconviction relief must show by a preponderance of evidence that the facts justify the relief. The petition must identify all facts supporting the grounds for relief and have attached affidavits, records, or other evidence establishing the existence of those facts. Mont. Code Ann. § 46-21-104(1)(c). "Mere conclusory allegations are insufficient to support the petition." *Beach*, ¶ 16. This insufficient allegation does not warrant a hearing or any relief.

(*Id*. at 14.) The district court concluded there was no basis for an ineffective assistance of counsel claim against appellate counsel. (*Id*. at 15.)

The district court granted Lotter an evidentiary hearing on her remaining IAC claim concerning how her trial counsel handled the blood spatter evidence. (*Id*.) Following the hearing, the district court denied Lotter's remaining claim, concluding that Jackson did not perform deficiently in handling blood spatter testimony and evidence. Also, Lotter failed to prove the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). (Doc. 72, attached to Appellant's Br. as App. B, at 9-10, ¶¶ 5-8.)

STATEMENT OF THE FACTS

I. Criminal proceeding

Mike and Lotter met professionally in February 2001, while Lotter was married to Chris Olson. Lotter and Olson have two sons. (Tr. at 475, 710, 712, 827.) Mike and Lotter married in September 2001. When Mike met Lotter, he was

a highly successful management consultant earning between $155,000 and $190,000 per year. (Tr. at 527, 709.) A friend and neighbor, Jill Sark, explained that the couple had a good relationship. Mike adored Lotter and doted on her. (Tr. at 232-37.) Now, the last thing Mike remembers about his marriage to Lotter is her lying on top of him and swinging her arm before everything went black. (Tr. at 753.)

After Mike and Lotter married, Lotter began a new position at State Fund. Seven months later, Lotter started having severe, debilitating migraine headaches. Mike described the migraines as "terrible," and the couple went to some headache clinics around the country to try to relieve Lotter's migraines. Mike also attended to Lotter's need for massages and physical therapy to address sore, tight muscles. Lotter suffered from restless leg syndrome and later developed gastrointestinal problems. (Tr. at 714-15.)

In 2002, Lotter left her job at State Fund. Mike supported her decision, telling her that she needed to do what was best for her. (Tr. at 716-17.) Mike would also have supported Lotter if she had decided to stay. (*Id.*) Lotter claimed that she only resigned from State Fund because Mike forcefully told her that she needed to quit. (Tr. at 830.)

During their marriage, Mike and Lotter had a joint account at Wells Fargo. Only Mike contributed money to this account, which covered all household

expenses. (Tr. at 723.) Lotter had her own account, to which Mike did not have access. Lotter's paychecks were directly deposited into her account. (Tr. at 530.) During the first eight years of marriage, Lotter did not contribute to the family/household expenses. (Tr. at 724.) From the time Mike and Lotter married until 2007, Mike paid support to his ex-wife in the amount of $4,000 per month. When Mike's support obligation ended, he had that money automatically deposited into a savings account. (Tr. at 727.)

Mike testified that, even though he traveled 45 weeks out of the year, he primarily did the shopping, cooking, cleaning, and laundry. Generally, Mike would try to complete these chores when he was home on the weekends. (Tr. at 802-03.) During part of the marriage, Lotter was unemployed, and Mike admitted that he found it frustrating how little she did around the house. (Tr. at 804.) Lotter, on the other hand, claimed she cooked and kept the house perfect so Mike would not be unhappy. (Tr. at 833-34.) Lotter admitted the two had very few arguments during their marriage. (Tr. at 807.)

In April 2009, Mike was laid off from his management consultant job and began collecting unemployment benefits. Mike also relied upon the money he had put into his savings account to meet the household expenses. (Tr. at 720, 722.) Mike finally had to tell Lotter that she needed to contribute money to cover the regular household expenses. (Tr. at 724.) Although Lotter did contribute some

money for household expenses, she never did so unless Mike asked her for it. (Tr. at 726.) After Mike lost his job, there was tension between him and Lotter, although they never fought. Rather, Mike felt there was a distance growing between them. (Tr. at 731.)

In 2009 and 2010, Lotter had six credit cards, three of which she obtained within that time frame. (Tr. at 548-49.) Lotter was primarily using her credit cards for online bidding transactions. (Tr. at 554-58.) In 2009, Lotter charged $14,000 on her credit cards and an additional $27,000 in 2010, for a total of $41,000, not including interest and finance charges. Lotter had spent most of that amount on online bidding transactions. (Tr. at 574.) Mike, on the other hand, had two credit cards, which he paid off monthly. (Tr. at 573.)

Unbeknownst to Mike, in July 2010, while he was struggling to meet household expenses, Lotter's mother gave her $3,000. (Tr. at 562.) Moreover, during the summer of 2010, Lotter's ex-husband gave her $11,500. (Tr. at 496-99.) Lotter never told Olson why she needed the money. (Tr. at 499.)

In September 2010, a job opportunity arose for Mike in Michigan. Mike's consulting project was scheduled to start on September 20, 2010. (Tr. at 737-39.) A day or two before the project, Mike seemed to lose all clarity and just could not connect the dots. Mike became so anxious that he would blow the consulting job for both him and his partner that he finally decided to turn the job over completely

to his partner. (Tr. at 739-40.) This experience was devastating. When Mike returned home, he sat down with Lotter and told her they were in financial trouble and she needed to contribute money to keep their household running. (Tr. at 744-45.)

