IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0048

LAURENCE DEAN JACKSON, JR.,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Seventeenth Judicial District Court,
Blaine County, The Honorable Robert G. Olson, Presiding

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Table of Contents

Table of Authorities ii

Issues presented 1

Statement of the case 1

Statement of the facts 4

Summary of the argument 5

Standard of review 6

Argument 8

I. The court abused its discretion in denying jackson's request for an evidentiary hearing 9

II. The court erred in denying jackson's petition on the merits 14

A. Counsel's failure to consult and retain qualified experts was not objectively reasonable 14

B. Counsel's failure to retain qualified experts was prejudicial 26

C. Counsel rendered IAC by failing to effectively present a compelling theory that was supported by substantial evidence 41

D. Counsel's failure to effectively present the "glaring discrepancy" theory was prejudicial 49

Conclusion 53

Certificate of compliance 54

Appendix 55

Table of Authorities

CASES

Burger v. Kemp,
483 U.S. 776 (1987) 9

Combs v. Coyle,
205 F.3d 269 (6th Cir. 2000).....40

Deschamps v. Mont. Twenty-First Jud. Dist. Ct.,
2024 MT 15, 415 Mont. 94, 542 P.3d 392 7

Duncan v. Ornoski,
528 F.3d 1222 (9th Cir. 2008) 15

Eze v. Senkoski,
321 F.3d 110 (2nd Cir. 2003).....25

Fisher v. Gibson,
282 F.3d 1283 (10th Cir. 2002) 41

Ford v. State,
2005 MT 151, 327 Mont. 378, 114 P.3d 244.....11, 12

Foster v. Lockhart,
9 F.3d 722 (8th Cir. 1993) 42, 48, 50, 53

Fugate v. Head,
261 F.3d 1206 (11th Cir. 2001) 42, 43, 48

Harrington v. Richter,
562 U.S. 86 (2011).....15, 26, 27

Heath v. State,
2009 MT 7, 348 Mont. 361, 202 P.3d 118 .....7, 10

Hendricks v. Calderon,
70 F.3d 1032 (9th Cir. 1995).....22, 48, 49

Herman v. State,
2006 MT 7, 330 Mont. 267, 127 P.3d 422 .....11, 12

Hinton v. Alabama,
571 U.S. 263 (2014) .....passim

Jackson v. Montana,
560 U.S. 912 (2010) 1, 3, 4

Pavel v. Hollins,
261 F.3d 210 (2nd Cir. 2001).....24, 25

Richey v. Bradsaw,
498 F.3d 344 (6th Cir. 2007) (Richey II).....passim

Richey v. Mitchell,
395 F.3d 660 (6th Cir. 2005).....passim

State v. Finley,
2002 MT 288, 312 Mont. 493, 59 P.3d 1132.....10, 12

State v. Hanson,
1999 MT 226, 296 Mont. 82, 988 P.2d 299.....10

State v. Henderson,
2004 MT 173, 322 Mont. 69, 93 P.3d 1231.....8

State v. Jackson,
2009 MT 427, 354 Mont. 63, 221 P.3d 1213.....passim

State v. Kougl,
2004 MT 243, 323 Mont. 6, 97 P.3d 1095.....8

State v. Lawrence,
2001 MT 299, 307 Mont. 487, 38 P.3d 809.....13

State v. Michelotti,
2018 MT 158, 392 Mont. 33, 420 P.3d 1020 7

Strickland v. Washington,
466 U.S. 668 (1984) ..... passim

Whitlow v. State,
2008 MT 140, 343 Mont. 90, 183 P.3d 861 ..... 7, 8

Other Authorities

Montana Code Annotated
§ 46-18-303(1)(b) 2
§ 46-21-104(1)(c) 10, 11, 12, 13
§ 46-21-104(2) 12
§ 46-21-104(c) 5, 10
§ 46-21-201(1)(a) 14

Montana Constitution
Art. II, § 24 8

United States Constitution
Amend. VI 8

ABA Standards for Criminal Justice
4-1.2(c) 9
4-1.1 to 4-8.63 (2d ed. 1980) 9

ABA Standards for Criminal Justice Prosecution Function and Defense Function 120 (3d ed. 1993) 9

Issues presented

1. Whether the court abused its discretion by denying Appellant's petition for postconviction relief without holding an evidentiary hearing.

2. Whether the court erred in denying Appellant's petition for postconviction relief on the merits.

Statement of the case

In *State v. Jackson*, Laurence Jackson, Jr. (Jackson) was charged by Information with Count I: deliberate homicide of Blaine County Deputy Joshua Rutherford (Rutherford); and Count II: attempted deliberate homicide of Blaine County Deputy Loren Janis (Janis). (D.C. 3.)[1] The State alleged during the evening of May 29, 2003, Rutherford and Janis were dispatched to Harlem, Montana. (D.C. 1.) Upon arrival, Rutherford engaged in a foot pursuit of an unarmed Jackson through a field on the outskirts of Harlem. Jackson resisted

[1] Documents filed in DC 03-08 will be cited as "D.C." and the corresponding Arabic numeral. Documents filed in DV 11-14 will be cited as "D.V." and the corresponding Arabic numeral. The 17 trial transcripts will be cited by Roman numeral volume (I-XVII). The eight sentencing transcripts will be cited as "Sent." and the corresponding Roman numeral volume (I-VIII). Other transcripts will be cited by date.

and a struggle ensued. Janis thereafter entered the field and attempted to assist Rutherford to subdue Jackson. The State alleged Jackson gained control of Rutherford's service Glock, and fatally shot Rutherford in the chest and wounded Janis in the left arm. (D.C. 1 at 2.)

Attorneys Edmund Sheehy, Jr. (Sheehy) and Robert Peterson (Peterson) were appointed as co-counsel. (D.C. 8.)

The State filed a Notice of Intent to Seek Sentence of Death, and later a Notice of Intent to Seek Persistent Felony Offender Status. (D.C. 37, 60.)

Following a 17-day jury trial, Jackson was found guilty of both Counts of the Information. (XVII at 117-21; D.C. 193.) The jury also found an "aggravating circumstance" pursuant to Mont. Code Ann. § 46-18-303(1)(b). (XVII at 134-37; D.C. 193.)

Jackson proceeded to a capital sentencing hearing. The court found the cumulative weight of the mitigating circumstances sufficiently substantial to call for leniency. (Sent. VIII at 28; D.C. 301 at 16.) It imposed a life-sentence without the possibility of parole as to Count I, and a consecutive life-sentence without the possibility of parole pursuant to Count II. (Sent. VIII at 28, 48; D.C. 301 at 16-17, 306 at 2.)

The court imposed a consecutive 100-year PFO sentence. (Sent. VIII at 48; D.C. 306 at 2.)

This Court affirmed Jackson's convictions. *State v. Jackson*, 2009 MT 427, 354 Mont. 63, 221 P.3d 1213. Jackson filed a Petition for Writ of Certiorari before the United States Supreme Court (*Jackson v. Montana* (No. 09-9761)). The Court denied Jackson's petition. *Jackson v. Montana*, 560 U.S. 912 (2010).

Jackson pursued postconviction relief (PCR). (D.V. 1.) Following the appointment of counsel, the court issued a *Gillham* order as to counsel. (D.V. 21, 24.)

Jackson ultimately filed an amended petition (Petition) and argued trial counsel rendered ineffective assistance (IAC) by: 1) failing to consult and retain qualified experts to effectively assist in Jackson's defense; 2) failing to present a coherent and effective defense strategy; 3) failing to present a coherent and effective summation; 4) unreasonably advising the jury of Jackson's status as a felon and probationer; and 5) failing to object to the prosecutor's misconduct in closing. (D.V. 42 at 271.) Jackson alleged he received IAC of appellate counsel should the court conclude, the foregoing claims should have

been raised on direct appeal. (D.V. 42 at 272.) Alternatively, Jackson alleged the foregoing cumulative errors prejudiced his right to a fair trial. (D.V. 42 at 272.)

