IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0237

NICK LENIER WILSON,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jennifer B. Lint, Presiding

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STATEMENT OF THE ISSUE

Whether the district court correctly exercised its discretion to deny the Appellant's postconviction petition without an evidentiary hearing or a response from the State when the petition, files, and records conclusively showed the Appellant was not entitled to relief.

STATEMENT OF THE CASE

On April 2, 2019, the Appellant, Nick Wilson (Wilson), was convicted of felony burglary, in violation of Mont. Code Ann. § 45-6-204, and misdemeanor theft, in violation of Mont. Code Ann. § 45-6-301. (Ravalli County Cause No. D.C. 18-88 Documents (Trial Docs.) 1, 4-5, 125;[1] *State v. Wilson*, 2022 MT 11, ¶¶ 2-7, 407 Mont. 225, 502 P.3d 679.) During trial, Wilson conceded he was guilty of theft but contested the burglary charge. (4/1/19 and 4/2/19 Trial Transcript (Trial Tr.) at 100.) The district court sentenced Wilson to 20 years' incarceration. (Trial Docs. 132 at 2-3, 129.1.)

On direct appeal, Wilson raised three evidentiary issues, and this Court affirmed the district court's rulings. *Wilson*, ¶¶ 8-36.

[1] The transcripts from the trial court record for Wilson's underlying conviction were submitted to this Court during Wilson's direct appeal, Montana Supreme Court Case No. DA 19-0584.

On December 19, 2022, Wilson filed a petition for postconviction relief (PCR petition). (Ravalli County Cause No. DV 22-451 Document (PCR Doc.) 1.) Wilson raised four issues: procedural error regarding the burglary jury instructions, ineffective assistance of trial counsel, failure of prosecutor to disclose materials, and ineffective assistance of appellate counsel. (PCR Doc. 1.) The district court denied Wilson's petition on various grounds without an evidentiary hearing or response from the State. (PCR Doc. 4.)

STATEMENT OF THE FACTS

I. The offense

Around 1 a.m., on March 15, 2018, Wilson entered the back door of an intake center for a thrift store where donated items were processed for sale or disposal. *Wilson*, ¶ 3. Wilson took several items, including electronics, recreation equipment, and clothes, and stashed them outside. *Id*. Around 3:30 a.m., Wilson walked to his girlfriend's home and borrowed her van. *Id*. He returned to the center around 4 a.m. and loaded the stashed items in the van. *Id*.

A few days later, law enforcement arrested Wilson, and the State charged him with felony burglary and misdemeanor theft. *Id*. ¶ 4. Wilson admitted to stealing the items from the intake center, but he claimed he had received authorization to enter the intake center after hours to clean up some rainwater that

had pooled on the floor. *Id*. ¶¶ 3-6. Wilson claimed he had obtained permission earlier in the day from F.Z., a developmentally disabled employee of the company that owned the intake center. *Id*. ¶¶ 3-4. The security video showed that Wilson never turned on any lights during the three hours that he rummaged through the merchandise at the intake center. *Id*. ¶ 5.

II. Procedural history

A. Pretrial

After the State charged Wilson, two attorneys from the Office of the Public Defender (OPD) represented him during the trial court proceedings. (Trial Docs. 6-7, 24.) Wilson's first attorney, Richard Gillespie (Gillespie), represented him from March 28, 2018, until August 16, 2018. (Trial Docs. 6, 24.) Gillespie attended Wilson's initial appearance, requested discovery, attended a settlement conference with the State, made two bail reduction requests, and pursued an affirmative defense. (Trial Docs. 8-9, 11, 14, 16-19, 21-22, 24.) During a status conference on June 7, 2018, Gillespie informed the district court that Wilson was asserting a mental disease or defect defense. (6/7/18 Tr. at 3-5.) Gillespie said he was researching professionals who could evaluate Wilson and testify. (*Id*.) During the second bail reduction hearing on June 18, 2018, Gillespie informed the district court that he was still pursuing the mental disease or defect defense. (6/28/18 Tr. at 5.)