By the end of September 2010, Mike's savings account had been depleted from $90,000 to $20,000. Mike had applied for Social Security benefits and was set to receive his first check in November. (Tr. at 746-47.) About a week later, Mike got up in the morning and submitted an online application for a job at Lowe's. When Lotter got up that morning, Mike told her they needed to have another talk about money. This is the last thing Mike remembers before waking up in the hospital in Great Falls. (Tr. at 748-49.) Lotter was the beneficiary on Mike's life insurance policies totaling $400,000 and his investments totaling about $170,000. (Tr. at 514-15, 603.)

At trial, Lotter testified that on October 10, 2010, she left the house at about 9 a.m. and shopped for about three and a half hours. Mike was asleep when she left. (Tr. at 849.) When she came home, she found Mike lying at the bottom of the stairs; she said he was communicative. Lotter went to the neighbor's house to get help. (Tr. at 851-52.)

Jerry Shepard (Shepard) is the fire chief for the West Valley Fire Department. On October 10, 2010, at about 12:44 in the afternoon, he was

dispatched to the Lotters' home. Mike was face-down at the bottom of six or seven stairs. Lotter told Shepard she had left the house at 9 a.m. and, when she returned, she found Mike at the bottom of the stairs. Shepard observed that Mike was confused, lethargic, in pain, and could not respond to questions. (Tr. at 272-73.)

Mark Kreisberg is a physician who formerly practiced privately in internal medicine before becoming a hospitalist at St. Peter's Hospital. When Dr. Kreisberg was in private practice, he saw Mike as a patient. Mike was a very healthy man, so Dr. Kreisberg saw him infrequently. (Tr. at 356-58.) Dr. Kreisberg saw Mike when he was admitted for treatment on October 10, 2010. Mike's demeanor, speech, and behavior were not normal. (Tr. at 359-60.)

Mike had bilateral aspiration pneumonia, multiple orthopedic injuries, including rib fractures and compression fractures to the spine. In sum, Mike's midsection was "busted up." (Tr. at 360.) Mike's blood oxygen level was below normal. (Tr. at 366.) Dr. Kreisberg obtained Mike's recent medical history from Lotter because Mike could not carry on a conversation. (Tr. at 367-68.) Dr. Kreisberg was left with the responsibility of determining why Mike had fallen. (Tr. at 367.)

Dr. Kreisberg noted in his chart that according to Lotter Mike had been consuming her Clonazepam. (Tr. at 366.) Clonazepam is a sedative, and its sedative effect varies from person to person. Adverse effects from too high a dose

can make a person extremely sleepy and accident prone. (Tr. at 367.) Mike presented at the hospital with symptoms of confusion, slurred speech, memory impairment, and sleepiness. (Tr. at 368.) Mike's toxicology screen was positive for Clonazepam. An overdose of this substance could result in sedation, clumsiness, decreased respirations, and amnesia. (Tr. at 370-71.) Mike's orthopedic injuries were so extensive that Dr. Kreisberg had him transferred to a hospital in Great Falls. (Tr. at 370.)

Mike spent over two weeks in the hospital. He had sustained five broken ribs and five fractures to his spine. He was discharged with a rigid back brace that immobilized his upper torso. Mike wore the brace except when he was in bed. He was afraid to be up and moving around without the brace. (Tr. at 750-52.)

On November 1, 2010, Lotter went over to Sark's house for coffee, saying that she needed a break from caring for Mike. Lotter indicated Mike's brother was coming to help care for him, and she was excited to return to work. Lotter then told Sark a story about being afraid there had been a prowler in her garage on Halloween. Lotter elaborated that she has locked herself in her bathroom and texted her oldest son. Both of her sons and her ex-husband came and looked around but did not find anything unusual. Lotter said that Mike remained asleep in the den through the whole commotion. (Tr. at 245.)

The following morning, November 2, 2010, Lotter went by Sark's house again and asked Sark if she could help her. Sark said sure, and asked what Lotter needed. Lotter responded, "Mike fell again . . . I need some help loading him into the car." (Tr. at 246.) Lotter and Sark went back across the street and Sark saw Mike lying in the garage attached to the Lotter's house. Mike's head was bloody and there was a puddle of blood in the garage where Mike had apparently fallen. Mike was wearing a bathrobe. Sark exclaimed that they needed to call 911. She was afraid that if they lifted Mike, they could hurt him. Lotter called 911 and then said they should go out back and smoke a cigarette. Sark suggested that they cover Mike with a blanket. (Tr. at 247.)

On November 2, 2010, at about 10:19 a.m., Shepard was again dispatched to the Lotters' home. Lotter reported that she had found Mike in the garage and assumed he had fallen and hit his head. Lotter surmised that Mike had gone to the garage to get coffee and gotten locked in the garage. Lotter elaborated she had the door between the kitchen and the garage set to lock automatically when the door shut because her ex-husband had been at the house and she was afraid of him being there. (Tr. at 276-77.) At trial, Olson said Lotter had never been afraid of him. (Tr. at 494.)

