IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0447

JEFFREY L. HARDMAN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-Second Judicial District Court,
Stillwater County, The Honorable Matthew Wald, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
roy.brown2@mt.gov

NANCY L. ROHDE
Stillwater County Attorney
RYAN ADDIS
Deputy County Attorney
P.O. Box 179
Columbus, MT 59019-0179

ATTORNEYS FOR RESPONDENT
AND APPELLEE

JOSEPH P. HOWARD
Joseph P. Howard, P.C.
P.O. Box 1928
Helena, MT 59624-1928

ATTORNEY FOR PETITIONER
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

Has Appellant met his burden to demonstrate that his trial counsel was deficient when counsel did not ask the jury venire about pretrial publicity? If so, has Appellant met his burden to demonstrate that—but for trial counsel's performance—he was deprived of a fair trial and a reasonable probability of a different outcome exists?

STATEMENT OF THE CASE

I. The criminal case: DC-09-34

On November 12, 2009, the State charged Jeffrey Hardman with deliberate homicide for fatally shooting his neighbor Michael Blattie over a $35 debt on October 15, 2009. (DC-09-34, Doc. 6, Inf.) In an Amended Information, the State added a tampering charge, alleging that Hardman hid the firearm after committing the homicide. (Doc. 37, Am. Inf.)

Counsels Steven Scott and Scott Spencer represented Hardman. Mr. Scott was a Major Crimes Unit attorney at the Public Defender's Office. (*See* 7/21/22 Tr. at 5.)

At trial, the State presented its case that Hardman deliberately shot Blattie. Hardman did not rely on justifiable use of force and disavowed any "self-defense" theory, instead presenting a defense that "the gun accidentally discharged in a

struggle." (Trial Tr. at 519, 521, 535.) Specifically, Hardman testified that Blattie shot himself during the struggle by fanning the hammer back, causing the gun to discharge. (Tr. at 595.) Hardman presented his case for accident, while also admitting to tampering with evidence by hiding his gun in a field. (Tr. at 606.) The defense conceded tampering in closing. (Tr. at 699.)

The jury found Hardman guilty of both offenses. (Doc. 111, Tr. at 711-12.) For deliberate homicide, the district court sentenced Hardman to the Montana State Prison for 100 years, with a 30-year parole restriction. (Tr. at 760; Doc. 118 at 2.) For tampering, the court sentenced Hardman to 10 years, consecutive. (Tr. at 761; Doc. 118 at 2.) Without objection and upon the request of Blattie's family, the court ordered Hardman to pay $35 to the Crime Victims Compensation Program each year, with a total obligation of $3,500. (Tr. at 762-63; Doc. 118 at 3.)

Hardman filed a direct appeal, disputing six evidentiary rulings unrelated to this instant appeal. *State v. Hardman*, 2012 MT 70, ¶ 9, 364 Mont. 361, 276 P.3d 839. In 2012, this Court rejected Hardman's arguments and affirmed the district court. *Hardman*, ¶ 36.

II. The civil postconviction case: DV-13-46

On June 27, 2013, Hardman filed a pro se petition for postconviction relief, raising 18 claims alleging ineffective assistance of counsel (IAC). (DV-13-46,

Doc. 1.) Without ordering a response from the State or holding an evidentiary hearing, the district court dismissed Hardman's petition for failing to state a claim for relief under Mont. Code Ann. § 46-21-104(1)(c). The court summarily disposed of all of Hardman's claims by concluding that, although Hardman provided an affidavit with his petition, it was conclusory and failed to provide specific facts entitling him to relief. (Doc. 3 at 3.)

Hardman appealed to this Court. While expressing "no view as to the merit of any of Hardman's claims," this Court ruled that Hardman's affidavit was sufficient to overcome Mont. Code Ann. § 46-21-104(1)(c) and the "District Court improperly dismissed Hardman's appeal for procedural irregularities." *Hardman v. State*, 2014 MT 236N, ¶¶ 7-8, 376 Mont. 549, 347 P.3d 265. This Court remanded to allow for the State to respond to Hardman's IAC claims. *Id*. ¶ 8.

Upon remand, Hardman requested appointment of counsel and permission to file an amended petition, which the district court granted. (Doc. 21.) On February 11, 2015, the district court granted Hardman 90 days to file an amended petition. (*Id*. at 3.) Defense counsel entered a notice of appearance and moved to vacate any briefing deadlines pending his amended petition indefinitely. (Doc. 23.) The district court granted the motion. (Doc. 24.)

On January 2, 2020, defense counsel filed an amended petition and brief in support, raising five claims—including a claim alleging that Hardman received

IAC when his "trial counsel failed to inquire of the venire regarding exposure to pretrial publicity and the media's pervasive coverage of the case[.]" (Doc. 25 at 58, Claim I; Doc. 26.) The district court ordered a response, and the issues were fully briefed. (Doc. 27; Docs. 35, 39.)

Next, the district court ordered Hardman's two trial counsels Scott and Spencer to file affidavits. (Doc. 40.) Scott responded. (Doc. 41.) Spencer was no longer practicing in Montana and could not be located. (Doc. 42.) In 2022, the district court proceeded with an evidentiary hearing limited exclusively to Hardman's claim relating to "testimony regarding the firearm that was used in the underlying incident" as well as "the use of a different firearm as demonstrative evidence." (Doc. 43; Doc. 54; 7/21/22 Tr. at 5.)

On June 21, 2023, the district court denied the amended petition, rejecting all five of Hardman's claims. (Doc. 57.) Hardman timely appealed. (8/17/23 Notice of Appeal.) Abandoning any other claims raised in his amended petition below, Hardman solely appeals the district court's denial of his pretrial publicity IAC claim. (Appellant's Br. at 1.)

STATEMENT OF THE FACTS

I. The offense

Appellant Hardman lived in Molt, Montana, with his son, Michael Couch, his daughter-in-law, Jennifer Couch, and the Couch's two children. The Couches rented a house from Harold Blattie. Harold's son, Michael Blattie (Blattie), the victim, lived in a house 150 yards from the Couches' house. (Tr. at 163, 243-47, 271, 303-04.) The area is remote, with only one other third-party residence within miles of the Blattie property and Couch rental. (Tr. at 269.)

Previously, Hardman had talked to Blattie about his intent to cut some weeds, and he wanted Blattie to repair his tractor so that Hardman could use it. (Tr. at 263-64.) On October 5, 2009, Blattie borrowed $35 from Hardman to fix the tractor, but never fixed it—despite prompting telephone calls from Hardman. (State's Ex. 52; Tr. at 566-67.)