On August 16, 2018, the regional manager of the OPD conflict defender division appointed Leta Womack (Womack) to replace Gillespie as Wilson's counsel. (Trial Doc. 24.) On September 13, 2018, Womack filed a waiver of speedy trial that Wilson signed and a motion to continue the trial. (Trial Docs. 27-28.) During a hearing the same day, Wilson said he understood the waiver could result in a delay of his trial and agreed with Womack's request to continue the trial. (9/13/18 Tr. at 3-4.)

On October 25, 2018, Womack requested a bail reduction and provided a letter from a licensed clinical psychologist regarding her evaluation of Wilson. (Trial Doc. 30.) The letter specified that Gillespie requested her opinion about Wilson's mental state at the time of his offense and his appreciation of the criminality of his conduct. (Trial Doc. 31.) The psychologist found Wilson had a low to moderate risk of reoffending with appropriate programming. (*Id*.) The district court denied the bail reduction, and Womack informed the district court that she would continue to pursue suitable arrangements for Wilson's OR release. (10/25/18 Tr. at 3-6.)

During a status conference on November 1, 2018, Womack informed the district court that the parties were unable to resolve the case and again requested a bail reduction. (Trial Doc. 32; 11/1/18 Tr. at 3-6.) Since the prior hearing, Womack had worked with a local mental health provider to arrange supervised housing that

required sober living and mental health treatment for Wilson if he was released. (11/1/18 Tr. at 3-6.) The district court said it was in favor of the placement opportunity but denied the bail reduction because the State had not had an adequate opportunity to review the proposal. (*Id*. at 5-6.)

On November 5, 2018, Womack filed a witness and exhibit list, which included F.Z.[2] as a witness. (Trial Doc. 34.) On December 4, 2018, Womack filed an opposed motion to continue the trial. (Trial Doc. 41.) The district court denied the motion during a hearing on December 6, 2018, and followed up with a written order. (Trial Docs. 44, 47.)

During the next week, the parties filed various documents. Womack filed a motion for Wilson's release pursuant to a stipulation reached with the State, a motion to dismiss, a motion in limine to exclude statements and evidence of Wilson's prior acts, and a response brief. (Trial Docs. 48, 55, 56, 58.) The State filed a trial brief, a motion to preclude F.Z. from testifying based on incompetency, an affidavit in support, and a response. (Trial Docs. 46, 51-52, 57.) In Womack's response to the State's motion to preclude F.Z. from testifying, she expressed concerns about Rebecca Merfeld (Merfeld), who was the case manager for F.Z. and a second developmentally disabled person that Womack had included in her

[2] F.Z.'s name is often misspelled in court documents, including Wilson's witness list. (*See* Trial Doc. 34 at 3.)

witness list. (Trial Doc. 58 at 2.) Womack described Merfeld as "seriously angry" during a December 10, 2018, interview. (*Id*.) Womack said she "was significantly concerned at this point that Ms. Merfeld had tainted the witnesses under her care, causing the witnesses to be afraid or hesitant to speak with defense counsel, or change their testimony/recollection of what had occurred." (*Id*.)

The parties discussed the issues raised in these filings during a hearing on December 13, 2018. (Trial Doc. 59.) Based on the discussion, the district court continued the trial date, granted the parties' stipulation to release Wilson upon conditions, and ordered a competency exam for F.Z. (Trial Docs. 60-61, 68.) During the month following the hearing, Womack filed two briefs in response to the State's motions, a reply brief in support of her motion to dismiss, a motion to modify the order granting Wilson's release, and an amended motion in limine. (Trial Docs. 63, 66, 69, 72, 75.) In a January 25, 2019 order, the district court found the State properly charged Wilson with a felony, sufficiently notified Wilson of the maximum punishment, and denied Wilson's motion to dismiss. (Trial Doc. 78.)

