

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA 23-0563

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JORY RUSSELL STRIZICH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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**BRIEF OF APPELLEE**

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

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE ISSUE ..... 1

STATEMENT OF THE CASE ..... 1

I. Criminal case/Cause No. BDC 2017-59 .....1

II. Postconviction case/Cause No. BDV 2023-191 .....8

STATEMENT OF THE FACTS .....11

SUMMARY OF THE ARGUMENT .....23

ARGUMENT.....24

I. The standard of review.....24

II. The district court correctly denied Strizich’s petition for postconviction relief .....25

A. The district court properly exercised its discretion in denying Strizich’s petition without a reply or an evidentiary hearing .....26

B. The district court correctly concluded Strizich’s IAC claims all lacked merit .....27

1. Introduction .....27

2. Strizich cannot prove his IAC allegations against trial counsel.....29

a. Trial counsel was not ineffective for failing to challenge the flight evidence under the Fourteenth Amendment .....29

b. Trial counsel was not ineffective for failing to object to or provide proper jury instructions for aggravated burglary .....32

3. Strizich cannot prove his IAC allegations against appellate counsel.....34

    a. Appellate counsel was not ineffective for failing to challenge the sufficiency of the evidence for aggravated burglary .....34

    b. Claim that appellate counsel was ineffective for failing to challenge the flight evidence under the Fourteenth Amendment .....41

CONCLUSION .....42

CERTIFICATE OF COMPLIANCE.....42

## TABLE OF AUTHORITIES

### Cases

<i>City of Hamilton v. Mavros</i> , 284 Mont. 46, 943 P.2d 963 (1997) .....	34, 35
<i>Coleman v. State</i> , 194 Mont. 428, 633 P.2d 624 (1981) .....	27
<i>DuBray v. State</i> , 2008 MT 121, 342 Mont. 520, 182 P.3d 753 .....	28, 29, 39
<i>Garding v. Montana</i> , 2021 U.S. LEXIS 288 (2021) .....	25
<i>Garding v. State</i> , 2020 MT 163, 400 Mont. 296, 466 P.3d 501 .....	25, 27
<i>Garrett v. State</i> , 2005 MT 197, 328 Mont. 165, 119 P.3d 55 .....	25
<i>Hagen v. State</i> , 1999 MT 8, 293 Mont. 60, 973 P.2d 233 .....	26
<i>Hamilton v. State</i> , 2010 MT 25, 355 Mont. 133, 226 P.3d 588 .....	25, 34
<i>Lacey v. State</i> , 2017 MT 18, 386 Mont. 204, 389 P.3d 233 .....	26, 31, 33
<i>Rose v. State</i> , 2013 MT 161, 370 Mont. 398, 304 P.3d 387 .....	25, 31
<i>Rukes v. State</i> , 2013 MT 56, 369 Mont. 215, 297 P.3d 1195 .....	26, 31
<i>State v. Bekemans</i> , 2013 MT 11, 368 Mont. 235, 293 P.3d 843 .....	27-28
<i>State v. Byrne</i> , 2021 MT 238, 405 Mont. 352, 495 P.3d 440 .....	7
<i>State v. Cobell</i> , 2004 MT 46, 320 Mont. 122, 86 P.3d 20 .....	25

<i>State v. Cybulski</i> , 2009 MT 70, 349 Mont. 429, 204 P.3d 7 .....	29
<i>State v. English</i> , 2006 MT 177, 333 Mont. 23, 140 P.3d 454 .....	37
<i>State v. Gardner</i> , 2003 MT 338, 318 Mont. 436, 80 P.3d 1262 .....	37
<i>State v. Griffin</i> , 2003 MT 267, 317 Mont. 457, 77 P.3d 545 .....	27
<i>State v. Hanson</i> , 1999 MT 226, 296 Mont. 82, 988 P.2d 299 .....	25, 27
<i>State v. Jackson</i> , 2009 MT 427, 354 Mont. 63, 221 P.3d 1213 .....	33-34
<i>State v. Miner</i> , 2012 MT 20, 364 Mont. 1, 271 P.3d 56 .....	28
<i>State v. Potter</i> , 2008 MT 381, 347 Mont. 38, 197 P.3d 471 .....	38
<i>State v. Strizich</i> , 2021 MT 306, 406 Mont. 391, 499 P.3d 575 .....	<i>passim</i>
<i>State v. Trull</i> , 2006 MT 119, 332 Mont. 233, 136 P.3d 551 .....	38
<i>State v. Walen</i> , 2013 MT 26, 368 Mont. 354, 295 P.3d 1055 .....	29
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	27, 28, 29, 31
<i>Strizich v. Montana</i> 142 S. Ct. 1699 (2022) .....	8
<i>United States v. Harris</i> , 792 F.2d 866 (9th Cir. 1986) .....	31
<i>Watson v. State</i> , 2002 MT 329, 313 Mont. 209, 61 P.3d 759 .....	25

<i>Whitlow v. State</i> , 2008 MT 140, 343 Mont. 90, 183 P.3d 861 .....	27, 28, 29
--	------------

**Other Authorities**

Montana Code Annotated

§ 45-4-103 .....	33
§ 45-6-204(2)(b)(i) .....	2
§ 45-6-204(2)(b)(ii) .....	2
§ 46-21-105(2) .....	25, 31, 32
§ 46-21-201(1)(a) .....	26
§ 46-21-201(5) .....	26

Montana Rules of Evidence

Rule 403 .....	30
Rule 404(b) .....	2

United States Constitution

Amend. XIV .....	8, 10, 29, 30, 41
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## STATEMENT OF THE ISSUE

Whether the district court properly exercised its discretion in denying Appellant postconviction relief without a reply pleading or an evidentiary hearing when the postconviction relief statutes do not require a reply to the State's responsive pleading, an evidentiary hearing is discretionary, and the record established that Appellant's allegations were not potentially meritorious claims for relief.

## STATEMENT OF THE CASE

### **I. Criminal case/Cause No. BDC 2017-59<sup>1</sup>**

In a Second Amended Information, the State charged Appellant Jory Strizich (Strizich) with Count I, aggravated burglary, or, in the alternative, Count II, accountability for aggravated burglary; Count III, burglary; Count IV, tampering with or fabricating evidence; and Count V, criminal possession of dangerous drugs (methamphetamine). (D.C. Doc. 65.) In Count I, the State alleged that Strizich:

committed the offense of AGGRAVATED BURGLARY, a felony, in that the defendant knowingly entered or remained unlawfully in an occupied structure . . . with the purpose to commit an offense therein, and in effecting entry or in the course of committing the offense or in immediate flight thereafter, he purposely, knowingly, or negligently

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<sup>1</sup> All the documents the State references under this heading are from the criminal case, Cause No. BDC 2017-59.

inflicted or attempted to inflict bodily injury upon another(s), in violation of Section 45-6-204(2)(b)(i), MCA.<sup>2</sup>

(D.C. Doc. 65 at 2.)

Strizich submitted 16 proposed jury instructions and a proposed verdict form. (D.C. Doc. 105.) Strizich proposed the following jury instruction on the definition of knowingly: “A person acts knowingly when the person is aware of his or her conduct.” (*Id.* at 27, Def.’s Proposed Instr. 13.) Strizich offered the following proposed instruction on the definition of purposely: “A person acts purposely when it is the person’s conscious object to engage in conduct of that nature.” (*Id.* at 30, Def.’s Proposed Instr. 14.)