In October 2009, Leonard Hankinson and Lisa Cross were staying at Blattie's house. (Tr. at 161-62, 176, 184.) Leonard and Lisa had fallen on hard times and Blattie was helping them out. (Tr. at 162, 184.) On October 14, 2009, Blattie drove Leonard to Miles City for a court proceeding, whereupon Leonard was ordered to pay $200 or be immediately jailed. (Tr. at 165.) Blattie agreed to pay Leonard's $200 fine if Leonard would pay him back the next day. (Tr. at 165,

178-80, 185-86.) Leonard agreed. They drove back to Blattie's residence in Molt. (Tr. at 166.)

On October 15, 2009, at approximately 1 p.m., Leonard and Lisa left Blattie's residence and drove into Billings, to collect and cash Leonard's unemployment check. The plan was to meet Blattie in Billings later to pay him back. (Tr. at 166, 168.) Meanwhile, back at the Couch rental, Michael and Jennifer Couch were both at work, while Hardman babysat his grandchildren. (Tr. at 246, 249-52, 343-44.)

At 1:27 p.m. and 1:35 p.m. that afternoon, there were two missed phone calls on Blattie's cell phone from the Couch's telephone. At 1:36 p.m., a threatening message was left on Blattie's cell phone from the Couch residence. Hardman later admitted leaving Blattie the threatening message. (Tr. at 308-10, 338-39, 568.) In his message, Hardman stated:

> Dude, I'm tired of this shit, man. You know, you either fucking do what you're supposed to do, do what you say you're going to fucking do, man. You better have my money back. I'm fucking sick of this shit, man. You think I'm some fucking punk or something, man? I've got news for you, dude, keep fucking me around.

(*See* Tr. at 125 (opening argument); *see also* DA 11-044 State's 12/8/11 Response Br. at 2, *referring to* State's Ex. 8 as the threatening message from Hardman.[1])

Meanwhile, Leonard and Lisa cashed Leonard's unemployment check, shopped, and picked up his nephew Drystin and his friend Tab. Around 3 p.m., Leonard called Blattie to arrange a place to meet in Billings so he could pay him back. Blattie told Leonard that he was not coming into Billings and directed Leonard to come back to his residence in Molt because "he owed the neighbor some money." (Tr. at 167-70, 179-80.)

Between 4 and 4:30 p.m., Blattie called Leonard. (Tr. at 171.) Leonard had left his cell phone in the car, thus Drystin received a call from Blattie to Leonard. Drystin answered. Blattie wanted to know the whereabouts of Leonard and Lisa. (Tr. at 170-71, 224-25.)

A little after 4:30 p.m., Leonard, Lisa, Tab, and Drystin returned to Blattie's house. (Tr. at 171, 189-90, 205-06.) Lisa first noticed that Blattie was on the front porch and that there was "something wrong with [him][,]" stating that "[i]t sounds like he's choking." (Tr. at 172, 190, 206.) Leonard started performing the Heimlich maneuver when he noticed that "there was a hole in him." (Tr. at 172,

[1] For this appeal, the Stillwater County Clerk's Office was initially unable to locate any exhibits, then later located some exhibits and transmitted them in the white file folder. However, some exhibits—including State's Ex. 8, the recorded phone message from Hardman—were either not recovered or were not transmitted.

190-91, 209.) Tab also noticed a hole in Blattie's bellybutton area. (Tr. at 209.) Leonard started performing CPR while Tab called 911. (Tr. at 173, 191, 207.) Everyone took turns performing CPR for 20-40 minutes until emergency responders arrived. (Tr. at 174, 204, 208.)

Paramedics arrived and observed Blattie on the front porch, with no pulse, and a round hole would through his bellybutton. (Tr. at 146-37.) Rigor mortis had already set in. He was pronounced deceased on the scene. (Tr. at 137.)

Couch got back to her house at 4:30 p.m. (Tr. at 250.) Hardman was at home with her kids. (Tr. at 251.) Couch's husband Michael clocked out of work at 4:49 p.m. (Tr. at 345.) Couch did not notice anything unusual about Hardman. Hardman did not mention being at Blattie's house. (Tr. at 251-52.)

Stillwater County Sheriff's Office Sergeant Charles Kem arrived on scene at around 6:20 p.m. (Tr. at 294.) He went to the Couch residence to interview any potential witnesses. (Tr. at 296.) As he pulled into the driveway, Hardman came out to meet him. (*Id*.) Sergeant Kem did not observe any injuries on Hardman. (Tr. at 297.)

Meanwhile, Blattie's brother Chris Blattie, a family friend Jonathan Buck, and another long-time friend Dane Schneidt arrived on scene. (Tr. at 271, 284-85, 312-13.) Because Blattie's property was cordoned off, they walked over to the Couch residence to find out what was going on. (Tr. at 274.) Chris and Dane both

shook Hardman's hand. Neither person noticed any visible injuries on Hardman's face. (Tr. at 277-78, 287, 291.) Jonathan too did not notice any injuries on Hardman, and further observed that Hardman "seemed kind of nervous[.]" (Tr. at. 314-15.) Chris asked Hardman, "Did you hear any guns go off?" Hardman responded, "I hear guns go off all the time out here." (Tr. at 278.)

Couch took her kids to the movies and came back around 10:30 p.m., whereupon she saw emergency vehicles at Blattie's residence. (Tr. at 254.) Hardman explained to her that "our neighbor had been shot." (Tr. at 255.) Hardman's demeanor appeared normal to Couch. (*Id*.)

The next day, Couch came back to her residence and put the kids to bed after taking them to the movies again. (Tr. at 264.) She heard the TV on in Hardman's room, just on the "static" channel. (*Id*.) Her husband Mike tried to open the door, but it was locked. Mike broke the door open and discovered Hardman on the floor of the room, unresponsive. (Tr. at 264-65.) They discovered that Hardman had overdosed on his medication. (*Id*.) They believed it to be a suicide attempt. (Tr. at 269.) Hardman left a note, stating:

> I'm sorry Mike, Jenn, kids. Dad loves and pop-pop loves you, little ones. Mom, I love you. It was an accident, but that doesn't matter. I can't take the guilt. God save me. And Mike, please forgive me, please. I hope Mike's family can forgive me. Sarah, dad loves you with my whole heart. Sorry, LO LO. Jenn, you can have

> my truck and trailer. Please split what little I have evenly between each other.

(Tr. at 348-49.) The note was signed "Jeffrey Hardman." (Tr. at 349.)[2]

At the hospital, Dr. Samuel Paczkowski diagnosed Hardman with "altered mentation" which was "believed to be secondary to a drug overdose." (Tr. at 426.) Hardman had difficulty breathing, requiring intubation. (Tr. at 425.) He also had borderline difficulty responding to stimuli. (*Id*.) Dr. Paczkowski did not observe any injuries to Hardman's face. (Tr. at 426.)