On January 29, 2019, the State filed the competency evaluation of F.Z. (Trial Doc. 79.) The evaluator determined F.Z. was incompetent to serve as a witness. (*Id*.) During a January 29, 2019 hearing, Wilson personally appeared, and Womack reiterated her concern regarding Merfeld's potential improper influence on F.Z.'s testimony. (Trial Doc. 81; 1/29/19 Tr. at 7-8.) The district court said

Womack should have an opportunity to question the evaluator and instructed Womack to request a hearing if necessary. (1/29/19 Tr. at 7-11.) During a subsequent hearing, Womack requested the district court's permission to allow the evaluator to assess F.Z. a second time, which the district court granted. (3/14/19 Tr. at 3-7.) In the evaluator's second report, he reiterated his prior finding that F.Z. was incompetent to testify. (Trial Doc. 117.)

After the parties finished briefing the pending motions, the district court issued an order granting in part, denying in part, and reserving ruling in part on the various evidentiary issues raised. (Trial Doc. 85.) On February 28, 2019, Womack filed a motion to suppress, which challenged Wilson's "involuntary confession." (Trial Doc. 93.) The district court summarily denied the motion. (Trial Doc. 95.) Womack filed an objection to this order along with briefing. (Trial Docs. 104, 111.) The district court later confirmed its denial in its pretrial order that resolved all pending issues. (Trial Doc. 113.)

B. Trial

1. The surveillance video

During the trial, both parties introduced portions of the surveillance video from the intake center. (Trial Tr. at 151-71, 272-78.) Womack asked if both the State and the defense would play the same video clips. (*Id*. at 6-11.) The State said Womack was entitled to play any portions of the video necessary for their case.

(*Id*.) Womack reiterated that she wanted to make sure the portions of the video that were significant to her case were played. (*Id*.) The district court said, "I totally agree. You can put in whatever you want. And maybe what you're asking is, if you end up replaying something of [the State]'s, is there going to be objection to it being cumulative or duplicative. The answer is no." (*Id*. at 9-10.)

The State played various portions of the video during its case-in-chief. (*Id*. at 151-71.) Womack objected at various times when the State's witness attempted to explain what was happening in the video because the images were to be interpreted by the jury rather than the witness. (*Id*.) The district court sustained these objections. (*Id*.)

Wilson testified in his defense. (*Id*. at 233-86.) On direct examination, Wilson explained in detail what he did at the intake center. (*Id*. at 233-62.) During a break in Wilson's testimony, the parties discussed the portions of the video proffered by Womack. (*Id*. at 264-67.) The State noted that "80 or 90 percent" of the video clips were duplicative of those played by the State. (*Id*. at 264.) The State questioned whether all the clips should be played again, which were a total of 109 minutes. (*Id*.) The State noted that Wilson should be allowed to answer specific questions but said it would object to Wilson summarizing what was occurring in the video because the video speaks for itself. (*Id*. at 264-65.)

Womack said she may not go through the longer clips but said Wilson should be allowed to explain what was happening in the video. (*Id*.) The district court said, "I couldn't see everything all the time, so I think there's a reasonable amount of inquiry that could be made into your client, but he's not going to be able to reinterpret the video." (*Id*. at 266.) Womack said she did not intend for Wilson to reinterpret the video but rather for Wilson to "identify what he's doing." (*Id*.) The district court said:

> Except that he did just give a complete narration of what he did at the scene. And what we can't have is him superimposing after-the-fact analysis of what he may or may not be doing. If you want to ask him what he's doing when he's not on camera, I think that's fair, but not to have him reinterpret what he's doing on the video.

(*Id*.) The district court said it would give Womack "a small amount of latitude." (*Id*. at 267.)

Womack played various portions of the video. (*Id*. at 272-78.) The district court did not limit the videos played by Womack, but it did sustain the State's objections when Womack asked Wilson to describe what was happening in the video. (*Id*.)

2. The burglary jury instructions

During the settling of jury instructions, Womack objected to the State's proposed burglary instructions. (*Id*. at 299-305.) Womack argued the State changed its proposed instructions based on Wilson's admission that he committed theft.

(*Id*.) The district court said it must instruct the jury based on the law, which was consistent with the State's revised instructions. (*Id*.) The district court provided the State's revised instructions. (*Id*. at 303-05, 315; Trial Docs. 122 at 53-54, 123 at 20-21.)

INSTRUCTION NO. 17

Burglary

A person commits the offense of burglary if the person knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein, or by committing any other offense within that structure.