The district court held a jury trial on October 2 through October 6, 2017. (10/2/17-10/6/17 Transcript of Jury Trial [Tr.] Volumes I-V.)<sup>3</sup> On the first day of trial, Strizich objected to the State presenting any evidence that he had fled from the Elkhorn Rehabilitation Center after he knew there was a warrant pending for his arrest, arguing that the evidence was inadmissible Rule 404(b) evidence. (Tr. I at 134.) The State responded that Strizich knew he had an outstanding arrest

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<sup>2</sup> Based upon the State’s specific language alleged in Count I, the State was referencing Mont. Code Ann. § 45-6-204(2)(b)(ii), but cited Mont. Code Ann. § 45-6-204(2)(b)(i).

<sup>3</sup> Since each volume of the trial transcript begins anew with page 1, the State will cite to the trial transcript by volume and page number.

warrant when he fled from Elkhorn, and that his flight was relevant as consciousness of guilt. (Tr. I at 136-42.)

The district court ruled that the flight evidence was relevant and admissible as consciousness of guilt. (Tr. I at 168-69.)

After the district court excused the jury on the third day of trial, the prosecutor explained:

Your Honor, tomorrow I understand that Mr. Norcross has made an objection, but we plan on putting on the testimony of a woman who has knowledge as far as the departure of Mr. Strizich from the Elkhorn Rehabilitation Center. The driver of the vehicle that he left with was a gentleman by the name of William Lamere, who was prosecuted for his actions that night.

I have for the Court's consideration certified copies of the dispositional order as well as the affidavit of probable cause to which he admitted, that is for the record in DJ 21—2017-1 of the Youth Court of this district, and I'm going to ask the Court to take judicial notice of that tomorrow, your Honor.

(Tr. III at 253-54.)

Defense counsel objected that Lamere's prosecution and dispositional order were irrelevant. (Tr. III at 254.)

When the State moved the court to take judicial notice of Lamere's dispositional order from youth court, defense counsel renewed his objection. The district court overruled the objection. (Tr. IV at 176-80.) But, after the court instructed the jury of the judicial notice of Lamere's admitted criminal conduct and a formal petition, the court also instructed the jury:

You are further instructed, ladies and gentlemen, that you may, but are not required to, accept as conclusive any fact judicially noticed.

(Tr. IV at 181.)

At the conclusion of the State's case-in-chief, Strizich moved to dismiss for insufficient evidence. (Tr. V at 29.) The district court denied the motion. (Tr. V at 30.)

The district court provided the jury with 53 jury instructions. (D.C. Doc. 129.) The court instructed the jury on the charge of aggravated burglary as alleged in Count I, the alternative charge of aggravated burglary by accountability as alleged in Count II, and the lesser offenses of burglary and criminal trespass to property. (D.C. Doc. 129, Instrs. 42-43 attached as Apps. A-B.) The court instructed the jury on the elements of aggravated burglary alleged in Count I of the Information. (D.C. Doc. 129, Instrs. 17-18, attached as Apps. C-D.)

The district court instructed the jury that, regarding the "purposely" mental state for aggravated burglary, "a person has the purpose to commit an offense when it is the person's conscious object to cause such a result." (D.C. Doc. 129, Instr. 36, attached as App. E.)

The district court instructed the jury that, regarding the "knowingly" mental state, "a person knowingly enters or remains unlawfully in an occupied structure

when the person is aware of his or her conduct.” (D.C. Doc. 129, Instr. 37, attached as App. F.)

The district court instructed the jury regarding the “negligent” mental state for aggravated burglary, “a person acts negligently when an act is done with a conscious disregard of the risk, or when the person should be aware of the risk . . . . The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation. ‘Gross deviation’ means a deviation that is considerably greater than lack of ordinary care.” (D.C. Doc. 129, Instr. 38, attached as App. G.)

Relevant to aggravated burglary, the district court instructed the jury that bodily injury “means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.” (D.C. Doc. 129, Instr. 50, attached as App. H.)

The jury found Strizich guilty of aggravated burglary (Count I), criminal trespass to property (Count III) and criminal possession of dangerous drugs. (D.C. Doc. 128.) The jury found Strizich not guilty of burglary and tampering with or fabricating physical evidence. (*Id.*)

The district court designated Strizich as a persistent felony offender. For aggravated burglary, the court sentenced Strizich to Montana State Prison (MSP) for 40 years. (D.C. Doc. 168.) For criminal possession of dangerous drugs, the

court consecutively sentenced Strizich to MSP for 20 years with 15 years suspended. For criminal trespass to property, the court sentenced Strizich to 6 months in jail, suspended, concurrent with the 40-year prison sentence. (*Id.*)

Strizich filed a notice of appeal. (DA 18-0248, Notice of Appeal.)

Originally, attorney Shannon Sweeney (Sweeney) represented Strizich.

(DA 18-0248, 4/12/19 Notice of Appearance.) Sweeney filed an opening brief in July 2020. Before the State filed its response brief, the Office of the State Public Defender gave notice that attorney Colin Stephens (Stephens) would be replacing Sweeney as appellate counsel. (DA 18-0248, 8/7/20 Reassignment of Counsel Notice.)

On August 8, 2020, Stephens filed a motion to withdraw the opening brief Sweeney had filed in July. (DA 18-0248, 8/18/20 Mot. to Withdraw Opening Br.)

In the motion, Stephens explained:

Since being appointed, the undersigned has spoken with Strizich and with prior appellate counsel. In varying forms both have expressed that Strizich's right to effective assistance of appellate counsel will be furthered if the undersigned is allowed to withdraw the original opening brief.

This is not to say that prior counsel was ineffective by any means. However, given the breakdown in communication between Strizich and prior counsel, allowing withdrawal of an opening brief that is potentially tainted by that communication breakdown will cure any possible inefficacy made, as well as stave off future claims that prior counsel was ineffective. In other words, Strizich asks to start his appeal with a clean slate and with counsel that he can communicate with.

(*Id.* at 1-2.) This Court granted the unopposed motion, instructed the clerk to withdraw the brief filed from the record, and set a new briefing schedule.

(DA 18-0248, 8/19/20 Order.)

On February 9, 2021, Strizich filed his opening brief, arguing that the district court erred by allowing the State to present evidence that Strizich fled from a rehabilitation center to avoid arrest and that, under a theory of plain error, the district court did not properly instruct the jury. *State v. Strizich*, 2021 MT 306, ¶ 2, 406 Mont. 391, 499 P.3d 575. This Court affirmed Strizich’s conviction and sentence. *Id.* ¶ 50.

This Court found that “Strizich has not met his burden to demonstrate that either the testimony of the high-speed chase or the evidence of Lamere’s disposition rendered the trial fundamentally unfair.” *Id.* ¶ 38. The Court concluded, “Strizich fails to establish that by admission of the flight evidence he ‘was prejudiced and his right to a fair trial violated.’” *Id.* ¶ 42, quoting *State v. Byrne*, 2021 MT 238, ¶ 30, 405 Mont. 352, 495 P.3d 440.

In considering Strizich’s assertion, made for the first time on appeal, that the district court did not provide the jury with the correct mental state instruction for the theft element of aggravated burglary, this Court concluded, “Taken as a whole, these instructions fully and fairly instructed the jury on each mental state definition

as it may apply to different elements of aggravated burglary, *including the aggravating factor charged.*” *Strizich*, ¶ 49 (emphasis added).