The State filed a response but did not solicit or otherwise attach affidavits from Jackson's counsel to rebut his IAC claims. (D.V. 60.)

The court denied Jackson's Petition without holding an evidentiary hearing. (D.V 68.) It is from this Order Jackson now appeals. (D.V. 68, attached hereto as Ex. A.)

Statement of the facts

A succinct recitation of the underlying facts from the criminal proceeding may be found at *Jackson*, ¶¶ 8-19. Additional facts will be discussed as necessary *infra*.

***PCR evidence*:**

Following the appointment of PCR counsel, Jackson retained certified crime scene and shooting incident reconstructionist, Tom Griffin (Griffin), BA, CSCSA, CBPA. Griffin authored an expert report setting forth opinions regarding the shooting death of Rutherford through the examination of the available evidentiary material by means

of reconstruction, using bloodstain pattern analysis and shooting incident reconstruction. (D.V. 47 at Ex. E, attached hereto as Ex. B.)

Griffin analyzed the answers Janis provided pursuant to his pretrial deposition, considering the key elements of the events in the deposition and whether the physical evidence, blood pattern analysis, and scene review were "Consistent, Inconsistent, or Inconclusive" with these elements. (Ex. B at 10, 15-18.) Griffin opined the "majority of the elements" were "inconclusive." (Ex. B at 10, 15-18.) Importantly, that Janis alleged the fatal and wounding gunshots were part of a short three-shot sequence, Griffin opined this claim was "inconsistent" with the physical evidence. (Ex. B at 16.)

Summary of the argument

The court abused its discretion by denying Jackson's Petition without holding an evidentiary hearing. Incredibly, it found his Petition was "short on specific facts." (Ex. A at 4.)

Jackson's Petition totaled 273 pages, 270 pages of which identified all facts supporting the grounds for relief as required by Mont. Code Ann. § 46-21-104(c). (D.V. 42 at 1-270.) Moreover, as noted *supra*, Jackson attached to his brief, *inter alia*, exhibits and Griffin's report

detailing how and why Janis' account of the shooting was "inconsistent" with the physical evidence. (Ex. B.)

Refusal to hold an evidentiary hearing in the present case is the very definition of an arbitrary act, a complete lack of conscientious judgment, exceeds the bounds of reason, and plainly resulted in a substantial injustice.

Regarding Jackson's five substantive IAC claims, the court clearly erred in denying his Petition on the merits. The court's findings of fact were clearly erroneous, and it clearly misapprehended the effect of the evidence relative to Jackson's burden pursuant to the second prong of the *Strickland* test. The Court's finding to the contrary (Ex. A at 6), the evidence of Jackson's guilt was anything but "overwhelming."

The court also erred in concluding counsel's performance was objectively reasonable. It wholly ignored the law Jackson "exhaustively cited," and his analysis and application of the same to the underlying record.

Standard of review

The decision to hold an evidentiary hearing in a PCR proceeding is discretionary and is reviewed for abuse of discretion. *Heath v. State*,

2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. A court abuses its discretion if it acts arbitrarily, without employing conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *State v. Michelotti*, 2018 MT 158, ¶ 8, 392 Mont. 33, 420 P.3d 1020. A court also abuses its discretion if it bases its ruling on a clearly erroneous assessment of the evidence. *Deschamps v. Mont. Twenty-First Jud. Dist. Ct.*, 2024 MT 15, ¶ 13, 415 Mont. 94, 542 P.3d 392.

This Court reviews the denial of a PCR petition to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861. Claims of IAC present mixed questions of law and fact, which this Court reviews *de novo*. *Whitlow,* ¶ 9.

This Court has adopted the two-part *Strickland* test for measuring IAC claims. *State v. Boyer*, 215 Mont. 143, 147, 695 P.2d 829, 831 (1985), *citing Strickland v. Washington*, 466 U.S. 668 (1984). First, petitioners must show counsel's performance was deficient. They must demonstrate counsel made such serious errors that counsel was not functioning as the "counsel" guaranteed under both the United States and Montana Constitutions. *State v. Henderson*, 2004 MT 173, ¶ 5, 322

Mont. 69, 93 P.3d 1231. The question which must be answered is, "whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20 (internal citations omitted).

Second, petitioners must show they were prejudiced by counsel's deficient performance. Petitioners must show a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Henderson*, ¶ 4. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome, but does *not* require that a defendant demonstrate that he would have been acquitted." *State v. Kougl*, 2004 MT 243, ¶ 25, 323 Mont. 6, 97 P.3d 1095 (emphasis added), *quoting Strickland* 466 U.S. at 694.

Argument

In all criminal prosecutions, the accused shall enjoy the right to the assistance of counsel. U.S. Const. Amend. VI; *Strickland*, 466 U.S. at 685. The right to counsel is also guaranteed under the Montana Constitution, Article II, Section 24.

The United States Supreme Court has stated: "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). It has recognized, "prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.63 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688. Here, ABA Standard 4-1.2(c) commands, "since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making *extraordinary efforts* on behalf of the accused." ABA Standards for Criminal Justice Prosecution Function and Defense Function 120 (3d ed. 1993) (emphasis added).

I. The court abused its discretion in denying Jackson's request for an evidentiary hearing.

The court correctly found Jackson "exhaustively cited law" in support of his Petition. (Ex. A at 4.) It clearly failed to employ conscientious judgment or correctly assess the evidence, however, in denying Jackson's request for an evidentiary hearing where Jackson's Petition was supported by undisputed, numerous, and substantial facts.

A person requesting PCR must show, by a preponderance of the evidence, the facts justify the relief. *E.g.*, *Heath*, ¶ 16. A PCR petition must, "'identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.'" *Heath*, ¶ 7, *quoting* Mont. Code Ann. § 46-21-104(1)(c). A court may dismiss a petition without holding an evidentiary hearing if the petition fails to satisfy this procedural threshold. *Heath*, ¶ 7 (citation omitted).

Mere allegations do not constitute "evidence" as contemplated by Mont. Code Ann. § 46-21-104(1)(c), nor are unsupported allegations sufficient to entitle petitioners to an evidentiary hearing. *See e.g.*, *State v. Hanson*, 1999 MT 226, ¶ 22, 296 Mont. 82, 988 P.2d 299. Section 46-21-104(1)(c), MCA, "requires that a claim of [IAC] must be grounded on facts in the record and not merely on conclusory allegations." *State v. Finley*, 2002 MT 288, ¶ 9, 312 Mont. 493, 59 P.3d 1132 (citation omitted).

In *Finley*, ¶¶ 8-10, this Court affirmed the denial of a PCR petition without an evidentiary hearing where the petitioner failed to satisfy Mont. Code Ann. § 46-21-104(1)(c). It found petitioner failed to

provide "any evidence" in any form that would establish the facts underlying the assertions in his petition, nor did he provide an explanation for why the supporting evidence was not provided. *Finley*, ¶ 10.

Likewise, in *Ford v. State*, 2005 MT 151, ¶ 36, 327 Mont. 378, 114 P.3d 244, this Court affirmed the denial of a PCR petition without an evidentiary hearing where the petitioner failed to, *inter alia*, satisfy Mont. Code Ann. § 46-21-104(1)(c). It found the majority of petitioner's claims were grounded on nothing more than his allegations and not grounded on facts of record. *Ford*, ¶¶ 21, 23-24, 30, 33.