Mike was bleeding from a cut to the back of his head. He was non-communicative and could not tell anyone what had happened. Mike was very

cold as if he had been lying in the garage for some time. The ambulance transported Mike to St. Peter's Hospital. (Tr. at 276-78.) Sark offered to drive Lotter to the hospital but Lotter declined. Lotter wanted a cup of coffee. Sark put the coffee in a travel mug so Lotter could get to the hospital. Lotter smoked another cigarette before leaving. (Tr. at 249.)

At trial, Lotter explained that on November 2, 2010, she awoke to Mike's faint yell, and she determined his yell had come from the garage. Lotter opened the door between the kitchen and the garage and Mike was sitting on the steps holding a can of coffee. (Tr. at 859.) Mike seemed to have a cut to his head but, again, Lotter said he was communicative. (Tr. at 860.)

Dr. Krainacker saw Mike for the first time when Mike was admitted to St. Peter's Hospital on November 2, 2010. (Tr. at 303-05.) When Mike was admitted, he was showing some seizure like activity. Dr. Krainacker ordered an EEG and ultimately put Mike on some anti-seizure medication called Tegretol. (Tr. at 308-09, 320.) Dr. Mulgrew, a neurologist, reviewed Mike's EEG, concluded that it indicated an increased risk of epilepsy, but could not diagnose Mike with epilepsy based on the EEG alone. (Tr. at 343-44, 346.)

Dr. Krainacker also ordered a toxicology screen due to Mike's confusion. Mike tested positive for benzodiazepine, an anti-anxiety medication. At higher doses, this drug can cause confusion, sedation, and amnesia. (Tr. at 315-16.) Lotter

reported that sometimes Mike would take her Klonopin, which is a benzodiazepine. (Tr. at 321.)

At trial, Mike explained that very infrequently he would take a half-of-a-half of one of his wife's pills if he was having difficulty sleeping. (Tr. at 760.) He estimated he might have done so three or four times a year. Mike does not like to take medicine and, other than taking ibuprofen occasionally, avoids medications. (Tr. at 817.)

When Dr. Krainacker saw Mike on November 4, 2010, Mike seemed to be thinking more clearly but was still a little confused. (Tr. at 313.) By the time Mike left the hospital, he was doing quite well. (Tr. at 318.) Dr. Krainacker's working diagnosis when he discharged Mike was epilepsy. Dr. Krainacker has since reviewed all of Mike's medical records and no longer believes that he was suffering from epilepsy in November 2010. According to Mike's trial testimony, he never suffered from epilepsy prior to October of 2010 and he does not currently suffer from epilepsy. Mike does not take any medication designed to manage epilepsy. (Tr. at 758-59.)

Mike does not remember the November 2, 2010 incident leading up to his second hospitalization and does not remember anything about his hospital stay. Mike does remember coming home from the hospital. (Tr. at 752.) His next memory is of his wife hitting him with a hammer. (Tr. at 753.)

On November 9, 2010, Lotter knocked on Sark's door, holding the travel coffee mug she had borrowed the previous week. Lotter's hair was wet, she was wearing a baseball cap, and she did not look well. Lotter asked Sark to come out to the garage because she wanted to talk to her. (Tr. at 250.) Lotter asked Sark what she thought of domestic violence. After Sark responded that she had divorced a guy for that, Lotter stated, "Mike attacked me." (Tr. at 251.) Lotter said Mike had accused her of pushing him down the stairs. (Tr. at 252.) She said she had kicked Mike in his broken ribs to get away from him. Lotter reported that she then found a hammer and hit Mike with the hammer "[l]ots" of times. (Tr. at 253.) She claimed that Mike had managed to hit her with the hammer once. Lotter said she had taken a shower and was "fine." (Tr. at 254.)

Sark asked about Mike, and Lotter responded that he was "really bad." Sark asked if Mike would call the cops on her, and Lotter replied that she had shut off the home phone and had his cell phone with her. Sark told Lotter they had to go see if Mike was okay. Lotter said, "let me finish this cigarette." (Tr. at 254.) After Lotter did so, she and Sark walked over to the Lotters' house and Lotter unlocked the front door. Sark saw Mike lying at the top of the stairs. His head was very bloody and looked very bad. Sark told Lotter to give her Lotter's phone. Lotter responded she did not have it. Sark ran across the street, got her phone, and called 911. Sark thought Mike was dead. Sark stayed on the phone with the dispatcher

until law enforcement arrived. (Tr. at 258-59.) Lotter walked over to her car, which she had parked in Sark's driveway. (Tr. at 260.)

Shepard was dispatched to the Lotters' home for the third time on November 9, 2010, at 1:08 p.m. When Shepard opened the front door of the house, he could see that Mike needed immediate attention. Mike was lying on his side with a lot of dried, black blood on his head, indicating that he had been there for a while. (Tr. at 279-80.) Mike was breathing and still had a pulse, but very obviously needed immediate medical attention. There was a hammer next to Mike that was covered in blood and hair. (Tr. at 281.)