On October 17, 2009, Harold found Blattie's cell phone, and accessed his voice mail. Harold discovered a threatening message that was left at 1:36 p.m. on October 15, 2009, a message that Hardman later admitted leaving. Harold did not know who left the message but told Undersheriff Woody Claunch and Investigator Marvin Dahl about it. (Tr. at 308-10, 336-39; State's Ex. 8.)

Undersheriff Claunch and Investigator Dahl interviewed Hardman on October 22, 2009. (Tr. at 340.) Hardman never mentioned leaving a threatening message nor did he indicate being at Blattie's house on October 15, 2009. (*Id*.)

On October 29, 2009, Claunch and Dahl interviewed Hardman a second time, this time with awareness of the threatening message that Hardman left on Blattie's phone. (State's Ex. 52: Tr. at 480-81.) Hardman said he loaned Blattie

[2] The note would later be recovered by police on October 29 or October 30. (Tr. at 348-40.)

$35 on October 5, 2009, so Blattie could fix the tractor. Hardman recalled leaving Blattie messages between October 5 and October 10, asking if he was going to fix the tractor and, if not, to return the $35. Hardman stated Blattie failed to fix the tractor and never paid Hardman back. (State's Ex. 52.)

Hardman explained that on the day Blattie died he called Blattie in the early afternoon and talked to him about the tractor. Hardman called Blattie's house phone but did not remember calling Blattie's cell phone. When asked about telephone calls from Couches' house to Blattie's cell phone at approximately 1:26 p.m. and 1:34 p.m., Hardman stated he might have made the calls, but he could not remember. *Id*.

When the officers asked Hardman about the threatening message left on Blattie's cell phone, and recited a portion of the message, Hardman remembered "leaving a message like that," but not on October 15, 2009. Hardman did not remember calling Blattie's house at 4:34 p.m. He only remembered making one call to Blattie that day, the early afternoon call in which he spoke to Blattie. Hardman denied going to Blattie's house to collect his $35. *Id*.

On October 30, 2009, at around 10 a.m., Hardman stopped by Faith Chapel in Billings, requesting to see a pastor. (Tr. at 433.) Assistant Pastor Robert Griggs met Hardman, introduced himself, and began talking with Hardman in an alcove off the atrium. (Tr. at 433-34.)

Hardman asked, "If what I share with you—can I share something with you that stays between us?" (Tr. at 434.) Pastor Griggs responded, "If it's of an illegal nature, I can't keep that to myself." (Tr. at 435.) Hardman replied, "It's okay, because I'm going to turn myself in later anyway." (*Id*.)

Hardman explained to Pastor Griggs that "he had been lying to the authorities about the details of that [Molt] shooting, which was the whole point of him being here that morning talking to me, that he needed to come clean about that." (Tr. at 440.) Hardman told Pastor Griggs about the $35 debt about the tractor job, the confrontation with Blattie, and how a "fight ensued." (Tr. at 442.)

> He said that after he had been hit, they were scuffling. Whether they were on the ground or not, that wasn't clear. But he indicated he reached out and it seemed to me he was reaching around behind, bringing the pistol to bear, and at that point he said Mr. Blattie's hands were on his hands. They were struggling over the gun. There were fingernail digs and the gun went off.

(Tr. at 444.) But Pastor Griggs understood that the "gunshot wasn't the end of the fight." (Tr. at 445.) Hardman explained that "Mr. Blattie had hit [him] a couple of times beyond that." (*Id*.) Hardman told Pastor Griggs "he had been hit over the right orbit of the eye" and that he had been "hit in the mouth" as well as he had "a fat lip and a loosened tooth." (*Id*.) Hardman explained he later "buried" the murder weapon "in a field." (Tr. at 446.)

After Hardman's account, Pastor Griggs said, "So what's the next step from here?" Hardman responded, "I'm going to go face the music." Pastor Griggs

replied, “You’re going right to the sheriff from here?” Hardman said, “Yeah, “I’m going right up.” (Tr. at 446-47.)

That same morning at around 11:53 a.m., Undersheriff Claunch was executing a search of the Couch’s residence. (Tr. at 491, 505, 511.) Reserve Deputy Officer Jennifer Siegfried approached Undersheriff Claunch and told him that Hardman had arrived and wished to talk with him. (Tr. at 491, 511.) Undersheriff Claunch and Deputy Siegfried walked out to Hardman’s truck, whereupon Hardman exited the truck and walked up to them. (Tr. at 491.) Hardman said, “I came to tell you that I was out there that afternoon,” looking out towards Blattie’s residence and gesturing with his right hand. (Tr. at 491-92, 507.)

Undersheriff Claunch put his hands up and told Hardman to stop. (Tr. at 492.) He explained that he couldn’t speak with Hardman because he had previously told him he did not wish to speak with police. (Tr. at 507-08.) He told Hardman to get an attorney, provided his contact information, and to have his attorney contact him. (Tr. at 509.)

Later that evening, Hardman returned to the scene and was arrested. (Tr. at 509-10.) In the meantime, Undersheriff Claunch had learned about Hardman’s confession to Pastor Griggs. (Tr. at 511.)

Dr. Thomas Bennett performed the autopsy. He observed that Blattie had a single gunshot wound near his belly button, and the bullet damaged his spinal

canal, which would have caused him to lose control of his legs, and he would have dropped straight down. (Tr. at 386, 389-93.) He concluded that Blattie did not die instantly and he would have remained conscious for a few minutes, but he later died from blood loss. (Tr. at 397, 417.) Dr. Bennett found no cuts, bruises, or scrapes on Blattie's hands. He testified that in past autopsies where there has been a fight he has found injuries on the victim's hands indicative of a fight. (Tr. at 397-98.) Dr. Bennett removed bullet fragments from Blattie's body which were sent to the Crime Lab. (State's Ex. 47; Tr. at 333-34, 395-96.)