Similarly, in *Herman v. State*, 2006 MT 7, ¶ 39, 330 Mont. 267, 127 P.3d 422, this Court affirmed the denial of a PCR petition without an evidentiary hearing where the petitioner failed to, in part, satisfy Mont. Code Ann. § 46-21-104(1)(c). It found petitioner failed to provide "attachments"—affidavits, records, or other evidence—establishing the existence of facts to support the majority of the grounds for relief in his petition. *Herman*, ¶¶ 26, 28, 32-35.

Jackson's Petition set forth six claims for relief and one claim of cumulative error. (D.V. 42 at 271-72.) The petition totaled 273 pages,

270 pages of which plainly identified all facts supporting the grounds for relief pursuant to Mont. Code Ann. § 46-21-104(1)(c). Moreover, every single fact was accompanied by specific citations to the record, thus "establishing the existence of those facts." Finally, Jackson attached to his brief, *inter alia,* exhibits and Griffin's report to support his claims counsel failed to retain a qualified expert and present an effective defense.[2] (Ex. B.)

In the face of 270 pages of facts with specific citations to the record, and the report of an eminently qualified, certified crime scene and shooting incident reconstructionist, the court nevertheless found Jackson's "Petition is short on specific facts." It concluded an evidentiary hearing was not necessary because Jackson, "failed to provide specific facts to support grounds for relief in his petition." (Ex. A at 4.)

The court abused its discretion in denying Jackson's request for an evidentiary hearing, instead disposing of his Petition by way of a perfunctory at best 10-page order. Unlike *Finley*, *Ford*, and *Herman*,

[2] Jackson's brief in support totaled 897 pages, with 5 exhibits, and advanced the legal arguments, citations, and discussions of legal authorities, in compliance with Mont. Code Ann. § 46-21-104(2).

Jackson clearly satisfied the requirements of Mont Code Ann. § 46-21-104(1)(c), by supporting his claims for relief with all facts and evidence, with specific citations to the record establishing the existence of said facts.

In the face of 270 pages of substantial facts, the court's refusal to hold an evidentiary hearing plainly reflects an arbitrary act, devoid of conscientious judgment, exceeds the bounds of reason, and resulted in a substantial injustice. The court's decision arbitrarily foreclosed Jackson's right to develop additional evidence to support his IAC claims and deprived the court of a genuine opportunity to explore fully counsel's decisions. *See State v. Lawrence*, 2001 MT 299, ¶ 16, 307 Mont. 487, 38 P.3d 809 (remanding for an evidentiary hearing to resolve factual issues regarding petitioner's IAC claims.).

The most definitive proof the court's decision was devoid of conscientious judgment and exceeds the bounds of reason is the fact it thereafter addressed Jackson's claims on the merits. (Ex. A at 4-10.) If as the court found Jackson's "Petition is short on specific facts," the question remains: How could it thereafter, on such a deficient factual record, review each of Jackson's claims on the merits and "conclude[] all

such claims are without merit[?]" (Ex. A at 4.) Pursuant to its own findings, the court could have summarily dismissed Jackson's Petition pursuant to Mont. Code Ann. § 46-21-201(1)(a), for failure to state a claim. It did not.

Jackson's Petition was *not* "short" on specific facts and this Court should conclude the district court abused its discretion in denying his request for an evidentiary hearing.

II. The court erred in denying Jackson's Petition on the merits.

A. Counsel's failure to consult and retain qualified experts was not objectively reasonable.

Counsel rendered IAC by failing to consult and retain qualified experts who could authoritatively explain the significance of the State's evidence or the lack thereof to the jury, and effectively illuminate obvious inconsistencies between the physical evidence, Janis' allegations, and the State's theory of the case. Instead, counsel unreasonably relied upon the opinion of a single "forensic expert," Kay Sweeney (Sweeney), whose reconstruction of the shooting was derived from his interpretation of evidence that he was not qualified to interpret or assess, *i.e.*, Rutherford's and Janis' gunshot wounds, and

Jackson's abdominal injury. Counsel thereafter pursued a theory at trial that was based in part, if not entirely, upon Sweeney's fundamentally flawed "reconstruction" of the shooting.

The United States Supreme Court has recognized, "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). "It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts . . .." *Richter*, 562 U.S. at 106.

The Ninth Circuit has concluded, although it may not be necessary in every instance to consult with or present the testimony of an expert, "when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." *Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) (citation omitted).

The selection of an expert witness is, "a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough

investigation of [the] law and facts,' is 'virtually unchallengeable.'" *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (alterations in original), *quoting Strickland*, 466 U.S. at 690. The mere hiring of an expert, however, "is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable." *Richey v. Bradsaw*, 498 F.3d 344, 362 (6th Cir. 2007) (*Richey II*).

Moreover, a lawyer cannot be deemed effective, "where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what basis for the expert's opinion is." *Richey II*, 498 F.3d at 362-63. Counsel has, "a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion." *Richey II*, 498 F.3d at 363.

The deficiencies of an expert can be imputed to counsel, "when counsel has *failed* to adequately research and screen an expert witness." *Richey v. Mitchell*, 395 F.3d 660, 683 (6th Cir. 2005) (emphasis in original) (citation omitted). Therefore, "counsel owes more to his client

than a passive duty to watch for red flags of incompetence." *Richey*, 395 F.3d at 683.

Pretrial, counsel moved for the appointment of a "forensic expert." (D.C. 27.) Counsel argued, *inter alia*, it was "essential to the defense in this matter to have an independent analysis of all evidence generated in this matter." (D.C. 27 at 1-2.) Counsel attached Sweeney's *curriculum vitae* (CV) to Jackson's motion and a flyer advertising Sweeney's services. (D.C. 27 at Ex. A; "flyer" attached hereto as Exhibit C, "CV" attached hereto as Exhibit D.)

Sweeney held himself out as a "forensic scientist" and claimed he had, *inter alia*: "Examined, analyzed, and interpreted physical evidence in the areas of chemical analysis, blood analysis, microanalysis (trace evidence), and firearms and toolmark identification." (Ex. C.) Sweeney's CV identified his formal education as: "Bachelor of Science in Chemistry," with a course in "Graduate level 'Mathematics Problems.'" (Ex. D at 2.)

Clearly, nothing in Sweeney's flyer or CV suggested he possessed the requisite knowledge, skill, experience, training, or education, to

render expert analysis or provide opinion testimony regarding forensic pathology or wound interpretation. (Exs. C, D.)

On April 7, 2004, the State's forensic odontologist, Dr. Johnson, authored an opinion letter regarding the nature of Jackson's abdominal injury. Dr. Johnson opined to the effect the injury was consistent with a "bite pattern injury" and explained the basis for his opinion. (D.V. 47, Ex. D, attached hereto as Exhibit E.)

At a suppression hearing, Dr. Parham testified to her examination of Jackson on May 30, 2003, hours after Jackson's arrest. (4/13/04 Hrg. at 131.) Dr. Parham described Jackson's abdominal injury as a "circular bruise." (4/13/04 Hrg. at 138.) She opined the injury was not consistent with a gunshot wound. (4/13/04 Hrg. at 151-52.)

On April 30, 2004, Sweeney authored a letter to Peterson. (D.C. 119 at Ex. 3; attached hereto as Exhibit F.) Sweeney advised:

> I was puzzled by the shape of the entry hole in Deputy Rutherford's anterior, (front) chest as described in the autopsy report. I was able to study this entry hole in more detail with the arrival of autopsy photographs on April 16, 2004.