Shepard remarked to Sergeant Tim Zarske of the Lewis and Clark County Sheriff's Office (LCSO) that this was the third time he had been dispatched to the Lotters' home. (Tr. at 281.) Shortly thereafter, Shepard was bent down near Mike when Mike opened his eyes and said, "This is the third time she's tried to kill me." (Tr. at 282.) These are the only words Mike uttered before being transported to the hospital. (*Id.*)

When Sergeant Zarske arrived at the Lotters' residence, Lotter was wrapped in a blanket and seated inside the house. (Tr. at 425.) Mike was lying in the entryway, and his head was saturated with blood. Mike was barely able to tell him his name. Mike's head was severely swollen on the left side and his eye was swollen shut. Mike had obviously sustained serious injuries. (Tr. at 427-29.)

Deputy Gilbertson also responded to the Lotters' residence. When he arrived, Lotter was outside, huddled in a blanket. She was subdued. Lotter told Deputy Gilbertson that she and Mike had been asleep in the living room. When Lotter woke up, Mike was not there, so she went to check on him. Lotter said she found him at the bottom of the stairs. Lotter went downstairs and the two argued because Mike was not wearing his back brace. Lotter said Mike was upset with her because she had not done the laundry. (Tr. at 450-51.)

Lotter claimed that Mike grabbed her. Eventually, Lotter was able to get away and go into the laundry room, where she retrieved a hammer. Lotter said she struck her husband with the hammer but it did not seem to even faze him. Lotter did not know how many times she hit Mike with the hammer. (Tr. at 452.) Deputy Gilbertson saw an empty glass that contained the remnants of juice at the top of the stairs. Lotter told him that Mike had been thirsty so she got him a glass of juice. (Tr. at 461.)

Lotter estimated that the encounter between her and Mike lasted about three hours. At some point in the struggle, Mike hit her with the hammer. Lotter had some minor marks on her head. Lotter's mother, who was listening to Lotter's account, interjected that Mike had hit Lotter with the hammer first. Lotter corrected her mother by saying "no." (Tr. at 453.)

At trial, Lotter testified that she awoke on November 9, 2010, Mike was not in bed, and both his walker and brace were gone. She ran down the stairs and found him on the landing. Mike did not know where he was. At some point, Mike called her by his ex-wife's name and accused her of pushing him down the stairs and trying to kill him. Lotter said she got down close to Mike to reason with him, at which point he grabbed her with his right arm. She was petrified. (Tr. at 874-76.)

Lotter claimed the two struggled but Mike was on top of her with his hands on her throat. (Tr. at 876-77.) Lotter kneed Mike in his ribs and got away. He was blocking the stairs so she ran into the laundry room and grabbed the hammer so she could use it to scare him. (Tr. at 878.) Lotter recalled hitting Mike with the hammer and watching blood squirt out of his head. She knew she hit him more, but could not recall how many times. (Tr. at 879-80.) Mike managed to grab her and held her down. (Tr. at 880.) Lotter said she passed out for a while. When she came too, Mike instructed her to go take a shower, get in the car, and go kill herself. Lotter said that she was on her way to do just that when she stopped at Sark's house. (Tr. at 883-84.)

Patrick Alduenda (Alduenda), a physician's assistant, treated Lotter on November 9, 2010. Lotter wanted all her injuries documented. (Tr. at 379.) She had no injuries to her face or neck. (Tr. at 382.) She had some small, superficial scalp lacerations and a small cut near her left ear. Lotter said her injuries were

from a hammer. She had no pain, tenderness or bruising in her neck area. (Tr. at 383-84.) None of Lotter's injuries were serious, and they did not require follow-up. (Tr. at 387.)

Lotter's mother approached Alduenda and told him that she was concerned her daughter might be suicidal. Consequently, Alduenda requested a member of the Crisis Response Team to evaluate Lotter. (Tr. at 388.) Therapist Michelle Cuddy (Cuddy) evaluated Lotter on November 9, 2011. Cuddy determined there was no indication that Lotter intended to kill herself. (Tr. at 409.) In Lotter's description of the events that unfolded with her husband, she claimed that Mike had tried to choke her. She also stated that she was "trying to kill him." (Tr. at 408.) Lotter reported that Mike had been verbally abusive to her, and it had started building. (Tr. at 415.) Lotter said that after she hit Mike with the hammer, he "looked like hell." (Tr. at 408.) Lotter stated she took a shower, gathered some belongings, and intended to go to a hotel and take a long sleep. (*Id.*)

Mike sustained serious injuries, including a depressed skull fracture and more than 20 lacerations. (Tr. at 391-94.) Mike was transferred by emergency flight to a hospital in Great Falls. (Tr. at 390.) Mike described his memory of his wife's attack as follows:

> I remember—the first thing I remember is I—I'm on my back. I don't know where I am in the house. I presume I'm in the house. I'm on my back. My eyes were closed. And I can feel this horrendous,

> painful weight on my chest just squeezing the life, squeezing the breath out of me. God, what is it?
>
> And I feel like my hands are pinned down. I don't know what. My eyes are closed; I can't see anything just yet. And I open my eyes, and there's Jill.
>
> And I'm trying to free my hands. They're pinned. And I said, why are you doing this to me?
>
> And then I see her arm swing. And then everything is black.

(Tr. at 753-54.)