. . . .

INSTRUCTION NO. 18

Issues in Burglary

To convict Nick Wilson of the charge of burglary, the State must prove the following elements:

1. That Nick Wilson knowingly entered or remained unlawfully within an occupied structure;

AND

2. That Nick Wilson did so with the purpose to commit the offense of theft therein.

OR

1. That Nick Wilson did commit the offense of theft therein.

> If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find Nick Wilson guilty.
>
> If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find Nick Wilson not guilty.

(*Id*. at 315 (formatting differences); Trial Doc. 123 at 20-21.)

C. Conviction and sentence

On April 2, 2019, the jury found Wilson guilty of both counts. (*Id*. at 336-38; Trial Doc. 125.) The district court sentenced Wilson to 20 years incarceration. (Trial Docs. 132 at 2-3, 129.1.)

D. Direct appeal

Wilson timely appealed his conviction. (Trial Doc. 138.) The Appellate Defender Division of OPD assigned new counsel for Wilson on appeal. (Trial Doc. 137.) Wilson raised three issues. *Wilson*, ¶¶ 9-35. He challenged the district court's pretrial order finding F.Z. incompetent to testify, and the district court's rulings during trial that struck witness testimony as improper character evidence and allowed the State to call the director of the victim agency as a rebuttal witness despite not being subject to the general order excluding witnesses. *Id*. This Court affirmed Wilson's convictions. *Id*. ¶ 36.

E. Sentence review

Wilson prematurely filed an application for sentence review prior to his direct appeal. (Trial Docs. 136, 143.) Wilson refiled his application after this Court issued remittitur. (Trial Doc. 146.) After a hearing, the sentence review division affirmed Wilson's sentence. (Trial Doc. 149.)

F. Postconviction

On December 19, 2022, Wilson timely filed a petition for postconviction relief and raised four claims. (PCR Doc. 1.) On January 17, 2023, the district court denied and dismissed Wilson's petition without a hearing or response from the State. (PCR Doc. 4.)

In his first claim, Wilson alleged "procedur[al] error." (PCR Doc. 1 at 4.) Wilson said the "State improperly omitted the elements of the burglary for purposes of jury instructions. MCA Statute is the letter of the law and shall not be omitted." (PCR Doc. 1 at 4 (cleaned up).) The district court denied this claim because it reasonably could have been raised on direct appeal. (PCR Doc. 4 at 2-3 *citing* Mont. Code Ann. § 46-21-105(2); *In re Evans*, 250 Mont. 172, 173, 819 P.2d 156, 157-58 (1991).)

In his second claim, Wilson alleged ineffective assistance of counsel (IAC) claims against both of his trial counsel. (PCR Doc. 1 at 4-11.) Wilson alleged his initial counsel, Gillespie, was "completely absent from his obligation to represent

his client for the [sic] 5 months in the initial proceedings of this case." (*Id*. at 5.) The district court found Wilson's allegations were contradicted by the record and barred because they reasonably could have been raised on direct appeal. (PCR Doc. 4 at 2-3.) The district court further explained:

> Petitioner contends that his first counsel, Mr. Gillispie, was absent and did not represent Petitioner for the first five months of the case. The record demonstrates that Mr. Gillispie was present at Petitioner's initial appearance, requested discovery, attended a conference with State counsel on Petitioner's behalf, and made bail reduction requests before the assignment of new counsel. These facts contradict Petitioner's allegations against Mr. Gillispie.

(*Id*. at 3.)

Wilson generally alleged that he "often found himself an unspoken participant throughout the pretrial stages" with both Gillespie and Womack, that he had "irreconcilable conflicts" with both attorneys, and he "was not an active participant in his own defense." (PCR Doc. 1 at 8.) Wilson's only allegation directed solely at Womack's representation focused on the district court's evidentiary rulings. (*Id*. at 6-7.) The district court found: "Petitioner contends that his second attorney, Ms. Womack, was not able to follow his instructions at trial due to evidentiary rulings made by the Court. This does not show that Ms. Womack's representation of Petitioner was ineffective." (PCR Doc. 4 at 3.)