(Ex. F at 1.) Sweeney continued:

> Because of my interest in what may have caused the bullet that entered Deputy Rutherford's chest to become misaligned, I examined the fabric of the shirt in the area around the bullet entry hole microscopically for any intermediate target material. I discovered tiny bits of material exhibiting the microscopic characteristics of fatty tissue, (fat globules) . . . These fat globules most likely originated from the wound on Mr. Jackson's right waist area, which has the characteristics of a bullet graze. This very likely means that when Deputy Janis fired at Mr. Jackson, he grazed Mr. Jackson's right side and the bullet continued on into the left chest of Deputy Rutherford while Rutherford had Mr. Jackson in a bear hug around the waist. The grazing contact of the fired bullet with Mr. Jackson's right side tissue would cause the bullet to begin to tumble and thereby enter Deputy Rutherford's chest in an orientation at least slightly tilted, relative to direction of flight, producing an elliptical entry wound.

(Ex. F at 1.)

On May 7, 2004, counsel sought authorization to retain a forensic odontologist. (D.C. 121.) Counsel explained:

> Sweeney was able to provide some information regarding the opinion rendered by Dr. Johnson. However, [Sweeney] informed counsel this area was not one of his expertise and he would not have the credentials to provide an opinion in Court. However, he did indicate this was an important evidentiary aspect of this case.

(D.C. 121 at 2.) Counsel concluded:

> Due to the importance of this issue to the defense in this matter, the Defendant respectfully requests this Court for an Order authorizing him to locate and retain the services of a Forensic Odontologist . . ..

(D.C. 121 at 2.)

Although Sweeney opined Jackson's abdominal injury evidenced "characteristics of a bullet graze," and incorporated this conclusion into his "dynamic incident reconstruction," one week later he advised counsel he lacked the "expertise" and "credentials to provide an opinion in Court" regarding this "important evidentiary aspect of this case."

On June 24, 2004, counsel identified Dr. Allan Currie as Jackson's forensic odontology expert. (D.C. 126.) Ultimately, however, counsel failed to call Dr. Allan Currie at trial. Counsel's decision compels one conclusion: Dr. Allan Currie's opinion was consistent with that of the Dr. Johnson, *i.e.*, Jackson's abdominal injury was consistent with a bite pattern injury.

Sweeney ultimately submitted his expert report. (D.V. 47, Ex. A, attached hereto as Exhibit G.) Sweeney reaffirmed his April 30, 2004 opinions—Jackson's abdominal injury was a "bullet graze" and the bullet that killed Rutherford was "tumbling." (Ex. G at 10.) Sweeney

further opined Janis' gunshot injury was self-inflicted based upon, *inter alia*, the appearance of the wound. (Ex. G at 10.)

Sweeney's report confirmed his "reconstruction" of the shooting was almost exclusively premised upon his interpretation and assessment of the injuries at issue, *i.e.*, Rutherford's and Janis' gunshot wounds, and Jackson's abdominal injury. As noted *supra*, however, nothing in Sweeney's flyer or CV remotely suggested he was qualified to render expert opinions regarding forensic pathology or wound interpretation. (Exs. C, D.)

As noted *supra*, a lawyer cannot be deemed effective, "where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what basis for the expert's opinion is." *Richey II*, 498 F.3d at 362-63. Again, "counsel owes more to his client than a passive duty to watch for red flags of incompetence." *Richey*, 395 F.3d at 683.

The record plainly demonstrates counsel "either willfully or negligently" kept themselves in the dark regarding the basis for Sweeney's reconstruction of the shooting. The record also plainly demonstrates counsel "either willfully or negligently" ignored red flags

of Sweeney's incompetence where Sweeney confessed he was not qualified to testify to the nature of Jackson's injury. Sweeney's deficiencies as an expert should be imputed to Jackson's counsel where they clearly, "*failed* to adequately research and screen" Sweeney and his qualifications to provide expert testimony in support of Jackson's defense. *Richey*, 395 F.3d at 683 (emphasis in original).

As will be demonstrated *infra*, counsel thereafter rendered IAC by pursuing a strategy guided by Sweeney's "reconstruction," *i.e.*: Jackson's abdominal injury was a "bullet graze," the bullet that killed Rutherford was "tumbling," and Janis' gunshot wound was a close-contact and self-inflicted injury. *See Hendricks v. Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995).

Unsurprisingly, the State systematically debunked Sweeney's interpretation of the injuries at issue, and thus the very basis for his "reconstruction" of the shooting, before he even took the stand to testify in support of Jackson's defense.

First, the State presented a series of experts and medical professionals who categorially refuted Sweeney's assessment of Jackson's abdominal injury, *i.e.*, the "bullet graze" theory. (V at 12, 21;

VII at 114, 116-17, 151-52; XII at 121-22, 127-29, 141, 153-55; XIII at 110, 112.)

The State also presented a series of experts and medical professionals who categorically refuted Sweeney's assessment of Janis' gunshot wound, *i.e.*, the close-contact and self-inflicted theory. (VI at 112, 118, 132-33, 141; VII at 81, 83, 96-97, 102, 107.)

Finally, before Sweeney offered any substantive testimony, the State used *voir dire* to force Sweeney to repeatedly concede he was not a forensic pathologist and had no medical training. (XV at 16, 21-22.)

Sweeney ultimately testified by-and-large consistent with his expert report. (XV at 111-14, 118-19, 125-27, 136-37, 140-42.)

Unsurprisingly, the State used its cross and recross-examinations to repeatedly force Sweeney to concede he was not a forensic pathologist and had no medical training. (XV at 178, 207, 209; XVI at 37-38.)

Pursuant to its rebuttal case, the State called State Medical Examiner, Dr. Gary Dale (Dr. Dale), who categorically refuted Sweeney's assessment of the injuries at issue.

First, Dr. Dale authoritatively explained why Jackson's abdominal injury was not consistent with a gunshot wound. (XVI at 74, 76-78, 95-98, 101, 103.)

Next, Dr. Dale authoritatively explained why Rutherford's gunshot wound was not consistent with a "tumbling bullet." (XVI at 51-54, 81, 104, 108-09.)

Dr. Dale also authoritatively explained why Janis' gunshot wound was not consistent with a close-contact wound. (XVI at 69-74, 86-87, 91-92, 104-06, 109-10.)

Finally, Dr. Dale averred to the effect Sweeney's interpretations of the injuries at issue was the product of "inexperience," noting Sweeney was not a forensic pathologist. (XVI at 53-54, 71-72, 73, 86-87.)

Jackson's case hinged all-but-entirely on whether the jury would believe beyond a reasonable doubt Janis' version of the shooting; therefore, a qualified and credible, "expert's interpretation of relevant physical evidence (or the lack of it) [was] the sort of 'neutral, disinterested' testimony," that could have tipped the scales and swayed the fact-finder in Jackson's favor. *Pavel v. Hollins*, 261 F.3d 210, 224 (2nd Cir. 2001). Moreover, as will be established *infra*, there was an

"obvious, commonsense mismatch" between the physical evidence and Janis' account of the shooting. *Pavel*, 262 F.3d at 224. Specifically, there was a "glaring discrepancy" between the forensic evidence, or the lack thereof, collected from Rutherford's Glock and Maglite, compared to Jackson's blood-covered hands.

Based on the foregoing, there can be no question an effective and "reasonably professional attorney" would have consulted and been prepared to call qualified experts to address and explain the significance of State's evidence or lack thereof. *Pavel*, 262 F.3d at 224. The importance of such consultation was also heightened given the physical evidence, or the lack thereof, was less than conclusive and open to interpretation. *Eze v. Senkoski*, 321 F.3d 110, 128 (2nd Cir. 2003); Ex. B.

Again, the selection of an expert witness is, "a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.'" *Hinton*, 134 S. Ct. at 1089 (alterations in original) (citation omitted). Here, however, the record clearly demonstrates

Sweeney was not qualified to provide opinion testimony regarding forensic pathology or wound interpretation.

Counsel acknowledged expert testimony was, "essential to provide specialized knowledge to assist the jury in understanding issues and evidence relevant in this case." (D.C. 204 at 9.) Counsel thus recognized, "the only reasonable and available defense strategy require[d] consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Richter*, 562 U.S. at 106. Jackson's counsel rendered IAC by hiring Sweeney without vetting his qualification and the basis for his opinions. *Richey II*, 498 F.3d at 362-63.