At trial, Detective Olson testified about photographing and collecting evidence from the crime scene. (Tr. at 611-703.) Detective Olson, who has completed extensive blood spatter training (Tr. at 613), testified about the photographs depicting blood spatter. (Tr. at 644-75.) Detective Olson did not give any opinions about what the blood spatter meant in relation to either Mike's or Lotter's positions or Lotter's statement about the events of November 9, 2010.

During the State's closing argument, the prosecutor referenced blood spatter minimally, twice:

> Do you really believe after hitting him in the head initially three times, with the blood spattering against the wall to the other side of the wall, that she didn't have the ability to pull her hand away and get around the three, four feet available to her and get up the staircase? Do you really believe that she isn't the aggressor at that point?
>
> . . . .
>
> Recall the circumstantial evidence of the blood spatter where we had a fantail. How many were there? Five, six, seven separate blows? A foot and a half or less off the ground. And how does she do

> it, unless she's on top of him hitting him repeatedly in a very confined space.

(Tr. at 1156-57.)

II. Facts from the postconviction proceeding

Attorneys Greg Jackson and Chad Wright were co-counsel on Lotter's criminal case. At the time of the evidentiary hearing, Jackson was in the 47th year of his legal career as a criminal defense attorney. (3/11/20 Transcript of PC Evid. Hearing [PC Tr.] at 6-7.) Lotter reached out to Jackson to procure his services. Jackson initially completed an extensive interview of Lotter. He, "spent a lot of time with Ms. Lotter getting her background, the background of her relationship, what background information she had on her husband Mike Lotter. Pretty extensive biographical information." (*Id*. at 9-10.)

Jackson and Wright interviewed Detective Olson and other officers before trial. During one interview, officers demonstrated the Total Station process created from the crime scene. (*Id*. at 14.) Before trial, Jackson did not believe that blood spatter would be an issue in Lotter's trial. Jackson explained:

> In the discovery was an extensive photo log and photographs. And in reviewing the photographs, there were numerous photographs that included blood spatter. The photo log, as I recall, identified those photographs as blood spatter. So during the course of preparation, we reviewed those, of course, early on. As soon as we received them, I review[ed] them.

> So I was aware there was blood spatter in some of the photographs and that blood spatter was primarily in the area of the lower landing of their home.

(*Id*. at 15.) Jackson was familiar with the forensic concept of blood spatter and had attended an extensive two-day training seminar on DNA and the investigation of blood spatter. (*Id*. at 16.) The training seminar had provided him with "a working knowledge of what blood spatter was, how it is generally interpreted, and what you may encounter in any given case that has blood spatter." (*Id*. at 17.)

During defense counsels' pretrial interview of Detective Olson, they did not address the topic of blood spatter. (*Id*. at 20-22.) During Detective Olson's direct examination, when the topic of blood spatter surfaced, Jackson asked to voir dire Detective Olson concerning his qualifications to provide testimony on blood spatter. Afterwards, Jackson concluded that it was very likely the district court would allow Detective Olson to render an opinion on blood spatter because Detective Olson had the appropriate training and "the standard in Montana is generally pretty low," so Jackson did not object. (*Id*. at 23.)

Jackson thought he could have been better prepared for Detective Olson's cross-examination. (*Id*.) In hindsight, Jackson thought he could have kept Detective Olson under subpoena, objected to lack of notice that Detective Olson would testify as an expert, or moved to strike any of Detective Olson's testimony related to blood spatter. (*Id*.) But, at the time, Jackson viewed Detective Olson's

testimony as supportive of the defense's theory of the case. (*Id*. at 26.) Jackson believed that the State used Detective Olson's testimony effectively during closing arguments, but elaborated:

> the argument Mr. Gallagher made, then, was not based upon any specific opinion that Detective Olson gave. But perhaps if I had known that blood spatter was going to be presented, that I would have investigated blood spatter deeper in terms of what it may have shown.

(*Id*. at 27.) Even if Jackson had known that Detective Olson would testify about blood spatter as depicted in crime scene photographs, it would not have affected how he viewed the Total Station testimony. (*Id*.)

Jackson reviewed all the crime scene photographs and the log that denominated some of the photographs as depicting blood spatter. It was important to determine whether the depictions in the photographs were supportive of the defense theory or could be problematic to that theory. Jackson explained:

> My opinion, after reviewing the photographs prior to trial, was that the photographs and what I viewed as blood spatter [in] the photographs—and I know it was blood spatter—was in fact supportive of what Jill had indicated occurred and was supportive of the defense theory, yes.

(*Id*. at 37.) Jackson explained that since Mike had no memory of what happened on November 9, 2010, he could not contradict Lotter's version of the events. Jackson believed that the blood spatter evidence supported Lotter's version of the events. (*Id*.)

Jackson thought the blood spatter evidence depicted in the photographs gave Lotter credibility. (*Id*. at 39.) Jackson elaborated:

> I believe they were very consistent with what Jill had indicated had occurred. She had indicated a three-hour struggle which occurred on the landing where she was being held and could not escape. Primarily a wrestling match of sorts on the floor area. And until she was able to escape, it was my understanding she had not been able to stand up.
>
> So in looking at the amount of spatter, the directionality of the spatter, and the patterns, I felt it was consistent.

