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STATE OF MONTANA
Case Number: DA 23-0048

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 APPELLEE

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

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STATEMENT OF THE ISSUE

Whether the district court abused its discretion in denying Jackson postconviction relief without holding a hearing.

STATEMENT OF THE CASE

In 2004, a jury convicted Laurence Dean Jackson, Jr., of deliberate homicide and attempted deliberate homicide for shooting two Blaine County Sheriff's Office (BCSO) deputies, killing Deputy Joshua Rutherford and wounding Deputy Loren Janis. *State v. Jackson*, 2009 MT 427, 354 Mont. 63, 221 P.3d 1213. The court sentenced Jackson to two consecutive life terms without parole. *Id*. This Court affirmed Jackson's convictions in December 2009 and Jackson's petition for certiorari was denied. *Jackson v. Montana*, No. 09-9761, 2010 U.S. LEXIS 4041 (May 17, 2010).

On May 12, 2011, Jackson filed a petition for postconviction relief (PCR) and memorandum. (DV-Docs. 1, 2.)[1] The court appointed PCR counsel who filed an amended petition and memorandum in 2018 that included five ineffective assistance of counsel (IAC) claims against his trial counsel. (DV-Docs. 20-22, 42-47.) After receiving the State's response and Jackson's reply, the court denied

[1]Citations to Cause No. DC-03-08 are "Doc." and Cause No. DV-11-14 are "DV-Doc."

Jackson's amended petition on December 5, 2022, without conducting an evidentiary hearing. (DV-Docs. 60, 67, 68 (*see* Appellant's App. A).)

STATEMENT OF THE FACTS

I. The shooting and investigation[2]

After drinking all day on May 29, 2003, Jackson assaulted William Gone by biting his ear and nose. *Jackson,* ¶¶ 9-12. Jackson later ransacked his girlfriend's trailer, and she called BCSO. *Id*. Rutherford caught up to Jackson in a dark field across the highway from the trailer[3] but was unable to detain him. *Id*. Jackson gained control of Rutherford's Maglite. *Id*. Janis joined the pursuit, intercepting Jackson who raised his arms and yelled, "well arrest me then!" *Id*. Janis sprayed Jackson with pepper spray which had no effect, so Janis struck him in the leg with an asp (baton). *Id*. Once Jackson went down, Rutherford placed him in an arm hold. *Id*. While on his stomach, Jackson continued struggling. (TR-3 at 107-15, 140-70, 174-78; TR-4 at 128; TR-9 at 21-57, 120-50; TR-11 at 9-12, 43-44, 93.) Rutherford lost control of Jackson, who turned onto his left side and reached around Rutherford's waist with his right hand. (*Id*.) Rutherford's Glock pistol was in a holster on the waistband of his jeans. (*Id*.)

[2]Citations to the 17-day trial transcript are "TR-1" through "TR-17."
[3]*See* Def. Ex. 3-A (attached as App. 1.)

Seeing Rutherford losing control of Jackson, Janis pivoted to strike Jackson with the asp in his right hand while holding his Maglite in his left. (TR-3 at 110-15, 127, 170-81; TR-4 at 3-15.) As Janis turned to strike Jackson, he heard "boom, ba-boom" and fell backwards. (*Id*. at 113.) Janis was shot in the left forearm and felt a slight burn on the left side of his face. (*Id*.) Rutherford exclaimed, "Loren, I've been shot, I've been shot by the heart," and Janis replied he had also been shot. (*Id*. at 114.) Right after Rutherford told Janis to "get an ambulance, get help," Janis heard another gunshot and saw a muzzle flash as Jackson fired again. (*Id*.) This was the first time Janis saw the gun in Jackson's hand. (*Id*.; TR-4 at 34.) Janis fired five times back at Jackson, who had moved closer to the road and fired three more times at Janis. (*Id*.)

Janis advanced towards Jackson, firing five more times. (TR-3 at 115-18; TR-4 at 10-15.) When Jackson went down, Janis believed he had hit him. (*Id*.) Janis got to his patrol car and radioed "officer down, officer hit." *Jackson*, ¶ 14. Janis also exclaimed to a witness, "Oh, Christ, Fred, Josh is hit, he's down." (*Id*.) Fred and Janis saw Jackson approaching the patrol car. (*Id*.) Janis believed Jackson was still armed because of his furtive motions. (*Id*.) Janis aimed his gun at Jackson and yelled, "Get down on the ground . . . . You shot F-ing Josh and you shot F-ing me. Get down on the ground or I'm going to kill you." *Id*. Janis also

exclaimed to another witness, Scott Baker, that "He shot Josh and he shot me!" (TR-6 at 208.)