In June 2009, Jose Concepcion was at the Couch's house when Hardman shot his single action .357 revolver. Hardman and Concepcion shot at targets on a wood rail fence. To fire Hardman's gun, Concepcion had to cock the hammer back and then pull the trigger.[3] (Tr. at 351, 362-68.) After talking to Concepcion, law enforcement recovered six bullets from the target range at the Couch's house. The bullets were sent to the Crime Lab for a ballistic comparison with the bullet fragments from Blattie's body. (Tr. at 351-55.) Firearms examiner Lynnette Crego testified that a bullet fragment from Blattie's body was fired from the same

[3] Undersheriff Claunch testified at trial that a single action gun required the shooter to "bring the hammer back into a full-cocked position" prior to firing, and the gun will not then fire unless the shooter's finger is on the trigger. Further, it is impossible to brush the hammer back to fire a single action gun. (Tr. at 496-98.) Hardman would admit at trial he brought a "single-action eight-shot revolver" to Blattie's house. (Tr. at 582.)

firearm as two of the bullets collected from the Couch's fence. The caliber of the bullets is ".38 .357 caliber." (Tr. at 469-70.)

II. Hardman's defense

Hardman testified in his defense. (Tr. at 518.) He explained the prior dispute over the $35 related to the tractor. (Tr. at 562, 565.) Hardman felt "deceit" from Blattie. (Tr. at 566.) He called Blattie but was not able to get a return call. (Tr. at 566-67.) Hardman admitted that he left the threatening message played during the State's case-in-chief. (Tr. at 568.) He was "angry" because Blattie "didn't fix the tractor and he didn't bring me back my money." (Tr. at 569.)

That afternoon, Hardman looked toward Blattie's house and saw Blattie's red truck parked in front. (*Id*.) Hardman again became "angry" and "went back in and called him again." (Tr. at 570.) Hardman and Blattie engaged in a "very" heated discussion whereupon Hardman asked about his money. (Tr. at 581.)

Hardman decided to go to Blattie's house to "confront" him. (*Id*.) Hardman admitted he brought with him a "Colt single-action eight-shot revolver." (Tr. at 582.) Hardman tucked the gun behind his back into his pants. (Tr. at 583.)

According to Hardman, Blattie came flying out to meet him on his front porch, slamming the door and "yelling." (Tr. at 587.) Hardman explained he "got

scared." (Tr. at 588.) Derogatory language was relayed back and forth about the $35 loan. (*Id*.) Blattie hit him "above the right eyebrow" and "in the lip." (Tr. at 589.) Hardman explained that he backed away and grabbed his gun, holding it up and trying to pull off the holster, but Blattie approached him. (Tr. at 590, 593.) He was able to remove the holster, but Blattie "ran up and grabbed the gun." (Tr. at 594.) Hardman explained that Blattie's "right hand came across and fanned the hammer back and the gun went off." (Tr. at 595.) Despite the gun being single-action, Hardman both denied that he cocked the gun and further denied that he pulled the trigger. (Tr. at 604.)

Hardman explained he "got scared and left[,]" deciding to go back home. (Tr. at 596.) Hardman contended he did not tell anyone because he "didn't want to get my family involved." (*Id*.) He tried to contain his "emotions" while talking with the police that night. (Tr. at 598.) He admitted attempting suicide and leaving a note. (Tr. at 599.)

On cross-examination, the State asked, "Where's the gun?" (Tr. at 606.) Hardman admitted it was "buried" in "a field" but explained he didn't know where. (*Id*.) Upon further prompting, he elaborated that it might be "out in a field towards Dave Kelsey's house, I do believe." (Tr. at 607.) Hardman conceded that he tampered with evidence, and that he got rid of the gun because it could be used against him. (Tr. at 608.)

Hardman admitted he lied to law enforcement, to Blattie's family, and to medical staff about his story. (Tr. at 608-12.) He did not call 911 and did nothing to help Blattie as he lay dying. (Tr. at 609.) Hardman admitted that no witness—including Jennifer Couch, several members of police, the people on the scene that night, and doctors who examined him the next day—testified that they saw any injuries on Hardman at all. (Tr. at 619-20.)

He admitted that Blattie had told him that Leonard was bringing his $35 that very day. (Tr. at 621.) He acknowledged that it was possible that he would have had his money if he had waited 30-40 minutes for it to arrive. (Tr. at 621-22.) He even admitted that Blattie was only "10 days" into a two-week loan. (Tr. at 614.) Finally, the prosecutor asked:

> **STATE**: And when Mr. Blattie didn't have his money, he paid, didn't he? He paid with his life, didn't he?
>
> **HARDMAN**: He's deceased, sir, yes.

(Tr. at 626.) On redirect, defense counsel asked Hardman:

> **DEFENSE COUNSEL**: Did you shoot Mr. Blattie?
>
> **HARDMAN**: Accidentally. Actually, no.

(Tr. at 640.)

III. Facts related to PCR claim regarding pretrial publicity

A. Facts related to media coverage

Molt is located just outside of Billings, but over the county line into Stillwater County. Billings media—the Billings Gazette and KULR8—covered the incident. Hardman appends several news articles from the Billings Gazette to his opening brief, including:

> (1) an October 15, 2009 article explaining that authorities were investigating a "suspicious death" in Molt (Exhibit B);
>
> (2) an October 16, 2009 article entitled "Name Released in Molt death" which released Blattie's name and further explained that an active investigation was ongoing (Exhibit C);
>
> (3) an October 17, 2009 article explaining that an autopsy had been conducted but authorities "are not releasing any details" of the medical examination (Exhibit D);
>
> (4) an October 20, 2009 article explaining that the investigation "will take weeks" and "very little information has been released" about the investigation into the matter and no arrests had been made" (Exhibit E);
>
> (5) an October 22, 2009 article entitled "Molt death ruled a homicide" which explained Stillwater County Sheriff's Office and DCI had refused to release any further information because it was an active investigation (Exhibit F);
>
> (6) an October 30, 2009 article entitled "Man arrested in Molt death" first mentioning Hardman's name and explaining that DCI searched Hardman's residence but authorities "declined to further comment on the details" of that search and that the investigation was ongoing (Exhibit G);

(7) a November 2, 2009 article entitled "$2 million bond set for Molt murder suspect" explaining Hardman's bail hearing and further explaining that "few details of the shooting have been released by authorities" and "[DCI] has assisted in the case, but the agency also has declined to release details." (Exhibit H);

(8) a November 6, 2009 article wherein Harold Blattie, Blattie's father, was interviewed and "declined to share what little information he has been told about the criminal case" but wanted to share his remembrances about his son's life. (Exhibit I);

(9) a November 12, 2009 article explaining that "few details of the circumstances of the shooting have been released" and that the deputy county attorney "declined Thursday to elaborate on the circumstances of the shooting," including whether Hardman had presented a claim of "self-defense." This article also partially described the note Hardman wrote that was recovered by police. (Exhibit J);

(10) a November 16, 2009 article entitled "Molt murder suspect pleads not guilty" wherein the reporter again explained that "details of the events surrounding the shooting and a possible motive have not been released." The article detailed that Hardman was "alleged to have written" a note, and Hardman had been "accused of leaving a threatening telephone message for Blattie" on the day of the shooting. (Exhibit K);

(11) a May 29, 2010 article entitled "Judge: Pastor's testimony allowed in Molt murder case" wherein—in five sentences—the author explains that the district court denied a suppression motion because Pastor Griggs told Hardman he would not keep illegal activity confidential (Exhibit L).