(*Id*. at 43.) Jackson acknowledged that DNA testing established a vast majority of the blood making up the spatter came from Mike. (*Id*. at 44.)

Jackson pointed out, "Detective Olson did not give opinions on positions. He did not give opinions on the relative positions of Ms. Lotter or Mr. Lotter." (*Id*. at 45.) Jackson surmised that, if the defense had known Detective Olson would testify in detail about blood spatter, he might have pursued consulting an expert. But, even if he had done so, there was nothing he could identify from the record to show that some different conclusion would have been reached in Lotter's case. (*Id*.) For example, based upon the circumstances, including Mike's 20 discrete injuries, the location of the struggle, and the length of the struggle, Jackson would have expected spatter directionality to be "every which direction." (*Id*. at 47.)

Jackson believed that the prosecutors used Detective Olson's testimony effectively in closing, but upon hearing the prosecutor's closing argument he did

not conclude that his interpretation of the blood spatter was wrong or that it was inconsistent with Lotter's testimony. (*Id*.)

During Wright's testimony, he reiterated that the blood was low on the wall suggesting that the encounter between Mike and Lotter occurred low to the ground. (*Id*. at 57.) Wright believed that the blood spatter testimony was detrimental to Lotter's case and that defense counsel could have done more to try to exclude Detective Olson's testimony, but he also stated he knew how hard Jackson always prepared for witnesses. (Tr. at 59-60.) Wright believed that the State had a duty to disclose Detective Olson as an expert witness. (*Id*. at 62-63.)

Wright acknowledged there was no doubt that Lotter used a hammer to repeatedly hit Mike in the head. (*Id*. at 65.)

Wright described Jackson as one of the finest criminal defense lawyers in Montana. (Tr. at 62.) Any time Wright had an opportunity to work with Jackson, he took it, because Jackson was a great mentor. (Tr. at 61.)

SUMMARY OF THE ARGUMENT

The district court properly denied four of Lotter's IAC claims without an evidentiary hearing because Lotter made only unsupported, conclusory allegations and Lotter failed to offer any meaningful analysis on appeal concerning why she was entitled to a hearing.

Following an evidentiary hearing, the district court properly denied Lotter's fifth IAC claim regarding defense counsels' handling of blood spatter testimony. Lotter offered no evidence at the evidentiary hearing suggesting that defense counsel performed deficiently in cross-examining Detective Olson or in not hiring a blood spatter expert. Even assuming she had done so, Lotter's claim would still fail. The State presented overwhelming evidence of Lotter's guilt and she failed to prove a reasonable probability of a different outcome.

ARGUMENT

I. The standard of review

This Court reviews a district court's denial of postconviction relief to determine whether the 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, citing *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387. Ineffective assistance of counsel claims are mixed questions of law and fact that this Court reviews de novo. *Id*.

This Court reviews a district court's discretionary rulings in postconviction proceedings, including rulings related to whether to hold an evidentiary hearing, for an abuse of discretion. *Lacy v. State*, 2017 MT 18, ¶ 13, 386 Mont. 204, 389 P.2d 233.

II. The district court properly denied Lotter postconviction relief.

A. Introduction

A person seeking postconviction relief bears the burden to show, by a preponderance of the evidence, that the facts justify relief. A petition must identify all facts supporting the asserted grounds for relief and have attached affidavits, records, or other evidence establishing the existence of those facts. *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588, citing Mont. Code Ann. § 46-21-104(1)(c). An allegation in a postconviction petition does not constitute evidence. *State v. Hanson*, 1999 MT 226, ¶ 22, 296 Mont. 82, 988 P.2d 299. A district court may deny a petition on the pleadings for failure to state a claim when the petition and supporting memorandum and attachments fail to establish a prima facie claim. Mont. Code Ann. § 46-21-201(1)(a); *Herman v. State*, 2006 MT 7, ¶ 15, 330 Mont. 267, 127 P.3d 422.

In considering IAC claims, Montana courts apply the two-pronged test the United States Supreme Court set forth in *Strickland*, 466 U.S. at 687. *Rose*, ¶ 22, quoting *Hagen v. State*, 1999 MT 8, ¶ 10, 293 Mont. 60, 973 P.2d 233. To prevail on an IAC claim, Lotter must prove both *Strickland* prongs: (1) that counsels' 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, 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." *Id*. 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 on 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, a 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.*

Lotter must prove both prongs of *Strickland*. If she fails to prove either prong, this Court need not consider the other. *Whitlow*, ¶ 11. Lotter bears a heavy burden in seeking to overturn the district court's denial of postconviction relief. *Hamilton*, ¶ 12, quoting *Whitlow*, ¶ 21.

B. The district court did not abuse its discretion in dismissing IAC and IAAC claims 1, 2, 4, and 5 without an evidentiary hearing.

A district court may dismiss claims within a postconviction petition without an evidentiary hearing if the petitioner fails to satisfy the procedural threshold set forth in Mont. Code Ann. § 46-21-104(1)(c). *Herman*, ¶ 7.

Lotter argues, for the first time on appeal, that the district court was legally bound to consider her separately denoted IAC claims as a single IAC claim that included several instances. (Appellant's Br. at 6.) Quoting *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005), Lotter states, "*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced." Lotter urges, for the first time on appeal, that this interpretation of *Strickland* is almost universally followed in the federal courts of appeal. (*Id*. at 7.)