In his third claim, Wilson alleged the State failed to disclose "collusion" between the State, Merfeld, and the potential witness F.Z. (PCR Doc. 1 at 14.)

Wilson alleged the State did not disclose this exculpatory evidence and he was not aware of it until January 18, 2022. (*Id*.) Wilson claimed his "right to know was being obstructed by the State and by the defense counsel." (*Id*.) The district court found this claim was barred because Wilson had notice of the issue and could have raised it on direct appeal. (PCR Doc. 4 at 3-4.)

> While Petitioner alleges he discovered this information in January 2022, this very issue was the subject of a pretrial Motion in Limine (*see*, *e.g.*, Doc. #58 in DC-18-88). Petitioner's attorney raised the issue with the District Court and the Petitioner was present at pretrial hearings discussing the issue on December 13, 2018 and January 29, 2019. *See* DC-18-88, Doc. #59, Doc. #70, Doc. #81.

(*Id*.)

In his fourth claim, Wilson alleged his appellate counsel provided ineffective assistance.[3] (PCR Doc. 1 at 15-17.) Wilson alleged his appellate counsel kept him "in the dark about what issues would be appealed," only told him the issues raised after she filed the brief, refused to raise a claim of trial counsel IAC, and failed to provide him with a complete case file. (*Id*. at 16.) Wilson said this was a breakdown in communication that rendered him a "helpless bystander." (*Id*.) The district court rejected this claim and found "[w]hile Petitioner makes allegations in his Petition, he has not been specific enough to identify all facts supporting the grounds for relief and, apart from his own affidavit, has not attached affidavits,

[3] Wilson relied exclusively on authority regarding appellate counsel's obligation to preserve the right to appeal. (PCR Doc. 1 at 15-17.)

records, or other evidence establishing the existence of those facts as required by § 46-21-104(1)(c), MCA." (PCR Doc. 4 at 3.) In conjunction with this claim, Wilson challenged the 20-year sentence imposed. (PCR Doc. 1 at 17.) The district court noted "Sentence Review held a hearing to review Petitioner's sentence on August 5, 2022, and the sentence was affirmed." (PCR Doc. 4 at 4.)

Wilson appealed and argued the district court abused its discretion in denying his PCR petition without a hearing or response from the State. (PCR Doc. 6; Appellant's Brief (Br.) at 1-7.)

SUMMARY OF THE ARGUMENT

The district court correctly denied all of Wilson's claims and dismissed his PCR petition without an evidentiary hearing or response from the State because the petition, files, and records conclusively showed Wilson was not entitled to relief.

Wilson based his challenge of the burglary jury instructions on an incorrect understanding of the law, and any challenge to the instructions should have been raised on direct appeal. The record directly contradicts every allegation related to his claim that the State and his counsel colluded with F.Z., and concealed that collusion from Wilson. If the record supported his claim as asserted, he should have raised the issue on direct appeal.

Wilson failed to support any of his IAC claims with facts in the record. The record directly contradicts most of Wilson's conclusory and self-serving statements, and nothing he provided could overcome the strong presumption that the actions of all three of his counsel—two trial counsel and one appellate counsel—were within the broad range of reasonable professional assistance. Moreover, Wilson provided no basis to support a finding of prejudice because none of the alleged deficiencies demonstrate a reasonable probability that, but for the alleged deficiencies, the result of the proceeding would have been different.

The district court's denial of Wilson's claims and dismissal of his petition should be affirmed.

ARGUMENT

I. Standard of review and applicable law

A. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. Discretionary rulings made by the district court in a postconviction relief proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath*, ¶ 13. Mixed

questions of law and fact presented by IAC claims are reviewed de novo. *Id*. A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on IAC claims. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

B. Law applicable to IAC claims

This Court reviews IAC claims applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petitioner has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca*, ¶ 16; *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. A claimant must prove both prongs of the *Strickland* test to obtain relief. *Rose v. State*, 2013 MT 161, ¶ 22, 370 Mont. 398, 304 P.3d 387. If a claimant fails to make a sufficient showing regarding one prong, there is no need for this Court to address the other. *Whitlow v. State*, 2008 MT 140, ¶ 11, 343 Mont. 90, 183 P.3d 861. This standard applies to IAC claims against both trial and appellate counsel. *State v. Colburn*, 2018 MT 141, ¶ 21, 391 Mont. 449, 419 P.3d 1196.

A counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. There is a strong presumption that

counsel's actions were within the broad range of reasonable professional assistance. *Baca*, ¶ 17.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

C. Pleading requirements for postconviction relief petitions

The postconviction statutes are demanding in their pleading requirements. *Ellenburg*, ¶ 12. A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Mont. Code Ann. § 46-21-104(1)(c). The petition must also "be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities." Mont. Code Ann. § 46-21-104(2). In addition, a postconviction petitioner has the burden of proving, by a preponderance of the evidence, that he or she is entitled to relief. *Ellenburg*, ¶ 12. Mere conclusory

allegations and self-serving statements are insufficient. *Kelly v. State*, 2013 MT 21, ¶¶ 9-11, 368 Mont. 309, 300 P.3d 120.

A district court may dismiss a petition for postconviction relief without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in Mont. Code Ann. § 46-21-104(1)(c). *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. Additionally, a district court may dismiss a petition for postconviction relief without ordering a response if the petition, files, and records "conclusively show that the petitioner is not entitled to relief." Mont. Code Ann. § 46-21-201(1)(a). Alternatively, the court may order a response and, after reviewing the response, "dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue." Mont. Code Ann. § 46-21-201(1)(a); *Hamilton*, ¶ 12.

II. The district court correctly exercised its discretion to deny Wilson's PCR petition without an evidentiary hearing or a State response because the petition, files, and records conclusively showed Wilson was not entitled to relief.

A. The district court correctly denied Wilson's first and third claims because he failed to raise the meritless claims on direct appeal.

Postconviction relief is not a substitute for direct appeal review. *See Hardin v. State*, 2006 MT 272, ¶ 16, 334 Mont. 204, 146 P.3d 746 *overruled in part on other grounds in Gardipee v. Salmonsen*, 2021 MT 115, ¶ 10, 404 Mont.

144, 486 P.3d 689; *State v. Hanson*, 1999 MT 226, ¶ 14, 296 Mont. 82, 988 P.2d 299. "When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a" postconviction proceeding. Mont. Code Ann. § 46-21-105(2).

During trial, Wilson's counsel objected to the burglary instructions, which Wilson challenged in his first PCR claim. During pretrial proceedings Wilson's counsel argued that Merfeld had inappropriately influenced the testimony of F.Z., which is the basis of Wilson's third claim. Wilson did not raise these issues on direct appeal. *See Wilson*, ¶¶ 8-36. The district court correctly denied Wilson's first and third PCR claims as procedurally barred because they reasonably could have been raised on direct appeal. *See* Mont. Code Ann. § 46-21-105(2); *Hardin*, ¶ 16; *Hanson*, ¶ 14.

Even if this Court disagrees with this procedural bar, this Court will affirm a district court that reaches the right result, even if for the wrong reason. *See State v. Marcial*, 2013 MT 242, ¶ 20, 371 Mont. 348, 308 P.3d 69. The district court's denial of Wilson's first and third claims was also correct because Wilson failed to support the claims with authority or facts. *See* Mont. Code Ann. §§ 46-21-104(1)(c), -104(2), -201(1)(a). Postconviction claims must be based on more than mere conclusory allegations and self-serving statements. *Kelly*, ¶¶ 9-11.

In his first claim, Wilson asserted the burglary jury instructions were incorrect as a matter of law. Wilson did not cite any authority to support his claim, but the burglary statute in effect at the time he committed the offense was Mont. Code Ann. § 45-6-204(1) (2017). The jury instructions that the district court provided accurately reflected that statutory language. (*See* Trial Doc. 123 at 20-21.) Even if Wilson had properly raised this challenge, he could not show that the district court, in its broad discretion, did not fully and fairly instruct the jury on the applicable law. *See State v. Cybulski*, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7. The district court correctly rejected Wilson's first claim because the district court records conclusively show that Wilson was not entitled to relief. *See* Mont. Code Ann. § 46-21-201(1)(a); *Marcial*, ¶ 20.

