IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0324

KALEB EDWARD DANIELS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Michael F. McMahon, Presiding

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DISCUSSION

The State of Montana asks this Court to look past the district court's summary consideration of Kaleb Daniel's postconviction claim about his trial attorney failing to investigate and present evidence regarding expected gunshot residue because the State "presented overwhelming physical and testimonial evidence" that Kaleb attempted to shoot Marshall Buus. (Appellee's Br. at 20.)

However, careful review of the trial record shows that the physical evidence of guilt was not overwhelming. The physical shooting evidence was contradicted by Marshall and Sonja Buus's own testimony. Thus, the possibility remained that, after shooting Jory Strizich in the leg, they took actions to deflect blame. During her call to the 911 operator, Sonja warned Marshall he was the one who was going to end up going to jail. She explained in Jory Strizich's trial: "You try to do what you need to do to protect yourself and you're the one that gets in trouble instead of the people who robbed you." (10-3-17 Strizich Trial Tr. at 249.) Kaleb wanted his attorney to use expert assistance to investigate what proof was available to counteract the Buuses' testimony that he had fired a weapon at Marshall. The State claims when Kaleb's trial

attorney mentioned gunshot residue at trial that was enough to provide effective assistance. (Appellee's Br. at 27-28.) Instead, a post-conviction hearing should have been conducted to explore why the attorney believed there was no available expert testing or investigation relevant to Kaleb's case.

The claim of overwhelming evidence also ignores that the State never produced the .25 caliber gun it said Kaleb fired at Marshall. Instead, the State found five .25 caliber casings in a single location at the southwest corner of the Buus cabin and two .25 caliber slugs in a bank beyond the driveway. (State's Exs. 45-57, 69 and 74; 7-11-2017 Tr. at 180-197.) This physical evidence did not match Marshall's and Sonja's description of the shooting. Marshall said Kaleb only fired at him once when he was near the cabin. (7-11-2017 Tr. at 311.) Marshall described Kaleb firing over his shoulder multiple times, but he was out on the county road when he did so – far away from the cabin. (7-11-2017 Tr. at 311-312.) Marshall knew the location of these shots because he saw Kaleb fall and there was a place in the snow next to the road showing where the fall happened. (7-11-2017 Tr. at 311-312 and State's Ex. 71.) Sonja only heard three shots – the three shots undisputedly

fired by her husband around the time he shot Jory in the leg. (7-11-2017 Tr. at 344.) She said she never saw Kaleb holding a gun when he was near the cabin, but echoed Marshall's testimony that Kaleb shot back towards them as he was running away on the county road. (7-11-2017 Tr. at 347.)

Two officers knew precisely where Kaleb crossed the road and thoroughly searched the area with two metal detectors. (7-11-2017 Tr. at 474-477.) Despite this extensive, targeted search, the two detectives never found any evidence showing Kaleb fired the two rounds from the road as described by Marshall. (7-11-2017 Tr. at 263-264.) Although Marshall said he did not know anybody who shot a .25 caliber gun on his property, shooting was an avid activity for people at the Buus cabin. He and his neighbor had even created a homegrown pistol shooting range for using handguns. (7-11-2017 Tr. at 320.)

Relying solely on the physical evidence, the jury would have to believe Kaleb fired five shots in the same location at Marshall. Given the close grouping of the .25 caliber shell casings, Kaleb would have had to have fired these shots in rapid succession before he fled to the road.

Kaleb supposedly fired these five shots but never hit Marshall, or the Durango parked nearby, or the trees within the supposed line of fire.

Relying solely on Marshall and Sonja's testimony, the jury would have to believe Kaleb fired from the county road. With no casings in the location where he supposedly fired from, gunshot residue could have confirmed whether he fired in the unusual manner Marshall described: firing with his right hand over his left shoulder. As Montana State Crime Lab firearms expert Lynette Lancon explained, gunpowder reside would come out all parts of the .25 caliber gun the State said was similar to the one Kaleb supposedly used. (7-11-2017 Tr. at 599.) Given the unusual shooting motion described by the Busses, gunpowder residue would be expected to be found around Kaleb's left shoulder, neck and head region.

Rather than feeling overwhelmed by the physical and testimonial evidence showing he attempted to commit deliberate homicide, Kaleb expressed frustration to his appellate attorney about his trial attorney's failure to prove that Mr. Daniels did not have or use a weapon. He specifically wanted his trial attorney to investigate and hire an expert witness. (*See*, 2/26/2017 Affidavit of Caitlin Boland Aarab, p. 3-4.)