This Court refuses to consider issues raised for the first time on appeal because it is fundamentally unfair to fault a district court for allegedly failing to rule correctly on an issue it never had the opportunity to consider. *State v. Racz*, 2007 MT 244, ¶ 16, 339 Mont. 218, 168 P.3d 685. Since Lotter did not make a claim of cumulative error below, she should not be allowed to do so for the first time on appeal.

Even so, Lotter's claim fails at the outset because, even assuming without conceding that this Court would consider the cumulative effect of individually *proven* instances of deficient performance on claims 1, 2, 3, and 5, Lotter utterly failed to prove deficient performance on *any* of those claims. Thus, there was no error to cumulate. *See*, *e.g.*, *State v. Ellerbee*, 2019 MT 37, ¶¶ 41-43, 349 Mont. 289, 434 P.3d 910.

The cases upon which Lotter relies additionally prove this point. For example, in *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001), the Second Circuit concluded defense counsel performed deficiently in four separate instances, and cumulatively these errors were prejudicial. *See also Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003) (separate *errors* by counsel should be analyzed together to evaluate their cumulative impact); *Richards v. Quarterman*, 566 F.3d 553, 557 (5th Cir. 2009) (the district court did not err in concluding that the collective impact of trial counsel's errors did not surmount the high standard for

proving IAC under *Strickland*); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003) (because petitioner exhausted his claim of cumulative error on both direct appeal and postconviction, and because petitioner established many instances of constitutionally deficient performance by counsel, prosecutorial misconduct, and improper admission of evidence, it was appropriate to consider the cumulative impact of the errors).

Lotter urges that her trial attorneys were ineffective for failing to establish the foundation necessary for expert testimony on BWS. But, as the district court correctly observed, Lotter did not offer a scintilla of what *evidence* was available to her trial attorneys, which they failed to present at trial. This Court has already concluded on direct appeal that the evidence Lotter presented at trial was insufficient foundation to allow expert testimony on BWS. Thus, Lotter was on notice that she had to support her petition with *something*. Yet she failed to do so. Lotter, who claims to be a battered woman, was in the best position to know what available evidence her trial counsel allegedly failed to present. Yet, she references no such evidence in her brief on appeal or in her Amended Petition.

It is reasonable to conclude that she presented no other evidence because it did not exist. For example, even though Dr. Jeffres's testimony was disallowed at trial, at the sentencing hearing Dr. Jeffres could not provide any specific evidence that Lotter was a battered woman. Because Lotter failed to make a prima facie

showing that her trial attorneys were deficient in their failure to present *available evidence*, Lotter's IAC claim fails at the starting line.

Lotter postulates that the record does not establish "why" defense counsel failed to lay an adequate foundation for expert testimony on BWS, thus she was entitled to an evidentiary hearing. It is Lotter's burden to demonstrate that she was entitled to an evidentiary hearing on this issue. But, even so, it is evident that Jackson and Wright presented the evidence they were aware of at trial.

Lotter generically argues that Jackson and Wright could have presented the medical reports from the experts to lay a proper foundation. In other words, Lotter urges that her attorneys should have presented inadmissible evidence to lay the foundation for inadmissible evidence. Even assuming there was any merit to this argument, Lotter did not attach these records to her Amended Petition, which she easily could have done. And, again, based on Dr. Jeffres's testimony at sentencing, there was nothing in her records to support Lotter's claim.

Lotter next argues that her trial attorneys were ineffective for failing to preserve a due process challenge to a hearsay statement admissible as a prior inconsistent statement. Lotter's claim is a legal one that did not need factual development. Lotter offers no legal analysis of this claim in her brief. It is not this Court's job to conduct legal research on a party's behalf, or to guess on a party's position or develop legal analysis that may support that position. *State v. Whalen*,

2013 MT 26, ¶ 32, 368 Mont. 354, 295 P.3d 1055. Nor can a party simply incorporate its briefing from below into its appellate brief. "Simply put, appellate arguments must be contained within the appellate brief, not within some other document." *State v. Ferguson*, 2005 MT 343, ¶ 41, 330 Mont. 103, 126 P.3d 463; *Herman*, ¶ 22; *see also Wilkes v. State*, 2015 MT 243, ¶ 19 n.1, 380 Mont. 388, 355 P.3d 755 (declining to consider an issue that was raised in a petition and briefly referenced on appeal but not adequately argued in the brief on appeal).

The district court correctly distinguished the circumstances of Lotter's case from the cases Lotter relied upon below—*State v. White Water*, 194 Mont. 85, 634 P.2d 636 (1981), and *California v. Green*, 399 U.S. 149 (1970) (Appellant's App. A at 12-13.). Importantly, Lotter had the ability to cross-examine both Mike and the volunteer firefighter to whom Mike made the statement. Also, the State presented overwhelming evidence of Lotter's guilt and the reliability of the admitted statement was sufficiently established. (*See id*.)