On August 18, 2022, the United States Supreme Court denied Strizich’s petition for a writ of certiorari. *Strizich v. Montana*, 142 S. Ct. 1699 (2022).

## **II. Postconviction case/Cause No. BDV 2023-191<sup>4</sup>**

On May 20, 2023, Strizich filed a petition for postconviction relief. (D.C. Doc. 1.) Strizich alleged that trial counsel was ineffective for failing to object to the flight evidence under the Fourteenth Amendment, arguing that the evidence violated his right to a fair trial under the federal constitution, and for failing to object to or provide comprehensive jury instructions about aggravating factors for the aggravated burglary charge. (*Id.* at 3.)

Strizich alleged appellate counsel was ineffective for failing to argue that the flight evidence violated his right to a fair trial under the Fourteenth Amendment and for failing to argue that there was insufficient evidence to support the aggravated burglary conviction. (*Id.*) Strizich filed a brief in support of his petition (D.C. Doc. 2) and attached an affidavit from his appellate counsel, Colin Stephens (Stephens’ Aff., attached to Appellant’s Br. as App. B).

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<sup>4</sup> All the documents the State references under this heading are from the postconviction case, Cause No. BDV 2023-191.

The district court issued an order for the State to file a responsive pleading by May 19, 2023. (D.C. Doc. 3.) The order did not allow Strizich to file a reply to the State’s responsive pleading. (*Id.*) On April 27, 2023, the district court granted the State’s motion for a 90-day extension to respond. (D.C. Doc. 5.) The order did not provide for a reply to the State’s response. (*Id.*) Although the district court record does not contain a second motion for extension of time to extend the State’s deadline, on July 25, 2023, the district court entered an order granting the State an extension of time to file its response until August 31, 2023. (D.C. Doc. 6.) For the first time, the district court included that Strizich’s “reply brief” was due on October 3, 2023. (*Id.*)

On August 31, 2023, the State filed its response. (D.C. Doc. 7.) The State argued that the district court should dismiss Strizich’s petition because his claims were procedurally barred and/or the record established the claims lacked merit. (*Id.*)

On September 12, 2023, the district court issued an order denying Strizich’s postconviction petition. (D.C. Doc. 8, attached to Appellant’s Br. as App. A.) Regarding Strizich’s ineffective assistance of counsel (IAC) allegations against trial counsel and appellate counsel for failing to object to the flight evidence under the federal constitution, the district court observed that on direct appeal this Court considered the fairness of admitting the flight evidence and concluded “Strizich

fails to establish that by the admission of the flight evidence he ‘was prejudiced and his right to a fair trial violated.’” (*Id.* at 4, quoting *Strizich*, ¶ 42.) The district court correctly observed that Strizich offered “no further rubric or analysis for determining ‘fairness’ under the Fourteenth Amendment . . . .” (*Id.*) The district court also concluded there was no merit to Strizich’s theory that because the State viewed him as a victim in the criminal charges against Lamere related to the high-speed chase, he somehow did not flee from the Elkhorn Rehabilitation Center to avoid arrest. The district court stated, “The fact that Lamere subsequently endangered Strizich is irrelevant to Strizich’s complicity in their misadventure.” (*Id.* at 5.)

Regarding Strizich’s claim that trial counsel was ineffective for failing to object to or provide comprehensive jury instructions as to the aggravating factors set forth in aggravated burglary, the district court observed that appellate counsel challenged the mental state jury instructions on direct appeal, and this Court held, “Taken as a whole, these instructions fully and fairly instructed the jury on each mental state definition as it may apply to different elements of aggravated burglary, including the aggravating factor charged.” (*Id.*, quoting *Strizich*, ¶ 49.)

Finally, the district court rejected Strizich’s claim that his appellate counsel was ineffective for failing to raise sufficiency of the aggravated burglary evidence on direct appeal. The district court noted that on direct appeal this Court stated that

the jury had received overwhelming evidence of Strizich's crimes. (*Id.* at 6, citing *Strizich*, ¶ 38.) The district court stated, "It is axiomatic that evidence which is overwhelming is necessarily sufficient." (Appellant's App. A at 6.) Thus, the district court concluded that the result of the direct appeal would not have been different if appellate counsel had raised a sufficiency of the evidence claim.

### **STATEMENT OF THE FACTS**

Marshall Buus and his wife Sonja, both 63 years old at the time of trial, own a cabin near Wolf Creek. (Tr. II at 45; State's Ex. 3.) They spend most weekends at their cabin, even in the winter. They use a propane generator for power, controlled by a switch inside the cabin. (Tr. II at 47-49.) Marshall and Sonja planned a sledding outing for December 28 and 29, 2016. (Tr. II at 52.) They arrived at their cabin in their truck about ten minutes ahead of other family members. (Tr. II at 52-53.)

Inside their truck, Marshall and Sonja had a plastic tote containing food, clothing, and Marshall's Ruger .45 semi-automatic pistol. The pistol has a small holster that holds the gun and one extra clip. The clip holds eight rounds. To fire the pistol, Marshall would have to physically ratchet a round into the chamber. (Tr. II at 56-57.) Marshall thought there were eight bullets in the magazine. He

routinely brings his pistol to the cabin for protection from bears and mountain lions while out on trails. (Tr. II at 58, 61.)

As Marshall and Sonja approached the cabin, they noticed a black vehicle parked near one of the cabin doors, backed up to the cabin. Marshall thought the vehicle might belong to his neighbor, who had permission to be on the Buus' property. (Tr. II at 62-63.) Officers later determined the vehicle was a Dodge Durango registered to Strizich. (Tr. IV at 66, 80.) Marshall could see through the window of the cabin door that the Christmas tree lights were on inside the cabin, meaning someone had turned the power on. Marshall realized someone had broken into their cabin. (Tr. II at 64-65.) As Marshall stopped the truck, Sonja exclaimed, "[T]here they go." (Tr. II at 66-67.)

Marshall parked and ran back down the driveway to the unattended vehicle. As Marshall opened the passenger door of the vehicle, a male was getting into the vehicle from the driver's side. He started the vehicle as Marshall yelled "what the hell are you doing here?" (Tr. II at 67.) The male, identified as Caleb Daniels (Daniels), reached into his pocket, pulled out a pistol, stuck it in Marshall's face, and ordered Marshall to get the hell back. (*Id.*) Marshall backed up as Daniels got out of the vehicle. Sonja ran down the drive and handed Marshall his pistol. Marshall yelled at Daniels to put his gun away. Daniels reached over the top of the truck, aimed his pistol at Marshall, and pulled the trigger. Marshall heard a click,

meaning either that the shell was a dud or that Daniels did not have a bullet in the chamber. (Tr. II at 68.)

As Marshall heard Daniels ratcheting a bullet into the pistol chamber, he put a bullet into his chamber and yelled for Daniels to put his gun away. Daniels began to move away from Marshall, while firing a shot over the vehicle. (Tr. II at 68.)

The other male, Strizich, was standing somewhere on the driveway. As Marshall leaned into the vehicle to grab the keys from the ignition, Strizich walked towards him. Marshall yelled at him to stay back, pointing his pistol at Strizich. (Tr. II at 68-69.)

Despite Marshall's warning, Strizich advanced around the back corner of the vehicle. Marshall fired a warning shot into the ground when Strizich was within five feet of him. Strizich continued to come at Marshall. Marshall fired another shot. Strizich yelled something like "you shot me," and went to the ground. Marshall yelled at Strizich to "stay the hell there" and said he would get him some help. (Tr. II at 70.)