B. Counsel's failure to retain qualified experts was prejudicial.

The United States Supreme Court has stated: "If there is a reasonable probability that [trial counsel] would have hired an expert who would have instilled in the jury a reasonable doubt as to [his client's] guilt . . . then [the client] was prejudiced by his lawyer's deficient performance . . .." *Hinton*, 571 U.S. at 276. In analyzing whether petitioners were prejudiced by counsel's failure to call an expert witness courts look to, *inter alia*, whether petitioners have

provided evidence contradicting the prosecution's experts and the strength of the other evidence. *Richter*, 562 U.S. at 112-13 (petitioner failed to establish prejudice because he did not offer evidence contradicting the prosecution's experts, and there was substantial circumstantial evidence supporting his conviction). The Court has also stated, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by [counsel's] errors." *Strickland*, 466 U.S. at 696.

In *Hinton*, petitioner alleged the testimony of his original expert (Payne) was "ineffective" and, thus, prejudicial. *Hinton*, 571 U.S. at 270. Pursuant to PCR, Hinton produced three new experts on toolmark evidence to support his claim he was prejudiced by Payne's "ineffective testimony." The Court found all three experts examined the physical evidence and testified they could not conclude any of the six bullets had been fired from Hinton's revolver. The State did not submit rebuttal evidence during the PCR hearing; indeed, its expert at trial refused to cooperate. *Hinton*, 571 U.S. at 270.

The State insisted Hinton could not have been prejudiced by counsel's use of Payne rather than a more qualified expert, because

Payne said all that Hinton could have hoped for from a toolmark expert, *i.e.*, the bullets used in the crimes could not have been fired from Hinton's revolver. In rejecting the State's argument, the Court reasoned: "It is true that [Payne's] testimony would have done Hinton a lot of good *if the jury had believed it*." *Hinton*, 571 U.S. at 275 (emphasis in original). The Court found the jury did not believe Payne's testimony. Thus, it observed:

> [I]f there [was] a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer's deficient performance and is entitled to a new trial.

Hinton, 571 U.S. at 276.

The Court acknowledged the State, at trial, presented testimony from two experienced expert witnesses that tended to inculpate Hinton. *Hinton*, 571 U.S. at 276. It concluded that did not, taken alone, demonstrate Hinton was guilty. The Court observed prosecution experts, of course, sometimes make mistakes:

> [W]e have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "Serious deficiencies have been found in the forensic evidence used in criminal trials . . . One study of cases in which exonerating evidence resulted in the

> overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases."

Hinton, 571 U.S. at 276 (citations omitted).

The Court declared: "This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law." Ultimately, the Court remanded Hinton's case for reconsideration as to whether counsel's deficient performance was prejudicial under *Strickland*. *Hinton*, 571 U.S. at 276.

In *Richey II*, 498 F.3d at 362, the State put forth a specific theory of how Richey set the fire and supported its theory with detailed scientific testimony. "The scientific evidence of arson was thus fundamental to the State's case." The court observed counsel retained DuBois to investigate the cause of the fire and test the conclusions of the State's experts. *Richey II*, 498 F.3d at 347. Pursuant to PCR, Richey adduced new forensic evidence that cast doubt on the State's arson conclusions. *Richey II*, 498 F.3d at 348. Richey retained fire experts Custer and Armstrong who opined the State used flawed

scientific methods not accepted in the fire-investigation community to determine arson caused the fire and there was no evidence of accelerants. *Richey II*, 498 F.3d at 348.

The court concluded the testimony of experts such as Armstrong and Custer, both of whom stated they would have testified on Richey's behalf had they been contacted, "would have severely undermined the States case against him." *Richey II*, 498 F.3d at 363-64. It found Armstrong and Custer would have testified the most likely cause of the fire was a cigarette smoldering in the cushions of a couch. *Richey II*, 498 F.3d at 364.

The court concluded: "There can be little doubt that Richey was prejudiced by his counsel's deficient performance." *Richey II*, 498 F.3d at 364. It reasoned there was a reasonable probability that had his counsel mounted the available defense the fire was caused by an accident, and was not the result of arson, the outcome of either the guilt or the penalty phase would have been different. The court concluded counsel's deficient performance undermined its confidence in the outcome of Richey's trial. *Richey II*, 498 F.3d at 364.

Here, counsel's failure to consult and retain qualified "forensic experts" had dire if not fatal consequences for Jackson's defense. Counsel's reliance upon Sweeney yielded the implausible and improbable "bullet graze," "tumbling bullet," and "self-inflicted, contact gunshot wound" theories they presented at trial. As noted *supra*, the State systematically and resoundingly refuted Sweeney's interpretation of the injuries at issue, and thus the foundation of his "reconstruction" and Jackson's theory of defense.

Here, as in *Hinton*, the State presented a series of experts and other professionals who unequivocally refuted Sweeney's opinions regarding the injuries at issue which informed his "reconstruction" of the shooting. *Hinton*, 571 U.S. at 265. The record also plainly demonstrates the State used its *voir dire* and cross and recross-examinations to discredit Sweeney's testimony, his "reconstruction" and, therefore, counsel's theory of defense. *Hinton*, 571 U.S. at 268-69. Finally, as will be demonstrated below, the State used its closing to belabor Sweeney's utter lack of qualifications to render expert analysis or provide opinion testimony regarding the very evidence whose

interpretation formed the foundation of his "reconstruction" and counsel's theory of defense. *Hinton*, 571 U.S. at 269.

Here, the core of the State's case was built upon expert analysis and opinions regarding the significance of the forensic evidence, and how the foregoing supported Janis' account of the shooting. Effectively rebutting that case required a "competent expert on the defense side" and, as will be demonstrated below, counsel's decision to rely upon Sweeney's as the defense's sole "forensic expert" would be prejudicial if not fatal to Jackson's defense. *Hinton*, 571 U.S. at 272-73.

The State's closing stands as perhaps the best evidence Jackson was prejudiced by counsel's decision to rely upon Sweeney as an expert and pursue a theory of defense derived from his "reconstruction."

First, the State derided Sweeney's lack of qualifications and opinion regarding the nature of Janis' gunshot injury, arguing *inter alia*:

> Sweeney, in contrast to the medical professionals and orthopedic surgeon, an emergency room doctor and the state pathologist holds a BS in Chemistry . . . And as he testified to you, he is self taught, and self proclaimed . . . And he's the only one that holds a contrary view.

(XVII at 26-27.)

The State also derided Sweeney's "tumbling bullet" theory:

> [T]here was no evidence that this bullet that struck Deputy Rutherford was tumbling. There's no evidence of that at all. [Dr. Dale] said, the direction or the angle of the injury, that could have been effected [sic] depending on if Deputy Rutherford had his arms out and moved his clavicle, that would have effected [sic] the angle of that injury.

(XVII at 28-29.)

Regarding Sweeney's "bullet graze" theory, the State argued, *inter alia*:

> [Dr. Dale] testified he had reviewed the photographs of the injuries to the defendant's side, and it wasn't a bullet graze. It wasn't a bullet graze at all . . . Dr. Johnson, a forensic odontologist, who reviewed the photographs of the defendant's injuries, and in his opinion, the injury was consistent with an injury caused by a pinching tool such as a mouth or a pair of pliers.

(XVII at 29.)