(*See also* Appellant's Exs. M-T) (several short articles to the same effect from Billings news station KULR-8.)

B. Facts related to voir dire

The trial began on August 27, 2010, at the Stillwater County Courthouse in Columbus, Montana. (Trial Tr. at 1.) Around 85 prospective jurors appeared for jury duty. (Tr. at 4-10.) The district court initially educated the prospective jurors:

> The universal qualification is that a juror must be impartial. That is, that he or she can decide the case fairly. Now, it is to this qualification of fairness that voir dire is addressed.

(Tr. at 18.)

1. State's voir dire

The State first informed the prospective jurors that it was seeking to determine "if you can be fair and unbiased to both parties." (Tr. at 21.) The State asked them whether they knew "defendant Jeffrey Hardman" or his counsel, or the prosecutors. Nobody responded. (Tr. at 23.)

The State asked if anyone could not "be a fair and unbiased juror" due to the nature of the charges. Nobody responded. (Tr. at 28.) The State explained the function of the jury, the presumption of innocence, the types of evidence, and the State's burden to prove the case beyond a reasonable doubt. At each juncture, the State asked the jurors if they had any issues, and nobody responded affirmatively. (Tr. at 30-32.) The State continued:

> I've talked to you several times that your job is to determine the facts and then ultimately make the decision of guilty or not guilty. It is the judge who will give you the law and you will interpret it, using both of those. When the judge gives you the law, you are required, if

> you're selected as the final jurors, you will raise your hands and take another oath. And that oath will be to follow the law.
>
> Will you all agree to follow the law as given to you by Judge Jones?

(Tr. at 37-38.) Nobody responded negatively, except one prospective juror who equivocated about the "federal government" getting "away with whatever they want." The State clarified about following the jury instructions and the prospective juror agreed it was necessary to follow the law. (Tr. at 38.) After covering concepts such as self-defense and witness credibility, the State said:

> Finally, I want to ask you one question, a general question. . . . is there anything out that there we don't know about that would prevent you, if I do my job, finding him guilty? Or, if they do their job, finding him not guilty? Is there anything that we should know about before we go forward in this very, very important matter? Anything else?
>
> I pass the jury for cause.

(Tr. at 49-50.)

2. Defense voir dire

At the outset, Scott urged to the prospective jurors that "[t]his is your opportunity to speak" and further encouraged anyone to get his attention in any manner if they wanted to talk. (Tr. at 50.) Scott began by asking about anyone's knowledge of Blattie or his family:

> **SCOTT**: Let me ask you this. I'm going to give you a few facts of this case. October 15, 2009, a man by the name of Michael Blattie is shot and killed. He was living on a ranch up in Mont, Montana. I

believe his father is—I may have this wrong. I believe his father was a county commissioner named Howard Blattie.

COURT: It's Harold Blattie.

SCOTT: . . . Does anybody know Harold or Michael Blattie? Familiar with them? All right.

(Tr. at 52-53.) Mr. Thormahlen responded affirmatively. Scott asked:

SCOTT: How would you feel about sitting on this case today?

THORMAHLEN: I wouldn't have a problem with it.

SCOTT: Would you tend to favor the State in this matter because you did know Mike and Harold?

THORMAHLEN: No, Sir.

SCOTT: My client is on trial for murder. Can you be fair to my client in this matter?

THORMAHLEN: I can.

SCOTT: What do you know about this case? Have you heard anything about this case?

(Tr. at 53-54.) The State objected, and the parties met in chambers. (Tr. at 54.) The State explained the phrasing of Scott's question might lead to an answer possible to taint the jury pool. The State suggested individual voir dire. (Tr. at 55.) The Court responded:

I agree with [the State]. We shouldn't spread knowledge that one jury may have. It may or may not be appropriate. But I don't want to take that chance as well.

(Tr. at 55-56.) Scott noted that "three or four other people" raised their hands as to knowing the Blatties. (*Id*.) The court responded:

> We will try to make a list if there are people who have knowledge. Obviously it's a homicide case and there's been considerable publicity. So they may indicate, only what I read in the papers, or something of that nature. So I guess I will leave it to you how far you want to go with that. I anticipate that is something you will hear. We will do it that way. Thank you.

(*Id*.)

Back in voir dire, Scott followed up with Mr. Thormahlen, ensuring he would remain impartial. (Tr. at 57.) Scott also asked if anyone else knew the Blatties. Mr. Frank responded affirmatively, and said it would be "difficult" to sit on the case but he hadn't yet formed any opinion on the case and "haven't heard anything" yet. (Tr. at 58.) Ms. Kulla knew Harold Blattie but she was "okay" with sitting on the case and had "not yet" formed any opinion on the case. (Tr. at 59.) Ms. Stabnow knew Harold Blattie and explained it would be "very difficult" to sit on the case but explained, "I think I can be unbiased, but I think it's difficult." (*Id*.) Nonetheless, Ms. Stabnow affirmed she had not yet formed an opinion about Hardman. (Tr. at 59-60.)

Scott provided the prospective jurors hypotheticals, asked how they would feel about certain situations, and explained criminal trial concepts. (Tr. at 61-92.) Scott wrapped up by asking:

> Finally, is there any reason, any reason whatsoever, that you could not sit as a juror on this case? Is there any reason that you could not sit as a juror?
>
> Thank you. I have nothing further.

(Tr. at 93.)

But before passing the jury for cause, Scott decided to bring Mr. Thormahlen into chambers to privately inquire if he knew about the incident. (Tr. at 95.) Thormahlen became the first prospective juror in the proceedings to volunteer that he had heard "just what the news had said. That's it." (*Id*.) Thormahlen nonetheless affirmed that "[i]f both sides do their job and we have to come to a decision on the facts and the law as given to us, I would have to do what I have to do." (Tr. at 95-96.) The parties followed up:

> **SCOTT**: So have you prejudged any opinion on that man?
>
> **THORMAHLEN**: I have not. I don't even know the man.
>
> **SCOTT**: That's all I have.
>
> **STATE**: One follow-up. Sir, you indicated the only thing you knew about this case was from the media. Would you agree the media could be absolutely wrong about the facts in this case?
>
> **THORMAHLEN**: Yes.
>
> **STATE**: You would have to put that aside, ignore it, and decide this case on the witnesses and testimony that you hear and evidence presented.
>
> **THORMAHLEN**: That's correct.