Marshall then heard another shot, looked up, and saw Daniels at the bottom corner of the cabin with his pistol aimed at Marshall. Marshall fired a shot to the right of Daniels into a group of trees. Daniels turned away and disappeared. Marshall ran to the side of the cabin to check on Sonja, who was on the deck attempting to call 911. (Tr. II at 71, 77.) Sonja was so nervous she could not

unlock her phone. While she was calling 911, she heard the shots being fired. (Tr. I at 208.) Sonja placed her 911 call at 2:16 p.m. (Tr. III at 225.) As Strizich was crawling through the snow away from the cabin, he was yelling at Daniels not to leave him. (Tr. II at 78.)

Marshall called his daughter to warn her not to come near the cabin. Marshall was shaken up as he and Sonja waited for law enforcement to arrive. (Tr. II at 81.) Marshall could not remain in the truck because he was so anxious about someone coming up from behind them. Marshall paced around the truck until it got too cold. (Tr. II at 212-13.) A law enforcement officer finally called and instructed them to drive down to the 7R Guest Ranch. (Tr. II at 81-82.)

Marshall was frightened by this incident. When Detective Pandis of the Lewis and Clark County Sheriff's Office spoke with him shortly after the burglary, Marshall was extremely distraught. Marshall was so visibly upset that Detective Pandis was concerned he might need medical attention. (Tr. IV at 182.) Sonja confirmed that after she and Marshall had gone to the guest ranch and were speaking with law enforcement officers, Marshall was still visibly shaking and his voice was not right.

Ten months later, Marshall was still affected by the events of December 28, 2016. (Tr. II at 227-29.) Sonja explained:

Oh, well, [Marshall] has good days and bad days. He doesn't sleep real well and he gets really upset about it. I guess you could say

he dreams about it at night. He thinks about it in the shower. You can find him just sitting there off in La-La Land. He's not doing very well really.

(Tr. II at 227.) Sonja could not get Marshall to return to the cabin for a month or more. (Tr. II at 228.) When the prosecutor asked Sonja how she was doing, she replied:

I'm doing much better than him. I didn't have a gun in my face. So, you know, that—I don't have that part, but I still, you know. I dream about it I think every night still.

(Tr. II at 30.)

Marshall had never fired a .25 caliber weapon near the cabin. He also had never fired his .45 caliber weapon anywhere near his cabin. During the summer of 2017, Marshall was cleaning out the rain gutters at the cabin and found a .45 bullet slug in the rain gutter. (Tr. II at 84-85; State's Ex. 174.)

When Sonja was finally able to return to the cabin, she noticed several things out of place. Many of the cupboards were open and items, like the vacuum, had been taken out of the hall closet. When Sonja had left the cabin the previous weekend, the television was plugged in. When she returned to the cabin the television was unplugged. (Tr. II at 219-20.) There were numerous items on the kitchen island that neither Sonja nor Marshall had left there, such as a fuel canister, ammunition, and torches. (Tr. II at 222.) There were guns stacked by the back door that had been removed from Marshall's and Sonja's bedroom closet. (Tr. II at 224.)

Sonja also found a hammer and bolt cutters that did not belong to them. (Tr. II at 225-26.)

Marshall and Sonja have a game camera attached to one of the posts on their deck. (Tr. II at 215.) Detective Pandis accessed the images from the game camera. (Tr. IV at 191; State's Exs. 82-127.) He identified Strizich and Daniels captured on the downloads from the game camera. (Tr. IV at 197; *see, e.g.*, State's Exs. 83-84.)

On December 28, 2016, a SWAT team was dispatched to the area of the Buus' cabin to search for Strizich. (Tr. III at 12.) The SWAT team found him sitting by a fire in the fireplace of a nearby cabin. Strizich had a wound in the center of his right shin. (Tr. III at 38-41.)

At about 4 p.m. on December 28, 2016, the Mayerniks learned that there had been a break-in at their cabin. (Tr. III at 117-18.) When Dale Mayernik walked through his cabin the next day, it was apparent that someone had been inside the cabin, bled on a piece of furniture, rummaged through the medicine cabinet, and bled on the bathroom floor. (Tr. III at 120-21.) Dale and his wife found a boot, a pair of sunglasses, a pair of gloves, a flashlight, and a belt buckle that did not belong to them or anyone they knew. (Tr. III at 122-23, 125.) They turned all these items over to law enforcement officers. (Tr. III at 129.)

Kelsey Lippert identified the belt buckle as his. Someone had stolen his pickup on Thanksgiving morning of 2016. The belt buckle was inside the truck

when the truck was stolen. (Tr. III at 161.) Deputies with the Cascade County Sheriff's Office recovered the pickup, but none of Lippert's other personal property from his pickup was ever recovered. Lippert knows the belt buckle was his because he was a member of the University of Montana Grizzlies football team. The belt buckle had his jersey number on it—number 42. It had been a gift to him and was one of a kind. (Tr. III at 162-63.)

On December 29, 2016, Deputy Kinyon of the Lewis and Clark County Sheriff's Office executed a search warrant on Strizich's Dodge Durango. (Tr. IV at 66.) Inside the vehicle, Deputy Kinyon found two cell phones, a set of bolt cutters, a set of binoculars, a pair of pliers, a glass pipe used to smoke methamphetamine located in a black zippered case, a backpack containing a box cutter and what looked to be a suction cup mount for something like a GoPro camera, a Rock Island Armory single-stack magazine, a high capacity magazine for a Glock handgun, a butane torch with a butane bottle on it, which is often used to smoke methamphetamine, a roll of tape, a Smith and Wesson .40 caliber handgun, and a Rock Island Armory pistol case. (Tr. IV at 70-76.) Someone had attempted to alter or remove the serial number from the Smith and Wesson handgun. In the pistol case, Deputy Kinyon also observed an Army Corps 1911 .45 caliber handgun, with additional high-capacity magazines for that pistol. (Tr. IV at 77-78.)

On December 29, Deputy Friede of the Lewis and Clark County Sheriff's Office took his metal detector to the Buus' property to look for evidence. (Tr. IV at 112.) Deputy Friede found a .45 caliber empty shell casing on an embankment right behind where Strizich had parked his vehicle in the Buus' driveway. (Tr. IV at 114-15.) Deputy Friede found three shell casings from a small caliber weapon near a basement door underneath the deck of the cabin. (Tr. IV at 117-18.)

Lynette Lancon is a forensic firearm and tool mark examiner at the State Crime Lab. (Tr. II at 164.) Lancon examined the fired cartridge cases and bullets that law enforcement officers collected outside of Marshall's and Sonja's cabin. (Tr. II at 167.) Lancon examined five .25 caliber auto cartridge cases. (Tr. I at 169-71.) Lancon concluded that the five .25 auto cartridge cases were fired by the same firearm. (Tr. II at 178.) Lancon also examined two .25 caliber bullets and concluded the two bullets were fired by the same firearm. (Tr. II at 181.)

Lancon examined a Ruger brand .45 automatic pistol and three .45 cartridge cases. Lancon concluded that the .45 automatic cartridge cases were fired by the submitted Ruger .45 automatic pistol. (Tr. II at 181-85.) Lancon also examined one .45 automatic bullet and concluded that it was fired by the submitted .45 caliber automatic pistol. (Tr. I at 187-88.)

On December 30, 2016, while Strizich was still hospitalized, Detective Pandis informed him there was a warrant pending for his arrest. (Tr. IV at 236.)