Wilson based his third claim on an assertion that he discovered after trial that the State and his trial counsel concealed from him an observed collusion between the State, Merfeld, and F.Z. As the district court correctly noted, this is contrary to the record. In pretrial briefing and during a hearing that Wilson attended, Womack stated her concern that Merfeld may be inappropriately influencing F.Z. This contradicts Wilson's assertion that he did not have notice of this issue until January 18, 2022. Moreover, Wilson has provided no facts to show that this "collusion" ever occurred. Womack's stated concern was based on Merfeld's demeanor towards her during a witness interview. This did not support a

legitimate claim during pretrial proceedings, and Wilson has provided no facts to support his allegation that his counsel or the State failed to disclose this or any other information. *See Ellenburg*, ¶ 16; *Marcial*, ¶ 20.

On either of these grounds, the district court correctly denied Wilson's first and third claims. *See* Mont. Code Ann. §§ 46-21-104(1)(c), -104(2), -105(2), -201(1)(a); *Ellenburg*, ¶ 16; *Marcial*, ¶ 20.

B. The district court correctly denied Wilson's IAC claims without a hearing or response because the petition, filings, and records conclusively showed Wilson was not entitled to relief.

Wilson claims all three of his counsel—two trial counsel and one appellate counsel—provided ineffective assistance. Underlying all his claims is the allegation that his attorneys prevented him from actively participating in his defense. Wilson consistently misconstrues the record, which contradicts all his claims. None of Wilson's allegations support a finding that any of his attorneys were deficient in their performance or that any alleged deficiency caused him prejudice. *See Baca*, ¶ 16. Wilson failed to provide any facts to support his argument and failed to rebut the strong presumption that his counsel's actions were within the broad range of reasonable professional assistance. *See Baca*, ¶ 17.

The district court correctly rejected Wilson's claims without a hearing or response from the State because Wilson failed to provide factual support for any of the claims that would entitle him to relief. *Id*.

1. The record contradicts Wilson's conclusory and self-serving allegations against trial counsel Gillespie's representation.

Wilson provided no factual support for his claim that Gillespie was "completely absent" during the initial proceedings. (PCR Doc. 1 at 5.) As the district court explained, Gillespie consistently appeared on behalf of Wilson and took various actions to assist in his defense. In light of the circumstances clearly demonstrated on the record, Wilson failed to support his allegation that Gillespie was "completely absent" or otherwise identify how Gillespie's representation fell below an objective standard of reasonableness measured under prevailing professional norms. *See Whitlow*, ¶ 20. Wilson's claim fails because he cannot show Gillespie's performance was deficient. *See id*. But Wilson cannot prove prejudice either, because he points to nothing that demonstrates a substantial likelihood that the result would have been different but for Gillespie's performance. *See Baca*, ¶ 17; *Strickland*, 466 U.S. at 694; *Richter*, 562 U.S. at 112.

The district court correctly rejected Wilson's IAC claim against Gillespie because the petition, files, and records conclusively showed that Wilson's

conclusory and self-serving statements did not entitle him to relief. *See* Mont. Code Ann. § 46-21-201(1)(a); *Kelly*, ¶¶ 9-11.[4]

2. The record contradicts Wilson's conclusory and self-serving allegations against trial counsel Womack's representation.

The district court correctly identified that Wilson's allegations against Womack are largely driven by the actions of the district court, not Womack. Wilson bemoans the evidentiary rulings—which this Court affirmed on direct appeal—but he does not specifically provide any basis to support the deficiency element of his IAC claim against Womack. The record shows Womack ably advocated for Wilson throughout the proceedings and completely undermines any finding that she provided deficient performance. The contradictions in the record to Wilson's generalized allegations against all his attorneys—that they precluded his participation in his defense—are particularly glaring with Womack because Wilson actively participated in pretrial hearings and testified during trial.