> **STATE**: And you understand, if you're selected as a juror, you're not to share anything with those jurors what you have heard in the media.
>
> **THORMAHLEN**: That's correct.

(Tr. at 96.) After this inquiry, Scott passed the jurors for cause. (Tr. at 97.)

Scott focused some preemptory strikes toward anyone who knew the Blatties. Scott's first strike was Mr. Thormahlen (Tr. at 100), followed later by Ms. Stabnow (Tr. at 102). Next, for the alternates, Scott had to choose between the other two people who knew Blattie, Ms. Kulla and Mr. Frank. Scott struck Ms. Kulla. (Tr. at 105.) Mr. Frank served as an alternate but was never on the jury. (Tr. at 107.)

After the parties selected the jury, Scott inquired:

> **SCOTT**: Will the court instruct the jurors to please not go home and Google or Yahoo or look up the case?
>
> **COURT**: I've been including Internet. It's part of jury conduct.
>
> **SCOTT**: I want to make sure the Court—the people may be curious, oh, what is this about?
>
> **COURT**: I will try to be as clear as I can about that issue, Mr. Scott. Thank you.

(Tr. at 105-06.)

The jury raised their right hand and were sworn in with the jury oath. (Tr. at 108.) The jury was admonished to "not make any investigation of this case or inquiry outside of the courtroom on your own" and to not read material, the

internet, "the newspaper[,]" and "radio or television broadcasts about the trial." (Tr. at 112-113.) The court explained that "[n]ews accounts may contain matters which are not proper evidence for your consideration" and the jury was required to "base your verdict solely on what is presented in court and not upon newspaper, radio, or television versions of what may have happened." (*Id*.)

C. Scott's affidavit

Scott explained in his 2021 affidavit—11 years after the trial— on the pretrial publicity issue:

> I recall before we did the trial that Scott Spencer mentioned the decedent was the son of a state senator or representative. I knew the area was small in population. My focus was to find out if anyone knew the decedent or his father in that manner. I have no specific memory as to why I did not ask about media coverage in this matter.

(Doc. 41 at 1.)

D. The district court's PCR order

After rejecting Hardman's assertion that the news coverage was "inflammatory" (Doc. 57 at 25), the district court further held that Scott was not deficient, explaining that Scott "effectively examined each of the prospective jurors regarding their potential biases or prejudices towards [Hardman], during which the jurors repeatedly assured they had not prejudged Hardman and could remain unbiased." (*Id*.) Thus, Scott's representation fell within *Strickland*'s "wide range of professional conduct that is considered effective[.]" (*Id*.)

The court also rejected Hardman's prejudice claim, observing that Scott ensured that the jury was impartial, further explaining:

> Each of the jurors that sat on Hardman's case ultimately stated under oath that he or she had no reason that he or she could not be impartial and fairly judge the case on the evidence presented. This assertion makes it clear that nothing in each of the jurors' minds or knowledge, be it publicity, personal knowledge or past personal experience, would prevent them from being a fair juror. That is the final test of whether a citizen may serve as juror in a particular case, and the true necessary qualification of a juror. If that is the state of mind of the jurors from which the panel is picked, then regardless of whether any specific questions or topics were addressed, the panel will be considered a fair, unbiased panel. Hardman's jurors each expressed the state of mind of a fair, unbiased juror.

(*Id*. at 25-26.)

SUMMARY OF THE ARGUMENT

Hardman fails to meet his burden to show that defense counsel Scott was deficient for not asking prospective jurors about non-inflammatory and factual news coverage, published in another county almost a year prior to trial. The record shows that Scott's voir dire examination demonstrated active and capable advocacy for Hardman. Scott engaged in reasonable professional assistance through targeted questioning to ascertain whether anyone on the panel could have a bias or partiality against Hardman. No fixed opinions were expressed against Hardman. Scott's questioning in voir dire was objective reasonable.

Hardman also fails to meet his burden to show a reasonable probability of a different outcome under *Strickland*. The prospective jurors did not announce a bias or partiality against Hardman. Nor does Hardman show that anyone's service on the jury prejudiced the outcome of the proceedings. This Court should affirm the district court's rejection of Hardman's IAC claim based on pretrial publicity.

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. Mixed questions of law and fact presented by ineffective assistance of counsel claims are reviewed de novo. *Id.*

ARGUMENT

This Court should reject Hardman's claim that his counsel was deficient and he suffered prejudice based on his counsel's voir dire examination.

This Court reviews IAC claims applying the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petitioner has the 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 v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948. A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on IAC claims. *Baca*, ¶ 16.

A. Hardman cannot meet his burden to demonstrate Scott was deficient. Instead, Scott engaged in reasonable professional assistance under *Strickland*.

A trial 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 v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. There is a strong presumption that counsel's actions were within the broad range of reasonable professional assistance. *Baca*, ¶ 17. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (*citing Strickland*, 466 U.S. at 687).

As an initial matter, to the extent that Hardman argues that a constitutional duty exists for defense counsel to investigate into and question jurors specifically on media coverage, that claim fails. The Constitution does not require any "magic words," but requires that the defendant be afforded an impartial jury by voir dire

which serves to identify unqualified jurors. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *accord State v. Kolberg*, 241 Mont. 105, 108, 785 P.2d 704 (1990) ("There is no set number of questions that counsel is required to ask of the jurors."). The Supreme Court has admonished courts from inferring a "constitutional duty to investigate" from precedent interpreting *Strickland*. *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011). Rather, "[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate.'" *Pinholster*, 563 U.S. at 195 (citing *Strickland*, 466 U.S. at 688.) "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions . . . ." *Pinholster*, 563 U.S. at 195 (citing *Strickland*, 466 U.S. at 688-89.) And "It is '[r]are' that constitutionally competent representation will require 'any one technique or approach.' *Pinholster*, 563 U.S. at 195 (citing *Richter*, 562 U.S. at 106).

In evaluating Scott's performance, *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Richter*, 562 U.S. at 110 (citing *Strickland*, 466 U.S. at 688). Thus, the only question here is whether Scott engaged in objectively reasonable professional assistance during voir dire.

Here, Scott engaged in objectively reasonable professional assistance. With the background knowledge of Blattie's influential father Harold in mind, Scott

asked direct questions to the jury venire to address anyone who might know Blattie or Harold. Scott zeroed in on four people, questioning them extensively about their respective relationships with the Blatties and whether they could remain impartial in light of those relationships. And given Mr. Thormahlen's longtime connection with the Blatties, Scott reasonably conducted individual voir dire on Mr. Thormahlen a second time to ensure that he could be impartial. Scott also repeatedly encouraged prospective jurors to participate, even asking a "catch-all" question at the end, giving the prospective jurors an opportunity to voice any of their concerns that they had not yet talked about.