Elena Applin is a certified nursing assistant at Elkhorn Health and Rehabilitation Center in Clancy, Montana. On January 21, 2017, Strizich was a patient there. (Tr. IV at 152-53.) At about 5:30 p.m. that day, a male and female entered the facility and walked past Applin to the rehabilitation unit of the facility without saying a word. (Tr. IV at 154.) A few minutes later, Strizich walked outside with the same male and female to smoke, with a nurse's permission. The three of them were probably outside for 20 minutes. Strizich came back inside by himself and returned to the rehabilitation unit. (Tr. IV at 155.)

A few minutes later, Applin and a coworker walked through the rehabilitation unit and out the back door to take a break. They were behind the building when a car came shooting past them. Applin recognized the car as the vehicle Strizich's visitors had been driving. Applin went inside to check on Strizich. He was not in his room, and the screen was missing from his window. When she reported this to the nurses' station, one of the nurses called the police. (Tr. IV at 157.)

Deputy Holmlund of the Lewis and Clark County Sheriff's Office had just left the sheriff's office when he heard a broadcast dispatch of an attempt to locate Strizich, who had left Elkhorn in a silver Honda Accord displaying a 40-day temporary sticker. Since Deputy Holmlund knew Strizich resided in Great Falls and he was near I-15, he parked underneath the Cedar Street overpass in Helena.

Less than three minutes later, he saw a silver Honda with a temporary sticker pass him. He radioed dispatch of the vehicle's location so other units could respond because he was off duty and was not wearing his body armor. (Tr. IV at 161-63.) Deputy Holmlund followed the vehicle from a safe distance. The driver of the vehicle was traveling between 85 and 95 miles per hour. (Tr. IV at 163.) There was a second vehicle, a Subaru, that seemed to intentionally keep between Deputy Holmlund and the Honda. (Tr. IV at 164.)

Deputy Schmidt caught up to the two vehicles, got behind the Subaru, and attempted to initiate a traffic stop. Meanwhile, Sergeant Weiss got behind the Honda and attempted to initiate a traffic stop. The drivers of both vehicles eluded the officers. (Tr. IV at 171.) The drivers accelerated to speeds of 135 miles per hour until the driver of the silver Honda crashed on Recreation Road outside of Wolf Creek. The driver of the Subaru kept going. (Tr. IV at 172-73.) Lamere was the driver of the Honda. Strizich was Lamere's passenger. (Tr. IV at 174.) The officers took Strizich into custody on the outstanding warrant. (*Id.*)

At trial, Strizich testified that on December 28, 2016, he just needed to get out of town, so he and Daniels decided to go to Holter Lake. (Tr. V at 50.) Daniels grabbed some things from his vehicle to take, including a backpack. Strizich claimed that Daniels had borrowed bolt cutters from him and, as Daniels was retrieving items from his vehicle, Strizich saw the bolt cutters sitting on the seat.

Strizich instructed Daniels that if he was done with the bolt cutters to throw them into the vehicle. Daniels complied before jumping into Strizich's vehicle. The two stopped at the Town Pump to get gas and then hopped on the interstate. (Tr. V at 52.)

En route to Holter Lake, Daniels suggested that they go to the Wolf Creek area instead. At Wolf Creek, Strizich turned onto Highway 434 and drove until turning onto Little Wolf Creek Road. (Tr. V at 52-53.) On Little Wolf Creek Road, Daniels claimed to realize they were low on fuel. Daniels tried to locate the nearest gas station on his phone but did not have reception. The two of them decided to stop at one of the nearby cabins to get help with gas. (Tr. V at 54.)

Strizich maintained that he pulled up the driveway of the Buus cabin, gave Daniels \$10, and instructed Daniels to ask the cabin owner for a couple of gallons of gas and for directions to the nearest gas station. (Tr. V at 55-57.) Strizich stayed in the vehicle listening to music. He realized it was taking Daniels a long time, so Strizich went to the cabin. (Tr. V at 59.) The door was ajar and mangled. There were pieces of the door on the deck. The doorknob was in front of the threshold and pieces of the lock were scattered on the deck. (Tr. V at 60.)

As Strizich called out to Daniels and pushed the cabin door open, he saw stuff strewn about. (Tr. V at 60.) Strizich claimed he yelled at Daniels, "[W]hat the hell are you doing?" (Tr. V at 61.) Daniels was rummaging through the cabin and

declared that no one was home. Strizich said he ordered Daniels to get out, but Daniels would not listen. Strizich was angry, so he entered the cabin and “got in” Daniels’ face. (*Id.*) Strizich told Daniels he was leaving. (Tr. V at 62.)

As Strizich was returning to his car, he saw a vehicle coming around his vehicle. Strizich was surprised. He panicked, turned around and walked away from the vehicle that was pulling up. Daniels came running past him towards Strizich’s vehicle. (Tr. V at 63.) As Daniels was running to the vehicle, Marshall came running towards Daniels yelling at him. Strizich saw Marshall’s wife run towards Marshall and hand him a pistol. Strizich said he “took off running” because he was scared. (Tr. V at 65.)

Strizich said he heard a bunch of yelling, so he looked back and saw Daniels sitting in the driver’s seat of his vehicle with the door open. He could also see a silhouette of Marshall through the window. Marshall had his gun pointed at Daniels. Strizich thought he could “deescalate” the situation by just explaining to Marshall what had happened. He claimed he put his hands up and walked towards Daniels and Marshall. (Tr. V at 66-67.)

Strizich claimed that he could hear Daniels pleading with Marshall, but Marshall was yelling at Daniels. Daniels got out of the vehicle and crouched down while Marshall was “taunting” him. Daniels kept saying, “I’m sorry, sir,” then took off running. (Tr. V at 67.) Strizich continued to approach Marshall, saying “calm

down” and “[l]et me explain.” (Tr. V at 68.) Marshall responded by turning the pistol on him. (*Id.*) Marshall ordered Strizich to “stay the hell back.” (*Id.*) Strizich claimed Marshall was “screaming hysterically” and “[b]eyond angry.” (Tr. V at 69.)

Strizich said that Marshall, either accidentally or purposely, shot his gun into the ground. Strizich claimed that with his hands in the air, he was imploring Marshall to stop, but Marshall shot him. (Tr. V at 71-72.) Strizich continued to hear gunshots as he crawled away. (Tr. V at 74.) Strizich made his way to the Mayernik cabin, broke the window, and crawled inside. (Tr. V at 78-79.)

Strizich thought that while he was in the hospital, Detective Pandis might have told him there was a warrant pending for his arrest, but it was “foggy.” (Tr. V at 96.) By the time he was at the Elkhorn Rehabilitation Center, Strizich knew there was a warrant pending for his arrest. He was scared and did not want to go to jail, so with the help of friends he fled. (Tr. V at 97.)

### **SUMMARY OF THE ARGUMENT**

The district court properly exercised its discretion in dismissing Strizich’s postconviction petition without a reply pleading or evidentiary hearing. Strizich made unsupported allegations of IAC that the trial record refuted. Strizich’s IAC claims were not potentially meritorious.

Strizich's IAC claims are either procedurally barred, disproven by the trial record, or both. Strizich did not sufficiently analyze or offer any authority to support his claim that his counsel were ineffective for not challenging the flight evidence under the federal constitution. This Court has already determined the flight evidence did not deny Strizich a fair trial. Flight evidence is admissible as consciousness of guilt in both state and federal courts.