The State delivered the following, fatal blow to Sweeney's "reconstruction" and, thus, Jackson's defense:

> When you consider the testimony of Dr. Johnson and Dale, and the testimony regarding what occurred on Fort Belknap, and the testimony of Stacey Brown regarding her analysis of the defendant's shirt, I believe you can find that this most likely is a bite mark and not a bullet graze. *There's simply nothing to support that this was a bullet graze injury to the defendant. And then the whole theory regarding the side injury and the fat globule and the tumbling bullet fails,*

> *because there is no basis for it. There is nothing to cooberated* [sic] *that theory*.

(XVII at 30 (emphasis added).)

Defense counsel's closing is further definitive proof Jackson was prejudiced by counsel's decision to rely upon Sweeney and his "reconstruction." Although counsel spent weeks attempting to convince the jury to believe Sweeney's "reconstruction" and "bullet graze" theory, Sheehy unbelievably argued:

> *I don't really care whether you believe Kay Sweeney that that's a bullet graze on the right abdomen*. We don't have to proof [sic] that. *That was his theory. He may be wrong*.

(XVII at 44 (emphasis added).)

Sheehy also highlighted the obvious disparity between Sweeney's and Dr. Dale's qualifications:

> Now, they want to say, well, you know, *Dr. Dale, he's the expert, he disagrees*. That's because *he's got all this formal training* . . . And remember how Dr. Dale described it. He said it a couple of times, that *it would only be someone inexperienced* . . . that was his comment, *inexperienced*.

(XVII at 61 (emphasis added).)

Again, although counsel spent weeks attempting to convince the jury to believe Sweeney's "reconstruction," Sheehy again reminded the jury it could reject Sweeney's "bullet graze" theory:

> The State makes much of the fact that Kay Sweeney said the bullet was tumbling, and he said it was tumbling because it struck someone, either Loren Janis or Larry Jackson, which *I said from the start, you can reject the theory that there was a bullet graze on Larry Jackson. That's fine.*

(XVII at 72-73 (emphasis added).)

Sheehy's closing clearly evidences the prejudice Jackson suffered as a result of counsel's decision to rely upon Sweeney and his "reconstruction." Sweeney's performance was so disastrous, and his opinions so incredible, counsel not once, but twice, argued to the effect the jurors could reject Sweeney's "bullet graze" theory. (XVII at 44, 72-73.) Of course, Sweeney's "bullet graze" theory informed his "tumbling bullet" theory and was integral if not the very foundation of his "reconstruction" that counsel presented as Jackson's theory of defense.

The prejudice Jackson suffered as a result of counsel's decision to rely upon Sweeney and his "reconstruction" should be self-evident where Sheehy repeatedly highlighted the State's attacks on Sweeney's lack of qualifications. (XVII at 46-47, 61, 67, 74.) The State's repeated attacks on Sweeney's lack of qualifications were prejudicial in their own right. That counsel highlighted said attacks in closing, without so much as attempting to rebut the same, confirms counsel's decision to rely

upon Sweeney and his "reconstruction" was prejudicial if not fatal to Jackson's defense. Counsel's failure to rebut the State's attacks, or otherwise argue Sweeney was in fact qualified, left the jurors with one inescapable conclusion: Sweeney was unqualified, and his "reconstruction" was at best an ill-founded fiction.

Unsurprisingly, the State also used its rebuttal to again belabor Sweeney's lack of qualifications to interpret the very evidence that formed the foundation of his "reconstruction." (XVII at 81, 88, 89.) The State's rebuttal capped a systematic and devastating attack upon Sweeney's qualifications, his "reconstruction" and, therefore, counsel's theory of defense.

Pursuant to *Hinton*, this Court should find Sweeney was "ineffective" and prejudicial. *Hinton*, 571 U.S. at 274-75. The court's conclusion to the contrary (Ex. A at 6), it cannot be said Sweeney rendered a "favorable opinion" at trial, let alone testified to all that Jackson could have hoped for from a "forensic expert." Again, Sweeney's "reconstruction" can be summed up as follows: "Considering all evidence, it is most probable that Deputy Janis fired at Mr. Jackson's back, grazed Mr. Jackson's right side and his bullet then

entered Deputy Rutherford's chest;" and, "Considering all the evidence relating to Deputy Janis's left forearm injury, it is probable that this injury was self inflicted while Janis was at or near his vehicle." (Ex. G at 10.)

At trial, the State unequivocally established Sweeney was not a qualified "forensic expert," and unequivocally established his "reconstruction" was at best an ill-founded fiction. Moreover, pursuant to Jackson's closing, counsel twice renounced the "bullet graze" theory that was integral to Sweeney's "reconstruction" and counsel's theory of defense. Jackson was prejudiced not just by counsel's failure to retain a more qualified expert; he was prejudiced by counsel's failure to retain a "forensic expert" who was remotely qualified and credible. To be sure, "[Sweeny's] testimony would have done [Jackson] a lot of good *if the jury had believed it*;" however, Sweeney's "reconstruction" was anything but credible and Jackson was plainly prejudiced by counsel's decision to rely upon Sweeney as the defense's sole "forensic expert." *Hinton*, 571 U.S. at 275 (emphasis in original).

Undoubtedly, the State will point to the legion of experts and professionals it called pursuant to Jackson's trial, whose testimony

tended to support Janis' account of the shooting. *Hinton*, 571 U.S. at 276. However, as the Court observed in *Hinton*, this does not, taken alone, demonstrate Jackson was guilty. As the Court poignantly stated prosecution experts, of course, sometimes make mistakes. *Hinton*, 571 U.S. at 276 (citations omitted). In the present case, it cannot be said the foregoing "threat" was minimized; rather, it was undoubtedly maximized because counsel retained an incompetent and unqualified expert who was incapable of effectively countering the State's experts. *Hinton*, 571 U.S. at 276.

Richey II is likewise instructive of this Court's analysis of the prejudice Jackson suffered as a result of counsel's decision to rely upon Sweeney and his "reconstruction." Here, as in *Richey II*, the State put forth a specific theory of how Jackson fired the fatal and wounding shots, *i.e.*, Janis' account of shooting, and supported its theory with expert testimony regarding the forensic and pathological evidence. *Richey II*, 498 F.3d at 362. The forensic and pathological evidence "was thus fundamental to the State's case." Counsel retained Sweeney to investigate the State's evidence and test the conclusions of its experts. *Richey II*, 498 F.3d at 347. Here, Jackson adduced a new interpretation

of the forensic evidence relative to Janis' account of the shooting (Ex. B) that casts doubt on Janis' allegations and the State's theory of prosecution. *Richey II*, 498 F.3d at 348. According to Griffin's review of the evidence, Janis' account of the shooting was at best "inconclusive," and actually "inconsistent" regarding his claim the fatal and wounding gunshots were part of three-shot sequence. (Ex. B at 10, 15-18.)

This Court should conclude the testimony of experts such as Griffin, who would have testified on Jackson's behalf had he been available and contacted, "would have severely undermined the States case against [Jackson]." *Richey II*, 498 F.3d at 363-64. Thus, "[t]here can be little doubt that [Jackson] was prejudiced by his counsel's deficient performance," where Griffin opined Janis' account of the fatal and wounding gunshots was actually "inconsistent" with the physical evidence (Ex. B at 17). *Richey II*, 498 F.3d at 364.

The record demonstrates there is more than a reasonable probability, had defense counsel mounted the available defense exposing Janis' account of the shooting as inconsistent with and contrary to the forensic evidence, the result of the guilt phase of Jackson's trial would have been different. Confronted with evidence

and qualified expert testimony undermining Janis' credibility and the State's theory of prosecution, there is a reasonable probability at least one juror would have had a reasonable doubt regarding Jackson's guilt, especially where the evidence of Jackson's guilt was circumstantial at best and Janis could not place Rutherford's Glock in Jackson's possession when the fatal and wounding shots were fired. (III at 139-40, 178; IV at 35.) Based on the foregoing, this Court should conclude counsel's deficient performance undermines any confidence in the outcome of Jackson's trial. *Richey II*, 498 F.3d at 364.