[4] The district court found Wilson's claims of trial counsel IAC were procedurally barred because they were record-based and should have been raised on direct appeal. (PCR Doc. 4 at 2-3.) The district court correctly identified that the record contradicted Wilson's claims, but that alone does not necessarily render an IAC claim record based. *See State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032. Regardless, the district court correctly denied the claims because Wilson's conclusory, unsupported, and self-serving allegations conclusively show his claims are without merit. *See* Mont. Code Ann. § 46-21-201(1)(a); *Kelly*, ¶¶ 9-11; *see also Marcial*, ¶ 20 (this Court will affirm a district court that reaches the right result, even if for the wrong reason).

Like his claim against Gillespie, Wilson's claim against Womack fails because he cannot show her performance was deficient or that he was prejudiced by her representation. *See Whitlow*, ¶ 20; *Baca*, ¶ 17; *Strickland*, 466 U.S. at 694; *Richter*, 562 U.S. at 112. The district court correctly rejected Wilson's IAC claim against Womack because the petition, files, and records conclusively showed that Wilson's conclusory and self-serving statements did not entitle him to relief. *See* Mont. Code Ann. § 46-21-201(1)(a); *Kelly*, ¶¶ 9-11.[5]

3. Wilson provided no facts to support his conclusory and self-serving allegations that his appellate counsel provided ineffective assistance.

The primary allegation Wilson provided to support his claim of ineffective assistance of appellate counsel is her refusal to raise trial counsel IAC claims. However, Wilson again ignores the record, which does not support these claims. Moreover, record-based IAC claims are an exception to the general rule that IAC claims should be raised in a postconviction petition. *See Sartain*, ¶ 30. Wilson provides no facts to undermine his appellate counsel's decision not to raise baseless claims or otherwise show her performance fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances. *See Whitlow*, ¶ 20.

[5] *See* n.4.

Even if Wilson's claims were not baseless, "It is well established . . . that appellate counsel need not raise every colorable issue on appeal." *Rose,* ¶ 28. This Court's "presumption of effective assistance of appellate counsel will be overcome only when ignored issues are clearly stronger than those presented." *Id*. Rather than pursue the baseless IAC claims, Wilson's appellate counsel raised three evidentiary issues that resulted in an *en banc* published opinion from this Court. *Wilson,* ¶¶ 8-41.[6] Wilson cannot show his trial counsel IAC claims are clearly stronger than the issues raised. *See id*.

In addition to his primary allegation, Wilson includes his appellate counsel in the general assertion that all his attorneys failed to adequately communicate with him, and he adds that she failed to provide him with a complete case file. The appellate court record does not provide the direct contradictions of Wilson's appellate IAC claim like the district court record provided for his trial counsel IAC claims. But nothing in the record supports it, which leaves Wilson with nothing more than self-serving statements. *See Kelly*, ¶¶ 9-11. As the district court found, Wilson "has not been specific enough to identify all facts supporting the grounds for relief and, apart from his own affidavit, has not attached affidavits, records, or other evidence establishing the existence of those facts as required by § 46-21-104(1)(c),

[6] Two justices concurred to express reservations about this Court's decision on the witness competency issue. *Wilson*, ¶¶ 37-42.

MCA." (PCR Doc. 4 at 3.) Without facts, Wilson's allegations are insufficient to overcome the strong presumption of reasonable representation. *See Baca*, ¶ 17.

Wilson failed to provide any facts to support his allegation that his appellate counsel provided deficient performance, and Wilson cannot prove prejudice because he points to nothing that demonstrates a substantial likelihood that the result would have been different but for his appellate counsel's performance. *See Baca*, ¶ 17; *Strickland*, 466 U.S. at 694; *Richter*, 562 U.S. at 112. The district court correctly rejected Wilson's appellate counsel IAC claim because the petition, files, and records conclusively showed that Wilson's conclusory and self-serving statements did not entitle him to relief. *See* Mont. Code Ann. §§ 46-21-104(1)(c), -201(1)(a); *Kelly*, ¶¶ 9-11.

CONCLUSION

The State respectfully requests this Court affirm the district court's denial of Wilson's PCR petition.

Respectfully submitted this 28th day of November, 2023.

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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 6,042 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-28-2023:

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