This Court has already decided that the district court fully and fairly instructed the jury on aggravated burglary, including the aggravating factors. Consequently, Strizich cannot prove that trial counsel was ineffective in challenging the jury instructions.

Strizich cannot prove his claim that appellate counsel was ineffective for failing to argue on appeal that the State failed to prove the bodily injury element of aggravated assault. The State presented evidence that because of Strizich's and Daniels' criminal conduct, Marshall suffered mental impairment, including sleep deprivation, bad dreams, reliving the crimes, and lack of focus.

## **ARGUMENT**

### **I. The standard of review**

This Court reviews a district court's denial of a petition for postconviction relief to determine whether its factual findings are clearly erroneous and whether

its legal conclusions are correct. *Garding v. State*, 2020 MT 163, ¶ 12, 400 Mont. 296, 466 P.3d 501, cert. denied, *Garding v. Mont.*, 2021 U.S. LEXIS 288 (2021). Ineffective assistance of counsel claims are mixed questions of law and fact, which this Court reviews de novo. *Id.* Rulings related to whether to hold an evidentiary hearing are reviewed for an abuse of discretion. *Watson v. State*, 2002 MT 329, ¶ 6, 313 Mont. 209, 61 P.3d 759.

A petitioner seeking to reverse a district court’s denial of a petition for postconviction relief “bears a heavy burden.” *Garrett v. State*, 2005 MT 197, ¶ 10, 328 Mont. 165, 119 P.3d 55, quoting *State v. Cobell*, 2004 MT 46, ¶ 14, 320 Mont. 122, 86 P.3d 20.

## **II. The district court correctly denied Strizich’s petition for postconviction relief.**

A person seeking postconviction relief bears the burden to show, by a preponderance of the evidence, that the facts justify relief. *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. An allegation in a postconviction petition does not constitute evidence. *State v. Hanson*, 1999 MT 226, ¶ 22, 296 Mont. 82, 988 P.2d 299. A petitioner cannot raise issues that “were or could reasonably have been raised on direct appeal.” Mont. Code Ann. § 46-21-105(2); *Rose v. State*, 2013 MT 161, ¶ 35, 370 Mont. 398, 304 P.3d 387; *Hanson*, ¶ 14. Additionally, the claims could be barred by the doctrine of res judicata if the

claims were resolved on direct appeal. *Hagen v. State*, 1999 MT 8, ¶ 13, 293 Mont. 60, 973 P.2d 233. A petitioner cannot use postconviction proceedings to relitigate issues resolved on direct appeal. *Rukes v. State*, 2013 MT 56, ¶ 11, 369 Mont. 215, 297 P.3d 1195. “Re-phrasing the issue as ineffective assistance of counsel does not change the fact that this Court reached and decided the issue on its merits.”

*Lacey v. State*, 2017 MT 18, ¶ 22, 386 Mont. 204, 389 P.3d 233.

**A. The district court properly exercised its discretion in denying Strizich’s petition without a reply or an evidentiary hearing.**

Strizich initially argues that the district court abused its discretion when it denied him relief without allowing him to file a reply to the State’s response and without holding an evidentiary hearing. Montana Code Annotated § 46-21-201(1)(a) provides that after a district court reviews the pleading responding to a postconviction petition, “the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue.” The statute further provides that the district court for good cause, may grant leave to either party to conduct discovery and, in its discretion, the court may conduct a hearing. Mont. Code Ann. § 46-21-201(5). The statute does not require the district court to allow the petitioner to file a reply to the State’s responsive pleading. And, here, the district court’s initial order granting the State additional time to respond did not allow for a reply.

Also, whether to hold an evidentiary hearing is discretionary. Strizich did not support his IAC allegations with evidence. Unsupported allegations, even those within a verified petition, are not sufficient to entitle a petitioner to an evidentiary hearing. *Hanson*, ¶ 12; *State v. Griffin*, 2003 MT 267, ¶ 12, 317 Mont. 457, 77 P.3d 545. Further, “[i]t is not error to deny an application for post-conviction relief without an evidentiary hearing if the allegations are without merit . . . .” *Coleman v. State*, 194 Mont. 428, 433, 633 P.2d 624, 627 (1981). Strizich did not establish any meritorious IAC allegations and the trial record clearly refuted his claims. Thus, an evidentiary hearing was not necessary. Strizich has failed to establish that the district court abused its discretion in not allowing a reply or holding an evidentiary hearing.

**B. The district court correctly concluded Strizich’s IAC claims all lacked merit.**

**1. Introduction**

In considering IAC claims in postconviction proceedings, Montana courts apply the two-pronged test the United States Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Garding*, ¶ 15, citing *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. To prevail on an IAC claim, Strizich must prove both *Strickland* prongs: (1) that counsel’s representation fell below an objective standard of reasonableness and (2) that this deficient performance prejudiced the defense. *State v. Bekemans*, 2013 MT 11,

¶¶ 29-30, 368 Mont. 235, 293 P.3d 843. The petitioner’s burden to establish IAC of appellate counsel is the same as for trial counsel. *DuBray v. State*, 2008 MT 121, ¶ 31, 342 Mont. 520, 182 P.3d 753.

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

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

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

Because Strizich must prove both prongs of *Strickland*, if he fails to prove either prong this Court need not consider the other. *Whitlow*, ¶ 11. The trial court and direct appeal records conclusively establish that Strizich cannot meet his burden under *Strickland*.

**2. Strizich cannot prove his IAC allegations against trial counsel.**

**a. Trial counsel was not ineffective for failing to challenge the flight evidence under the Fourteenth Amendment.**

Strizich acknowledges that trial counsel challenged the State’s admission of flight evidence, but alleges trial counsel performed deficiently because he did not challenge it under the Fourteenth Amendment. Strizich offers one paragraph of “argument” addressing this claim that is devoid of any meaningful legal analysis or citation to authorities that might support his assertion. (Appellant’s Br. at 37.) This Court has repeatedly held that it will not conduct legal research on a party’s behalf, guess at the party’s precise position, or develop legal analysis that would support that position. *State v. Walen*, 2013 MT 26, ¶ 32, 368 Mont. 354, 295 P.3d 1055; *State v. Cybulski*, 2009 MT 70, ¶¶ 13-15, 349 Mont. 429, 204 P.3d 7 (declining appellate review of issues inadequately briefed); *DuBray*, ¶ 30.

Strizich offers no analysis of how counsel performed deficiently by not including the Fourteenth Amendment in his objection to the State's evidence of flight. Although the State should not be forced to guess at why Strizich has raised this claim, the State speculates that Strizich is criticizing trial counsel for not federalizing this claim so he can raise it in federal court. But Strizich has failed to provide any federal law that trial counsel should have relied upon to argue that the flight evidence violated his federal due process rights to a fair trial.

Importantly, in this Court's opinion affirming Strizich's conviction, it considered Strizich's unpreserved claim that the flight evidence was unduly prejudicial under Mont. R. Evid. 403. *Strizich*, ¶¶ 33-37.

In so doing, this Court concluded:

On the record as it stands, however, Strizich has not met his burden to demonstrate that either the testimony of the high-speed chase or the evidence of Lamere's disposition rendered the trial fundamentally unfair. The jury received overwhelming evidence of Strizich's involvement in the crimes, including the items in Strizich's Durango, the state of the [Buus'] cabin, the state of the Mayernik[']s cabin, the photographs of Strizich and Daniels at the [Buus'] cabin, and Lippert's stolen belt buckle. Strizich intentionally took off with Lamere and laid in the back seat, from which the jury could infer he sought to avoid arrest and prosecution for those offenses. And Strizich readily acknowledged that he fled Elkhorn to avoid legal accountability for the Buus burglary.