Sweeney was at best a "chemist," with no formal training or education in the fields necessary to assess and analyze the evidence at issue. Counsel's decision to retain Sweeney with the court-ordered funds designated for hiring a "forensic expert" was indefensible and prejudicial to Jackson's defense. This Court should conclude instead of making "extraordinary efforts" as prescribed by ABA standards, *Combs v. Coyle*, 205 F.3d 269, 289-90 (6th Cir. 2000), counsel's deficient performance and conduct with respect to Sweeney was not merely ineffectual, but positively detrimental to Jackson's cause.

Jackson must merely demonstrate, *inter alia*: "If there is a reasonable probability that [trial counsel] would have hired an expert who would have instilled in the jury a reasonable doubt as to [Jackson's] guilt . . . then [Jackson] was prejudiced by his lawyer's deficient performance . . .." *Hinton*, 571 U.S. at 276. This Court should conclude Jackson has carried this burden pursuant to Griffin's report. (Ex. B.)

Moreover, Sweeney's blatant deficiencies as an expert should be imputed to Jackson's counsel and their decision to present his "reconstruction" must be considered IAC and prejudicial where, "counsel [] *failed* to adequately research and screen an [Sweeney]." *Richey*, 395 F.3d at 683 (emphasis in original) (citation omitted).

C. Counsel rendered IAC by failing to effectively present a compelling theory that was supported by substantial evidence.

In order to make the "adversarial process meaningful, counsel has a duty to investigate all reasonable lines of defense." *Fisher v. Gibson*, 282 F.3d 1283, 1291 (10th Cir. 2002) (citations omitted). This duty is, "strictly observed in capital cases." *Fisher*, 282 F.3d at 1291 (citation omitted).

Reasonable performance of counsel includes an, "adequate investigation of facts, consideration of viable theories and development of evidence to support those theories." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993). "Counsel has a constitutional duty to investigate and prepare a defense strategy," and "not to proceed with a 'defense without evidence to support it.'" *Fugate v. Head*, 261 F.3d 1206, 1221 (11th Cir. 2001) (citations omitted).

Relevant to the instant appeal, the record demonstrates counsel presented, *inter alia*, the following theories. First and foremost, counsel presented Sweeney's fundamentally flawed "bullet graze," "tumbling bullet," and "self-inflicted, contact gunshot wound" theories. Next, counsel ostensibly pursued the theory the "glaring discrepancy" between the forensic evidence, or the lack thereof, collected from Rutherford's Glock and Maglite, compared to Jackson's blood-covered hands, demonstrated Jackson could not have handled Rutherford's Glock and therefore could not have fired the fatal and wounding shots.

As argued *passim* above, the record demonstrates nothing in Sweeney's flyer or CV suggested he was qualified to interpret the injuries at issue that ultimately informed his "reconstruction." (Exs. C,

D.) Again, Sweeney's deficiencies as an expert should be imputed to Jackson's counsel and their decision to present his "reconstruction" must be considered IAC where, "counsel [] *failed* to adequately research and screen an [Sweeney]." *Richey*, 395 F.3d at 683 (emphasis in original) (citation omitted). Pursuant to Jackson's argument and analysis *supra*, this Court should conclude counsel rendered IAC by pursuing a theory based in part, if not entirely, upon Sweeney's flawed "reconstruction." *Fugate*, 261 F.3d at 1221 (citations omitted).

Regarding the "glaring discrepancy" theory, it would be an incredible understatement to suggest counsel believed, at least post-trial, this theory was compelling and critical to Jackson's defense.

The evidence established three minutes and 50 seconds elapsed between Janis' call to dispatch to report he had located Rutherford and his subsequent call requesting medical assistance. (IV at 114-15.) According to Janis, Jackson wielded Rutherford's Maglite during this brief timeframe. (4/23/04 Depo. at 105, 118-20; III at 106-07, 141; XI at 110-11.) Janis alleged Jackson wrested Rutherford's Glock from its holster and thereafter fired the fatal and wounding shots, and several follow-up shots. (4/23/04 Depo. at 139, 157; III at 114-15, 137-38; IV at

22.) The evidence demonstrated Rutherford's Glock was discharged seven times in total. (XII at 203-04.)

The State's evidence confirmed Jackson's hands were completely covered with blood immediately following his arrest. (4/13/04 Hrg. at 162; V at 51-52, 70, 76; VIII at 166; IX at 17.) Indeed, law enforcement struggled to test Jackson's hands for GSR—"[i]t was difficult to find areas that were clear of [blood], yes." (IX at 17.)

The grip and trigger of Rutherford's Glock and the grip of his Maglite were similarly textured to promote a secure grip. (XII at 40, 43-45.)

Law enforcement recovered Rutherford's Maglite near the shoulder of Highway 2. (X at 37.) Unsurprisingly, given Jackson's blood-covered hands, the Maglite was covered with blood. (X at 38-40; XIII at 94-97, 158, 161, 169-70.)

Conversely, although the State theorized Jackson wrested Rutherford's Glock and thereafter discharged the weapon seven times, the grip and trigger of Rutherford's Glock were *completely devoid* of any blood. (XIII at 159, 174-75.)

Counsel railed about the significance of the foregoing "glaring discrepancy" in multiple post-trial, post-conviction, appellate, and PCR pleadings.[3] (*E.g.*, D.C. 204, 214; 2/17/05 Hrg. at 33; Def's. Reply (DA 06-0195) at 21; Pet. at 10 U.S. Supreme Court; D.V. Doc. 20.) Indeed, Peterson argued, *inter alia*, "[Jackson's] blood soaked hands and the murder weapon devoid of blood on the very parts that had to have been held or touched in order to be fired, continue to defy rational thought and analysis." (D.V. 20 at 3.) This argument notwithstanding, it cannot be said counsel effectively developed and presented this theory at trial.

First, it cannot be said they explored the "glaring discrepancy" theory with the venire pursuant to *voir dire*. (I at 132-84, 188-204; II at 44-62.)

Moreover, it cannot be said counsel effectively previewed the "glaring discrepancy" theory in opening or otherwise argued the lack of blood on the grip and trigger of Rutherford's Glock was obviously inconsistent with the State's theory of prosecution. (III at 48-75.)

[3] Peterson filed Jackson's original PCR petition to preserve Jackson's right to pursue PCR. (D.V. 1.)

Rather, counsel made only passing reference to the discrepancy between the forensic evidence collected from Rutherford's Glock and Maglite. (III at 71.) Counsel made absolutely no mention of Jackson's blood-covered hands. (III at 48-75.)

Similarly, it cannot be said counsel effectively developed and presented the "glaring discrepancy" theory pursuant to the evidentiary phase of Jackson's trial. Although the State's lead investigator, Chief Barthel, professed the "evidence tells an investigator the story" (XI at 24), counsel failed to challenge Chief Barthel to explain away the "glaring discrepancy" between the forensic evidence collected from Rutherford's Glock and Maglite compared to Jackson's blood-covered hands (XI at 3-92, 113-18).

Next, although Sweeney testified to the blood evidence or lack thereof collected from Rutherford's Glock and Maglite compared to Jackson's blood-covered hands (XV at 91), Sweeney did not effectively articulate how the foregoing "glaring discrepancy" was obviously inconsistent with and contrary to the State's theory Jackson wrested Rutherford's Glock and thereafter discharged the weapon seven times. (XV at 2-151; XV at 4-28.) In fact, on cross-examination, Sweeney was

forced to concede his expert report made no mention of the significance of the foregoing evidence. (XV at 191-93.)