Similarly, Lotter offers no analysis of how the district court erred in denying her claim that her trial attorneys were ineffective in failing to properly prepare her for cross-examination. Lotter relied on justifiable use of force at trial. Lotter had no choice but to testify since she relied on justifiable use of force because there was no one else who could have relayed her version of events. Mike could not undermine Lotter's version of events because he could not remember what

happened. Lotter portrayed Mike in a negative light and characterized him as the attacker. Lotter has proffered nothing to suggest that her defense attorneys did not spend time preparing her for cross-examination, nor has she identified any topics she was unprepared to address or questions that she did not know how to answer. Lotter has offered nothing to pierce the presumption her counsel performed within prevailing professional norms. This "claim" is based wholly on unsupported allegations, and the district court properly dismissed the claim without a hearing.

Finally, Lotter offers no analysis of her claim of ineffectiveness against her appellate counsel. Notably, appellate counsel attempted to raise the due process claim on direct appeal but this Court declined to consider it. Since Lotter raised all her IAC claims in postconviction and the district court did not conclude that Lotter should have raised any of the IAC claims on direct appeal, Lotter's IAC claim against her appellate counsel fails because there is simply no way for her to prove it—even if the district court had granted her discovery and an evidentiary hearing.

Lotter insinuates that she could not comply with the postconviction procedural statutes on four of her claims without the benefit of an evidentiary hearing. But a petitioner may not conduct a "fishing expedition" in an attempt to establish the right to an evidentiary hearing. *Smith v. State*, 2000 MT 327, ¶ 28, 303 Mont. 47, 15 P.3d 395. Lotter failed to prove that the district court abused its discretion by not conducting an evidentiary hearing on all of her IAC claims.

C. The district court properly dismissed IAC claim 3 following an evidentiary hearing.

As Lotter acknowledges, the district court correctly found that counsel did challenge Detective Olson's qualifications to testify about blood spatter and that Jackson concluded Detective Olson was qualified to testify about blood spatter. (Appellant's Br. at 21.) But Lotter argues that Jackson's conclusion that the blood spatter evidence was helpful, not harmful, to the defense proves her IAC claim against him. (*Id*.) Lotter primarily claims this is true because of minimal remarks concerning blood spatter that the prosecutor made during closing argument.

Lotter, as she did below, asks this Court to assume that Jackson was deficient because: (1) he failed to recognize that Detective Olson might testify about blood spatter, (2) he did not attempt to prevent such testimony upon learning of it, (3) his cross-examination of Detective Olson was deficient, and (4) he failed to consult with an expert.

Importantly, despite the benefit of an evidentiary hearing, Lotter did not present *any* evidence of what Jackson should have asked on cross-examination or whether there was an expert who would have disagreed with any of Detective Olson's testimony about the photographs depicting blood spatter.

All the blood spatter photographs were admitted without objection. (Tr. at 616-18, 622-36.) Lotter has not made a claim that trial counsel was ineffective for not objecting to these photographs. There was no dispute that all the blood spatter

was low on the walls. More importantly, Lotter admitted she used the hammer to hit Mike in the head repeatedly. Lotter testified that she and Mike were both on the ground, and Mike could not dispute that testimony. Because the blood spatter was low on the walls, it did lend support to Lotter's testimony.

In addition to the blood spatter photographs that were admitted without objection, the State presented medical testimony about the 20 injuries Mike sustained on every part of his head. And DNA testing established that the majority of the spattered blood belonged to Mike.

In closing, the prosecutor interpretated *all* the evidence to suggest that Lotter was on top of Mike while she repeatedly hit him in the head with a hammer. The prosecutor could have done so even if Detective Olson had not testified about the blood spatter depicted in the admitted photographs. Importantly though, Detective Olson did not use the blood spatter to give any opinions on the relative locations of either Mike or Lotter nor did the prosecutor suggest that Detective Olson had done so.

Even assuming Lotter could have proven the deficient performance prong of *Strickland*, her claim still fails because she cannot prove prejudice. Lotter offered no evidence that even remotely suggested a reasonable probability of a different outcome. Lotter suggested that she established prejudice because Wright opined at the evidentiary hearing that the blood spatter evidence was prejudicial to Lotter

and Jackson thought the prosecutor used Detective Olson's testimony effectively in closing argument.

But, all the evidence the State presented was prejudicial to Lotter, including: her employment history; her credit card debt; her spending habits; the peculiarity of Mike's two prior "accidents," which occurred while he had *Lotter's* drugs on board; Mike's final "fall" that culminated in Lotter hitting him in the head with the claw foot of a hammer at least 20 times, after which Lotter showered, shut off the house phone, took Mike's cell phone, and left the house with no way for Mike to summon help; and all of Mike's documented injuries.

The State presented overwhelming, admissible evidence of Lotter's guilt. Even for the most experienced and respected criminal defense attorney in Montana, Lotter's defense was an uphill battle. Lotter has failed to demonstrate that had Jackson done something differently with the blood spatter, there was a reasonable probability of a different outcome.

/ / /

CONCLUSION

The State requests that this Court affirm the district court's order denying Lotter postconviction relief.

Respectfully submitted this 16th day of June, 2022.

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By: */s/ Tammy K Plubell*
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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 9,967 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0143

JILL MARIE LOTTER,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPENDIX

Affidavit of Jennifer Hurley (Doc. 39.)..... Appendix A

CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-16-2022:

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