*Id.* ¶ 38. The Court further concluded that Strizich failed to firmly convince the Court that "the flight evidence presented to the jury amounted to constitutional deprivation of a fair trial or undermined the integrity of the judicial process to such

an extent that its admission requires reversal.” *Id.* ¶ 39. Montana Code Annotated § 46-21-105(2) bars Strizich from raising this claim under the guise of IAC when this Court has already concluded that the flight evidence did not deny Strizich a fundamentally fair trial. *See Rose*, ¶ 35; *Rukes*, ¶ 11; *Lacey*, ¶ 22.

Even so, since a district court has discretion to admit evidence of flight in Montana, Strizich cannot prove that, had trial counsel objected to the admission of the evidence under the federal constitution, the trial court would have disallowed the evidence. And on direct appeal, this Court has already concluded that the flight evidence did not deprive Strizich of a fair trial. Finally, like this Court, the Ninth Circuit Court of Appeals has long recognized that evidence of flight is generally admissible as consciousness of guilt. *See United States v. Harris*, 792 F.2d 866, 869 (9th Cir. 1986). There was nothing for Strizich to gain by trial counsel objecting to the flight evidence under the federal constitution.

The district court correctly denied Strizich postconviction relief on his IAC claim concerning flight evidence because trial counsel repeatedly challenged the flight evidence and this Court had already determined on direct appeal that the flight evidence did not deny Strizich a fair trial. It is not possible for Strizich to prove either prong of his IAC claim under *Strickland* when evidence of flight is generally admissible in federal court.

**b. Trial counsel was not ineffective for failing to object to or provide proper jury instructions for aggravated burglary.**

Strizich next argues that his trial counsel was ineffective because he did not offer the proper jury instructions concerning the aggravating factors for aggravated burglary. (Appellant's Br. at 38-40.) But Strizich fails to mention that, even though trial counsel did not object to all the jury instructions of which he now complains, this Court still considered the mental state instructions related to the elements of aggravated burglary, including the aggravating factor charged, on direct appeal when it considered Strizich's plain error argument. *See Strizich*, ¶¶ 46-49. This Court concluded:

Taken as a whole, these instructions fully and fairly instructed the jury on each mental state definition as it may apply to different elements of aggravated burglary, including the aggravating factor charged.

*Id.* ¶ 49.

Again, Mont. Code Ann. § 46-21-105(2) bars Strizich's claim because his IAC claim against trial counsel is based on something this Court has already addressed and decided in the State's favor on direct appeal. Because this Court has already concluded that the jury instructions related to the aggravated factor for the aggravated burglary charge fully and fairly instructed the jury, it is impossible for Strizich to prove that his trial counsel was ineffective for failing to object to or

offer different mental state instructions related to the aggravated assault.

*See Lacey*, ¶ 22.

Strizich also inaccurately portrays the State's comments during closing argument to suggest the State argued to the jury that if Strizich entered the cabin that in and of itself harmed Marshall. (Appellant's Br. at 39-40, quoting Tr. V at 189.) Reviewing the State's comments in full shows that the State did not shy away from any of the elements of aggravated burglary or remotely suggest that Strizich caused Marshall bodily injury by simply entering the cabin. The State argued that Strizich caused Marshall bodily injury in the form of mental impairment based on the sum of his conduct at the Buus' property. (Tr. V at 190.)

The State explicitly explained to the jury that if it was not convinced the State had proven bodily injury, it could convict Strizich of the lesser-included offense of burglary or even criminal trespass. (Tr. V at 190-91.) The State did not attempt to trick the jury into believing that it did not have to find mental state beyond a reasonable doubt.

Finally, Strizich's allegation that his trial counsel was ineffective for failing to offer a jury instruction for "attempt" as set forth in Mont. Code Ann. § 45-4-103, in the context of attempting to cause bodily injury for the purposes of aggravated assault, is misguided. The statute to which Strizich cites is for the inchoate offense of attempt. Further, in the case to which Strizich cites, *State v.*

*Jackson*, 2009 MT 427, 354 Mont. 63, 221 P.3d 1213, the State charged Jackson with the crime of attempted deliberate homicide. The use of the word attempted to inflict bodily injury is clearly the commonplace meaning of the word attempt. And in Strizich's case the State did not theorize that Strizich attempted to commit bodily injury. Rather, it theorized that Strizich *did* inflict bodily injury in the form of mental impairment. Strizich has failed to prove that his trial counsel performed deficiently by not offering a jury instruction for attempt based on the inchoate offense of attempt.

**3. Strizich cannot prove his IAC allegations against appellate counsel.**

**a. Appellate counsel was not ineffective for failing to challenge the sufficiency of the evidence for aggravated burglary.**

Strizich claims that his appellate counsel was ineffective for not raising a sufficiency of the evidence claim challenging the aggravated burglary charge because the record was “devoid” of evidence that Strizich inflicted or attempted to inflict bodily injury on Marshall or Sonja. (Appellant's Br. at 18.) Strizich devotes precious space to convince the Court that he never physically struck or attempted to physically strike Marshall. But, in the district court the State never theorized that Strizich physically struck Marshall or attempted to physically strike him. As such, Strizich's insistence that the facts of his case are comparable to those in *City of Hamilton v. Mavros*, 284 Mont. 46, 943 P.2d 963 (1997), is misplaced.

In *Mavros*, this Court reversed Mavros' convictions for two counts of assault because there was insufficient evidence to prove Mavros caused a reasonable apprehension of bodily injury in his common-law wife, when his wife testified at trial that, during a heated encounter with him that she orchestrated, she was never afraid of him or afraid that he would inflict bodily injury upon her. *Id.* at 52-53, 943 P.2d at 967.

Rather, the State presented evidence that, because of the burglary and Strizich's and Daniels' attempted flight after the burglary, Marshall suffered a mental illness or mental impairment. The State presented credible evidence that Strizich and Daniels were both involved in the burglary, even though Strizich portrayed himself as an innocent bystander victimized by his friend's poor decision-making. For example, Strizich and Daniels were in *Strizich's* vehicle, and the vehicle was loaded with weapons, ammunition, and useful tools for breaking into a cabin.

Marshall and Sonja happened upon the burglary in progress. Both Strizich and Daniels fled from inside the cabin. Daniels stuck a gun in Marshall's face while Strizich advanced to the rear of the vehicle. Marshall had every reason to suspect that Strizich too was armed with a gun. While Daniels ran from the vehicle towards the corner of the cabin and fired a shot at Marshall, Strizich continued to advance on Marshall despite Marshall's repeated warnings that he needed to stop.

It was Strizich's advance on Marshall, while Daniels continued to fire at him, that resulted in Marshall firing a warning shot at Strizich, followed by a second shot that hit Strizich in the leg.

By all accounts, after Strizich and Daniels both fled, Marshall was badly shaken up. While waiting for law enforcement, he could not sit in his vehicle because of his fear that Daniels and/or Strizich would approach him and his wife from behind. When Detective Pandis initially spoke with Marshall, he was so distraught that Detective Pandis thought he needed medical care.