Finally, and perhaps most importantly, it cannot be said counsel effectively argued the "glaring discrepancy" theory in closing. Indeed, counsel made only a single passing reference to the "glaring discrepancy" between Jackson's blood-covered hands and the spotless grip and trigger of Rutherford's Glock:

> It's Officer Rutherford's gun . . . take a look at that grip and the textures on that grip. And you saw the photograph of Larry Jackson's hands, and you heard the Assistant Police Chief George Tate say blood was all over his hands . . . There's no blood on the butt of that gun; absolutely none. Nor is there any blood on that trigger.

(XVII at 57.) Counsel did not, however, explicitly argue or explain how this "glaring discrepancy" demonstrated Jackson could not have handled Rutherford's Glock and could not have fired the fatal and wounding shots. (XVII at 43-78.) Moreover, unbelievably, counsel made absolutely no reference to Rutherford's blood-covered Maglite. (XVII at 43-78.)

Again, as noted *supra*, counsel railed about the significance of the "glaring discrepancy" in multiple post-trial, post-conviction, appellate, and PCR pleadings. The record plainly demonstrates, however, counsel

failed to properly present this theory at trial or make remotely similar arguments in closing.

This Court should conclude counsel's performance was not objectively unreasonable in terms of, "adequate investigation of facts, consideration of viable theories and development of evidence to support those theories." *Foster*, 9 F.3d at 726. Counsel ignored their "constitutional duty to investigate and prepare a defense strategy" and, "not to proceed with a 'defense without evidence to support it.'" *Fugate*, 261 F.3d at 1221 (citations omitted).

Although "not every murder case can be won by the defense," the record demonstrates Jackson's case did not fall into the foregoing category. *Hendricks*, 70 F.3d at 1042. Here, the State relied upon, "circumstantial evidence to place the weapon in [Jackson's] hand." (Sent. VIII at 26; D.C. 301 at 15.) As demonstrated by the compelling and undisputed evidence underlying the "glaring discrepancy" defense, this was not a case where, "the law and facts [were] so overwhelmingly in favor of the government that defense counsel [could] do little more than try to poke holes in the government's case in cross-examination." *Hendricks*, 70 F.3d at 1042. Jackson's case was not so "hopeless[]" that

it relegated counsel to the "role of official hand-holder." *Hendricks*, 70 F.3d at 1042.

The record demonstrates counsel's failure to effectively develop and present the "glaring discrepancy" theory, rather than presenting Sweeney's "reconstruction," was not objectively reasonable. *Hendricks*, 70 F.3d at 1042.

D. Counsel's failure to effectively present the "glaring discrepancy" theory was prejudicial.

Jackson need only establish a reasonable probability that, but for counsel's failure to develop and present the "glaring discrepancy" theory, rather than Sweeney's "reconstruction," the result of the proceeding would have been different. This Court must remember, in evaluating whether there is a reasonable probability this error contributed to Jackson's conviction, this case was tried to a jury. A conviction requires a unanimous verdict reached after deliberations guided by the reasonable doubt standard. Thus, if there existed a reasonable probability, but for the errors of counsel, one reasonable juror would find it impossible to convict Jackson beyond a reasonable doubt, then the different result standard is satisfied. A hung jury is an outcome significantly different than a guilty verdict.

Jackson will not belabor how and why counsel's decision to present Sweeney's "reconstruction" was prejudicial if not fatal to his defense. The State's experts and other professionals testified regarding pivotal evidence—Rutherford's and Janis' gunshot injuries, and Jackson's abdominal injuries—and rendered opinions that completely refuted Sweeney's unqualified opinions regarding the same that formed the basis of his "reconstruction" and Jackson's defense. As will be argued below, the prejudice resulting from counsel's failure to effectively present the "glaring discrepancy" theory is likewise so patent.

In *Foster*, 9 F.3d at 725, defendant argued counsel rendered IAC by failing to seek an impotency test or present other evidence showing defendant was impotent and, therefore, could not have raped the victim as alleged. The State argued even if counsel had obtained a sleep test, and presented evidence of Foster's impotency at trial, it was improbable the trial's result would have been different. *Foster*, 9 F.3d at 726. The court found, however, except for blood typing evidence, which falsely led the jury to believe Foster was in a small group of the population that could have produced the semen found in the victim, the "only evidence"

implicating Foster was the victim's testimony. *Foster*, 9 F.3d at 726-27. Moreover, the court found "uncontradicted medical evidence" established Foster was physically incapable of committing the rape in the manner the victim and the State alleged at trial. Thus, the court held there was a reasonable probability the trial's outcome would have been different had defense counsel presented evidence of Foster's impotency. *Foster*, 9 F.3d at 727.

Here, post-trial, counsel argued, *inter alia*:

> Did this gun itself reveal any evidence that in any way supported the State's claim that Mr. Jackson actually held that gun in his hand? No . . . the actual physical evidence derived from the gun (or lack thereof) completely supports the factual finding that Mr. Jackson never held that gun.

(D.C. 214 at 4)

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> Rutherford's weapon, which according to Janis had been grabbed by Mr. Jackson, used to fire the fatal shot and the shot injuring Janis, then carried away and used again to fire shots at Janis, and finally dropped some distance from the alleged scene of the confrontation, had <u>absolutely no blood whatsoever</u> on the pistol grip, much less blood belonging to Mr. Jackson. The pistol grip was totally clean in spite of the fact this weapon had the same textured surface as the flashlight. Further, the actual trigger on Rutherford's weapon had the same textured surface as the grip and no blood was found on it either.

(D.C. 204 at 22-23 (emphasis in original).)

***

> Photographs taken of Mr. Jackson upon his arrival at the Hill County Detention Center clearly depict the bloody condition he was in. A photograph specifically taken of his hands showed they were covered in blood. And yet it was the State's and Janis's position these hands had grabbed Mr. Rutherford's gun from him, handled it, fired it, and carried it away, all without leaving one smudge of blood on the handle.
>
> Again, no explanation for this glaring discrepancy between Janis's story and the physical evidence was ever provided to the jury.

(D.C. 204 at 23.)

The foregoing compelling arguments were utterly absent when they mattered most, in opening and closing arguments. The record is quite clear the "glaring discrepancy" theory was compelling and irrefutable, and but for counsel's failure to effectively present and argue the same, there is a reasonable probability the jury would have had a reasonable doubt regarding Jackson's guilt. As noted *supra*, the evidence placing Rutherford's Glock in Jackson's hand was circumstantial. A defense that capitalized on this weakness and marshalled evidence and argument regarding the "glaring discrepancy" could certainly have led to a different result.

Janis' credibility was central to the State's case. The court found he, "pondered whether or not Rutherford may have been accidentally shot" and "could not positively place Rutherford's weapon in [Jackson's] hand." (Sent. VIII at 26; D.C. 301 at 15.) Thus, this Court should hold there was a reasonable probability the trial's outcome would have been different but for counsel's failure to effectively present the "glaring discrepancy" theory that went to the very heart of the State's case. *Foster*, 9 F.3d at 727.

Conclusion

This Court should remand this matter for an evidentiary hearing on all of Jackson's claims for relief. Alternatively, it should find the court erred in denying Jackson's petition on the merits.

Respectfully submitted this 5th day of August 2024.

/s/ *Joseph P. Howard*
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Certificate of compliance

Pursuant to Mont. R. App. P. 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this principle brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 10,000 words, not averaging more than 280 words per page, excluding the certificate of compliance.

/s/ *Joseph P. Howard*
Joseph P. Howard

Appendix

Judgment ..... Ex. A

Griffin Expert Report..... Ex. B

Sweeney flyer..... Ex. C

Sweeney CV ..... Ex. D

Dr. Johnson letter..... Ex. E

Sweeney letter to Peterson ..... Ex. F

Sweeney's Expert Report ..... Ex. G

CERTIFICATE OF SERVICE

I, Joseph Palmer Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-05-2024:

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