The logic of this strategy was reasonable. The State had already confirmed that nobody in the jury pool knew Hardman. If any prospective jurors knew the victim Blattie or his family, it would be more likely that they had some background knowledge of the case. Molt is a small community comparatively to Stillwater County from which the jury was drawn.[4] Scott's actions reasonably prevented contagion to the jury pool, thus ensuring that the jury pool remained unbiased.

Scott's reasonable professional assistance continued during the preemptory strikes. While Mr. Thormahlen and the few other prospective jurors who knew the

[4] In 2010, the population of Stillwater County was 9,117. U.S. Census Bureau QuickFacts: Stillwater County, Montana. The unincorporated area of Molt had a population of 597 in 2010. Molt, Montana - Wikipedia.

Blatties affirmed they could be impartial, Scott reasonably did not take any chances. Scott's very first elimination in preemptory challenges was Mr. Thormahlen, followed later by Ms. Stabnow, and Ms. Kulla,[5] to alleviate any potential prejudice. Finally, after Mr. Thormahlen volunteered in chambers he had heard prior news coverage, Scott specifically advised the district court to tell the selected jury about the admonitions against looking up information online or in the media.

All of Scott's actions were undertaken to ensure a fair and impartial jury. Accordingly, Scott did not engage in deficient performance. "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Richter*, 562 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

Moreover, as the Supreme Court has explained "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Here, Scott was a seasoned and capable attorney, asking pointed questions on a variety of topics to weed out any potential bias,

[5] His last strike had to choose between Ms. Kulla and Mr. Frank, both of whom knew the Blatties. Thus, Mr. Frank ended up an alternate but never served on the jury. (Tr. at 706.)

including: (1) whether anyone would "prejudge" Hardman just by the nature of the charges; (2) whether anyone could not "sit in judgment of others for any reason"; (3) whether anyone from the criminal justice field "talked to you about this case at all"; and (4) whether the prospective jurors understood there were two sides to every story. (Tr. at 68, 81, 83, 96.) Scott covered topics such as the presumption of innocence, the right of a defendant to not testify and to not incriminate himself, and the State's burden to prove its case beyond a reasonable doubt and meet all the elements of the offense. (Tr. at 82-84, 89-90.) Scott ensured nobody was distracted by big life events or medical problems. (Tr. at 61-64, 75.) Scott engaged in active and capable advocacy. *Richter*, 562 U.S. at 111.

To the extent that Hardman argues that the news coverage was so extensive and prevalent that Scott was deficient for failing to ask the jury about such coverage, that claim fails. No showing has been made "that the publicity in this case was massive or pervading to the extent of exerting an influence upon jurors to insure a conviction[.]" *Great Falls Tribune v. District Court*, 186 Mont. 433, 439, 608 P.2d 116, 120 (1980) (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Estes v. Texas*, 381 U.S. 532 (1965)). Relevant here is "the amount of time that elapsed between the crime and the defendant's trial, and whether the community passions diminished during that period." *State v. Kingman*, 2011 MT 269, ¶ 42, 362 Mont. 330, 264 P.3d 1104 (citations omitted). Like in *Kingman* where "[m]ost

of th[e] coverage occurred during the first three weeks following the incident," *Kingman*, ¶ 9, all of the articles except one occurred in October/November 2009 around the time of Hardman's arrest—long before Hardman's trial at the end of August 2010. Nobody in the jury pool even knew Hardman. Next, the "size and characteristics of the community in which the crime occurred are clearly relevant" in assessing pretrial publicity. *Kingman*, ¶ 42. The coverage complained of by Hardman was wholly provided by Billings news providers in Yellowstone County—KULR-8 and the Billings Gazette. While Molt is near Billings, Hardman fails to provide any data regarding readership of the Billings Gazette across Stillwater County, much less that the Billings coverage was so inescapable to Stillwater County residents that an unbiased jury could not be drawn.

Nor did the district court clearly err when it determined that the media coverage was not of an "inflammatory nature" that should have prompted questions about pretrial publicity from Scott. "Inflammatory publicity is that which community members could not ignore and 'invites prejudgment of the defendant's culpability.'" *State v. Kaarma*, 2017 MT 24, ¶ 46, 386 Mont. 243, 390 P.3d 609 (citing *Kingman*, ¶ 42). Such publicity might be "editorializing on the part of the media or a calculated attempt to prejudice public opinion against the defendant or to destroy the fairness of the pool from which the defendant's

prospective jurors would be drawn." *State v. Pittman*, 2005 MT 70, ¶ 19, 326 Mont. 324, 109 P.3d 237 (citations omitted). The more "demonstrably enraged or inflamed the community is, the less likely it will be to find jurors who can render a decision free from bias." *Kingman*, ¶ 42.

Here, nothing in the initial media coverage surrounding Hardman's arrest should have tipped Scott off to inflammatory pretrial publicity that so permeated the community as to render impossible the seating of an impartial jury. *See Sheppard,* 384 U.S. at 342-45, 352-57. For example, Hardman's provided articles in Exhibits B, C, D, E, and F simply show that police were investigating Blattie's death and they were not releasing information to the public. These articles do not even mention Hardman. While Exhibits F, G, H, J, and K discuss Hardman's arrest, bail hearing, and arraignment, they do not contain inflammatory information either, but rather the articles repeatedly explained that few details were available to the public about the incident because the police were still investigating the matter. Two articles briefly reference Hardman's "alleged" note and "accus[ation]" that Hardman had placed a phone call to Blattie. *See Kingman*, ¶ 43 (finding information "not reported in an inflammatory manner" and unlikely to sway public opinion against the defendant when using terms such as "allegations" and "accusations" and "charges"). While one article quoted a couple sentences from Hardman's note, (Exhibit J), there is no indication that these details were broadcast

or printed repeatedly. *See Kingman*, ¶ 49; *compare to Rideau v. Louisiana*, 373 U.S. 723, 724 (1963) (inherently prejudicial impact of repeatedly viewing Rideau confess in detail during 20-minute police interrogation broadcast on television). While Exhibit I contained an interview from Harold Blattie about his son's life, Hardman was only mentioned once in that article as a suspect. Finally, Exhibit L explained that the district court ruled against Hardman in the suppression motion relating to Pastor Griggs. Notably, this article does not even discuss what Hardman had confessed to Pastor Griggs.