Ten months later, Marshall still thought about how Strizich and Daniels had not only violated the family cabin that he treasured but violated his own sense of safety. Marshall continued to have difficulty sleeping and had bad dreams about the events that had transpired. Marshall thought about what happened all the time and, as his wife explained, was often checked out. Ten months after this shattering experience, Marshall was still not himself.

Viewing this evidence in the light most favorable to the prosecution, it clearly supported the jury's verdict because the traumatic experience of the burglary and the flight thereafter resulted in Marshall suffering a mental impairment at the hands of Strizich and Daniels.

Strizich's arguments regarding mental illness or impairment support appellate counsel's effectiveness in not challenging the sufficiency of the evidence

rather than appellate counsel's ineffectiveness. For example, Strizich attempts to piece together a definition of mental illness and impairment from administrative rules and cases that are contextually distinguishable from how mental impairment is used within the definition of bodily injury. For the first time on appeal of the denial of his postconviction petition, Strizich contends that Stephens should have argued a definition of mental illness or impairment that would have required the State to prove that Marshall required care, treatment, or rehabilitation due to the mental illness or impairment. There are two major problems with Strizich's assertion.

First, trial counsel did not make such an argument in the district court. Thus, any effort by appellate counsel to insert such a requirement into the definitional section of the criminal code would not have been preserved for appeal. Even though an appellant can raise a sufficiency of the evidence claim for the first time on appeal, here, appellate counsel would have had an uphill battle to make such a nuanced argument based on statutory interpretation since this Court will not hold a district court in error for matters it never had the opportunity to address. *State v. English*, 2006 MT 177, ¶ 71, 333 Mont. 23, 140 P.3d 454, citing *State v. Gardner*, 2003 MT 338, ¶ 44, 318 Mont. 436, 80 P.3d 1262.

Second, this Court has previously held that the term "impairment" is of common usage, so the finder of fact must look to the circumstances to determine

the definition of impairment. *State v. Potter*, 2008 MT 381, ¶ 30, 347 Mont. 38, 197 P.3d 471. This Court has explained that the Legislature does not need to define every term it employs when construing a statute. If a term is of common usage and is easily understood, it is presumed that a reasonable person of average intelligence would comprehend its usage. *State v. Trull*, 2006 MT 119, ¶ 33, 332 Mont. 233, 136 P.3d 551. In *Trull*, this Court concluded that the terms “protracted” and “impairment” as used to establish serious bodily injury under the aggravated assault statute are not obscure or incomprehensible. Rather, the terms are of common usage and readily understood. *Id.* ¶ 34. Thus, a sufficiency of the evidence argument based on this theory would not have been successful.

Strizich next argues that Stephens should have based a direct appeal sufficiency of the evidence argument on a theory that, to meet its burden of proving bodily injury in the form of mental illness or mental impairment, the State needed to provide expert testimony. This theory suffers the same fate as above. Strizich did not raise the expert testimony claim in the district court. Thus, this theory to support a sufficiency of the evidence argument was not preserved for appeal. Also, this Court has already held that the terms “protracted” and “impairment” are of common usage, so it is presumed that a reasonable person of average intelligence would comprehend their meaning. *Trull*, ¶ 34.

The same holds true of the term “mental impairment.” Marshall did not need to seek out a diagnosis to suffer a mental impairment. Ten months after the crimes, he still could not sleep and dreamt about the events every night. He was not his normal self, frequently stared into space, and felt angry. Marshall’s wife had to talk him into returning to the cabin, a place that he had formerly enjoyed every weekend. Because of Strizich’s and Daniels’ criminal conduct, Marshall suffered a mental impairment that was still impacting his life ten months after the event. As such, Stephens did not perform deficiently by not raising this claim. As Stephens recognized, the standard of review for a sufficiency of the evidence claim favors the State. (Appellant’s App. B at 11.)

To the extent Strizich argues Stephens performed deficiently because he did not understand that an appellant can raise a sufficiency of the evidence claim for the first time on appeal, Stephens also stated in his affidavit that he did not challenge the sufficiency of the evidence because he “did not believe the record supported a challenge to the sufficiency of the evidence” (Appellant’s App. B at ¶ 11), especially since the evidence is viewed in the light most favorable to the State. The presumption of effective assistance of counsel will only be overcome when ignored issues were clearly stronger than the issues appellate counsel presented. *DuBray*, ¶ 31. In hindsight, Stephens asserted that a sufficiency of the evidence challenge was “arguably stronger” than the claims he raised, while also

pointing out that the claims he raised were neither “frivolous nor weak.” (Appellant’s App. B at ¶ 15.) Arguably stronger does not overcome the presumption of effectiveness. It is worth noting that Stephens convinced three justices on appeal that the flight evidence was unfairly prejudicial. *Strizich*, ¶¶ 51-71.

Even if this Court were to find that Stephens performed deficiently by not raising a sufficiency of the evidence challenge on appeal, Strizich has failed to prove that, but for Stephens’ deficient performance, Strizich would have prevailed on appeal. Strizich repeatedly asserts that the State’s evidence against him was weak because he was not an active participant in the criminal conduct. The jury, however, did not believe Strizich’s explanation for why he drove to the Buus’ cabin and why he was inside the Buus’ cabin. The jury did not believe Strizich’s testimony that he was unaware of all the guns and ammunition in his vehicle and had no intention of using any of the tools within his vehicle to commit a burglary. The jury did not believe Strizich’s claim that he only kept advancing on Marshall to try to explain that it was only a misunderstanding and that he and Daniels had stopped at the cabin to ask for some gas.

Viewing the evidence in the light most favorable to the State, including the evidence of mental impairment, Strizich has failed to prove a reasonable probability of a different outcome on direct appeal, especially in light of this

Court's assessment that the State presented overwhelming evidence of Strizich's guilt.

**b. Claim that appellate counsel was ineffective for failing to challenge the flight evidence under the Fourteenth Amendment.**

Strizich finally argues that Stephens provided IAC by not challenging the flight evidence under the Fourteenth Amendment. This claim suffers the same fate as the flight evidence IAC claim lodged against trial counsel, with the additional problem that appellate counsel could not raise a federal constitutional challenge for the first time on appeal unless he did so under the plain error doctrine. Strizich devotes one sentence to his analysis of appellate counsel's ineffectiveness. (Appellant's Br. at 37.) On direct appeal, this Court has already concluded the flight evidence did not deny Strizich a fair trial. Consequently, Strizich cannot prove his IAC claim against appellate counsel.

///

**CONCLUSION**

The State respectfully requests that this Court affirm the order of the district court denying Strizich’s petition for postconviction relief.

Respectfully submitted this 7th day of June, 2024.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,949 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell  
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0563

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JORY RUSSELL STRIZICH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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**APPENDICES**

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BDC 2017-59 Doc. 129, Jury Instruction 42 .....	Appendix A
BDC 2017-59 Doc. 129, Jury Instruction 43 .....	Appendix B
BDC 2017-59 Doc. 129, Jury Instruction 17 .....	Appendix C
BDC 2017-59 Doc. 129, Jury Instruction 18 .....	Appendix D
BDC 2017-59 Doc. 129, Jury Instruction 36 .....	Appendix E
BDC 2017-59 Doc. 129, Jury Instruction 37 .....	Appendix F
BDC 2017-59 Doc. 129, Jury Instruction 38 .....	Appendix G
BDC 2017-59 Doc. 129, Jury Instruction 50 .....	Appendix H

## CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-07-2024:

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Electronically signed by Janet Sanderson on behalf of Tammy K Plubell  
Dated: 06-07-2024