Kaleb's trial attorney's response was baffling. Kaleb had asked to get an expert witness, but his attorney felt it was Kaleb's duty, despite Kaleb's lack of education and active addiction problems, to identify what kind of expert and what the expert would testify about. (2/26/2021 Affidavit of Steven Scott, p. 4). Trial counsel then said he was unsure how a ballistics expert would have helped. *Ibid.*

Trial counsel's response makes no sense when, for years, courts have allowed gunshot residue evidence to "show the probability that the defendant did or did not fire a gun or to show that the test results are consistent or inconsistent with the subject firing a gun." *State v. DelReal*, 225 Wis. 2d 565, 575–76, 593 N.W.2d 461, 466 (Ct. App. 1999) *citing*: *United States v. Barton*, 731 F.2d 669, 672 (10th Cir.1984); *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74, 78 (1996); *Mills v. State*, 476 So.2d 172, 176–77 (Fla.1985); *People v. Cole*, 170 Ill.App.3d 912, 120 Ill.Dec. 744, 524 N.E.2d 926, 935–36 1988); *State v. Velez*, 588 So.2d 116, 133 (La.Ct.App.1991); *State v. Stephan*, 941 S.W.2d 669, 674 (Mo.Ct.App.1997); *State v. Chatman*, 156 N.J.Super. 35, 383 A.2d 440, 442 (Ct.App.Div.1978). Despite being unsure about how expert evidence could have helped, trial counsel did ask questions about the availability

of gunshot residue testing at the Montana State Crime laboratory. (7-11-2017 Tr. at 266-269.) Because there was indeed overwhelming evidence of Kaleb being involved in the burglary, the only reasonable and available defense strategy for the attempted deliberate homicide charge required consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. *See*, *Harrington v. Richter*, 562 U.S. 86, 106, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011)

What trial counsel's actions at trial and his subsequent statements in his affidavit revealed is that he believed gunshot residue evidence was fragile. Just the opposite: "[Gunshot residue] lasts nearly forever. It can land on anything and stay there indefinitely." Howard, Steven, *Gunshot Residue and Cross Contamination*, 31 Champion 38, 39 (October 31, 2007). And, unlike detecting gunshot residue on someone's hands, the shooting position in this case made it more likely to deposit gunshot residue on clothing. Gunshot residue is more rapidly lost from hands than from clothing. Testing gunshot residue has been found even five days later on clothing. Lloyd JBF, *Liquid chromatography of firearms propellants traces*, Journal of Energetic Material, 593 1986;4:239-71. The State tries to counter this fact by

falsely claiming all of Kaleb's clothing, including his hat and coat were wet when they were collected at the scene of Kaleb's arrest. (Appellee's Br. at 27.) In truth, the evidence technician testified he had removed wet items when he was cataloging both Jory and Kaleb's clothing. *See*, 7-11-2017 Tr. at 243-255.) Everyone agreed their pants and socks were wet from fleeing through the snow, but the evidence technician never said all of the items were wet: "A lot of the stuff was wet. And I had to allow it to dry before I could bag it." (7-11-2017 Tr. at 250.)

These significant differences in evaluating the necessity for scientific testing of the evidence shows the importance of the evidentiary hearing in postconviction relief. Kaleb should not have been required to prove the facts entitling him to relief in his *pro* se postconviction petition. Montana relies on the same federal standard showing the preference for a hearing: "The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only allege — not prove — reasonably specific, nonconclusory facts that, if true, would entitle him to relief." *Aron v. United States*, 291 F.3d 708, 715 n. 6 (11th Cir. 2002). This approach makes sense because if the defendant was required to prove the facts that would entitle him to relief before being

granted an evidentiary hearing, the hearing itself would be unnecessary. This Court recently affirmed the importance of evidentiary hearings when it remanded for appointment of counsel and an evidentiary hearing five years after the defendant filed a *pro* se motion "for ineffective assistance of counsel" because the postconviction relief procedures had been compromised. *See*, *State v. McKnight*, DA 22-0167 (6/27/2023, Order).

CONCLUSION

This Court should remand for a proper adversarial hearing to resolve the crucial issues about the attorney's refusal to enlist expert help to prove Kaleb's innocence on the attempted deliberate homicide charge.

Respectfully submitted this 19th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook 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 1,581, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Chad Wright
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CERTIFICATE OF SERVICE

I, Chad M. Wright, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 07-19-2023:

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