In sum, none of the articles "invited prejudgment" as to Hardman's culpability, but merely described Hardman as a suspect, and his conduct as "alleged" or "accused" acts. This is not the type of pretrial publicity that "spawn[ed] editorials crying for defendant's conviction." *State v. Bretz*, 185 Mont. 253, 273-74, 605 P.2d 974, 988 (1979).[6] Instead, like in *Kingman*, these articles contained "factual accounts of the background of the case and various courtroom proceedings occurring after [Hardman's] arrest." *See Kingman*, ¶ 43. And, during voir dire, both the State and Scott ended their respective voir dire by asking the prospective jurors if there was anything that was on their mind or anything that they had not yet discussed. Nobody responded. Apart from

[6] *overruled on other grounds by City of Helena v. Frankforter*, 2018 MT 193, ¶¶ 13-14, 392 Mont. 277, 423 P.3d 581.

Mr. Thormahlen's in-chambers passing statement at the end of voir dire, nobody even mentioned anything about pretrial publicity. *See, e.g.,* S*tate v. Deschon,* 2004 MT 32, ¶ 18, 320 Mont. 1, 85 P.3d 756 ("no one made a statement that raised enough concern for [defense counsel] to believe 'they might pollute the jury.'").

Contrary to cases where pretrial publicity infected the entire jury pool and rendered a fair trial impossible, the lack of any positive assertions of extensive knowledge by prospective jurors in the case about Hardman or his offenses does not show that Scott was deficient. The record does not show "a 'carnival atmosphere' pervaded the trial." *Sheppard*, 384 U.S. at 358 (as quoted in *Skilling v. United States*, 561 U.S. 358, 380 (2010)). This is not a case where "the 'pattern of deep and bitter prejudice' shown to be present throughout the community" was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box "[t]wo-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

But even assuming *arguendo* that some prospective jurors could have heard and remembered some old generalized news coverage about the incident, that does not mean they were impartial. As this Court has explained:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Bretz, 185 Mont. at 273-74, 605 P.2d 974 (citing *Irvin*, 366 U.S. at 722). Nothing in the trial record indicates that Scott was deficient during voir dire.

B. Hardman cannot meet his burden to demonstrate a reasonable probability of a different outcome.

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. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Richter*, 562 U.S. at 104 (citing *Strickland*, 466 U.S. at 104). Instead, the likelihood of a different result must be "substantial." *Richter*, 562 U.S. at 112. "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a

trial whose result is reliable.'" *Richter*, 562 U.S. at 104 (citing *Strickland*, 466 U.S. at 687).

If this Court reaches the prejudice prong, Hardman does not demonstrate that any of the prospective jurors were actually biased or that their service on his jury prejudiced the outcome of the proceedings. *See, e.g., Skilling*, 561 U.S. at 398-99; *see also Deschon*, ¶ 21 (concluding on merits of pretrial publicity claim that the appellant "failed to demonstrate that any juror bias existed."). And, at trial, the jury selected is presumed to follow the instructions of the district court, including admonitions against independent research, relying solely on the evidence presented at trial. *State v. Erickson*, 2021 MT 320, ¶ 27, 406 Mont. 524, 500 P.3d 1243 (This Court "presume[s] that the jury upholds its duty and follows a district court's instructions."); Tr. at 113 (admonition). Even assuming *arguendo* that any jurors could have remembered that Blattie was shot and Hardman was a suspect from the almost year-old media coverage, that limited information could not have reasonably tainted Hardman's defense that an accidental discharge occurred during a struggle with a gun. Hardman fails to show a reasonable probability of a different outcome and that he was deprived of a fair trial whose result is reliable. Indeed, as the district court correctly concluded:

> Each of the jurors that sat on Hardman's case ultimately stated under oath that he or she had no reason that he or she could not be impartial and fairly judge the case on the evidence presented. This assertion makes it clear that nothing in each of the jurors' minds or

> knowledge, be it publicity, personal knowledge or past personal experience, would prevent them from being a fair juror.

(Doc. 57 at 25-26). This Court should further reject Hardman's incorrect argument that prejudice should be "presumed" here based on "structural error" pursuant to *State v. Lemere*, 2005 MT 118, 327 Mont. 115, 112 P.3d 1005. *Lemere* represents an extreme situation in which a defense attorney failed to question a prospective juror—who happened to be the mother of the paralegal who sat at the State's table and actively assisted the prosecution during voir dire. *Lamere*, ¶¶ 3-5. Hardman fails to even put forth an argument or authority demonstrating that the failure to ask about pretrial publicity constitutes a structural error occurrence, or an error that "affect[s] the framework within which the trial proceeds[.]" *Ariz. v. Fulminante*, 499 U.S. 279, 310 (1991). An error may be ranked structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (citations omitted). Hardman has not demonstrated any special circumstance here where prejudice should be presumed. Instead, Hardman has it backwards. There is "the presumption of a prospective juror's impartiality" as to prior pretrial publicity. *Bretz*, 183 Mont. at 273-74, 605 P.2d at 988 (citing *Irvin*, 366 U.S. at 722).

More to the point, *Lemere* has been overruled by the Supreme Court in *Weaver* regarding the applicable procedural posture here. *Weaver*, 582 U.S. at 293-93 (*citing Lamere*, ¶¶ 23-28 and resolving "disagreement among the Federal Courts of Appeals and some state courts of last resort about whether a defendant must demonstrate prejudice in a case like this one—in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel."). Here, Hardman's claim is not a preserved merits-based claim raised on direct appeal, nor has Hardman ever raised a structural error jury claim on direct review. Rather, Hardman is collaterally attacking his conviction by raising an ineffective assistance of claim in postconviction review proceedings 15 years later. As the Supreme Court has recently observed in *Weaver*:

> When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced.

Weaver, 582 U.S. at 305. The court continued that, in that IAC circumstance, "petitioner must show prejudice in order to obtain a new trial." *Id.* Thus, even assuming Hardman *had* demonstrated that structural error was otherwise applicable, because he raises an IAC claim on collateral review, he still must show prejudice, which he has wholly failed to do.

CONCLUSION

This Court should affirm the district court's denial of Hardman's PCR petition.

Respectfully submitted this 23rd day of May, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Roy Brown*
ROY BROWN
Assistant Attorney General

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 9,900 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-23-2024:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Jeffrey L. Hardman
Service Method: eService

Nancy L. Rohde (Govt Attorney)
PO Box 179
Columbus MT 59019
Representing: State of Montana
Service Method: eService

Joseph Palmer Howard (Attorney)
PO Box 1928
Helena MT 59624
Representing: Jeffrey L. Hardman
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Roy Lindsay Brown
Dated: 05-23-2024