Although Jackson raised his hands, saying he did not have a gun, he kept reaching down with his right hand. (TR-3 at 118-21, 125-26; TR-4 at 11-35; TR-5 at 154-223; TR-6 at 20-95, 196-234.) Eventually, Jackson dropped to the ground, took off his pants, and then continued towards Janis, yelling "Go ahead and fucking shoot me! I don't care! I'm not going back to prison!" (*Id*.)

After Jackson was in custody, he told the paramedic he was alright but thought he had been shot in his lower abdomen, adding that, "I brought this on myself." (TR-5 at 17.) But, while being transported to jail, Jackson said he was covering for someone who had run away. (*Id*. at 36, 47-51.) When asked who it was, Jackson said he did not know. (*Id*.)

Detention officers photographed the blood on Jackson's body and hands, and collected swabs for gunshot residue and blood evidence. (TR-8 at 120-81; TR-9 at 2-21.) Jackson had lacerations on the back of his head and above his left eye and an oblong abrasion on his lower right abdomen that bled onto the waistband of his boxers. (*Id*.; TR-7 at 106-57.) Three days later, Jackson's abdominal wound had horizontal striations and was partially scabbed over. (Ex. I-5.)

Jackson killed Rutherford with a single shot to his chest. (TR-14 at 27-47.) The bullet entered at an angle, below his left collarbone, creating an oval or

elliptical shape. (*Id*.) The bullet traveled left-to-right and on a level trajectory through Rutherford's subclavian vein and left lung, exiting out his back just left of his spine. (*Id*.) Although he had lost a lot of blood, Rutherford would have been ambulatory immediately after being shot. (*Id*.) No gunshot powder was found on Rutherford's shirt, indicating that when he was shot, Rutherford was at least 30 inches away from the muzzle. (TR-12 at 175-90; TR-13 at 5-47.) David Johnson, D.D.S., determined the bite marks on Rutherford's left shoulder matched a cast of Jackson's bite. (TR-12 at 99-154.) After reviewing photographs of Jackson's abdominal wound, Dr. Johnson believed the wound could have been caused by a bite or other pinching mechanism. (*Id*.)

II. Relevant pretrial proceedings

Because the State sought the death penalty, qualified defense attorneys, Robert Peterson and Edward Sheehy (collectively, Counsel or the Defense), had to be approved to represent Jackson. (Docs. 8, 13, 18, 37; 6/10/03 Tr.) Both attorneys had completed the necessary CLE specific to capital cases. (*Id*.) Sheehy had been in good standing with the Bar since 1978 and predominantly practiced criminal law. (*Id*.) Sheehy had tried four capital cases and in the past five years had represented two different defendants in homicide trials. (*Id*.) Peterson had

been in good standing with the Bar since 1981, predominantly practiced criminal law, and had been lead counsel in two deliberate homicide cases. (*Id*.)

Counsel obtained a psychological evaluation to ensure Jackson was competent and immediately filed motions for funds and appointments of experts. (Docs. 4, 6, 12, 14, 16-17, 24, 27, 31, 90, 92-93, 102, 127, 131, 164, 221, 222, 224, 225; 6/10/03 Tr.; 9/22/03 Tr.) The court approved the following experts: a mitigation expert for capital cases; an expert in law enforcement procedures and policies and crime scene investigations (Charles Winters); and a forensic specialist (Kay Sweeny). (*Id*.) The court reviewed Sweeny's qualifications before approving his fees. (*Id*.) The court also granted Jackson's motion for leave to hire an investigator and authorized Dr. Joseph Rich to determine whether Jackson lacked the ability to appreciate the criminal nature of his actions. (Docs. 20, 23, 81, 90.) Notably, although Janis' availability was never in question, Counsel deposed Janis in April 2004. (Docs. 62, 82, 87, 89, 322.)

For months leading up to the trial, Sweeny consulted with Counsel about the evidence and expressed concerns about sending the evidence back before he could complete his review and conduct additional testing not done by the State. (Doc. 119, Exs. 1, 2-3, 6.) The court granted Jackson additional time to disclose his expert witnesses and their reports, largely because Sweeny, Winters, and Dr. Rich needed time to review Janis' deposition. (Docs. 101, 115 at 3-4, 116; 4/28/04 Tr.

at 33-50.) Later, the court authorized funds for Sweeny to examine Rutherford's shirt and allowed additional time for Sweeny and Winters to submit their reports. (Doc. 119.)

The court approved Jackson's requests to retain an expert in radiology to review recent x-rays depicting shrapnel lodged in Janis' left temple and a forensic odontologist to review the State's odontologist bite marks report since Sweeny did not have that level of expertise. (*Id*.; Docs. 121-125, 129-132, 154, 164; 5/11/04 Min Ent.) In July 2004, Jackson's requests for additional funds for Sweeny's services and additional testing were granted. (Docs. 129-132.) Sweeny submitted his report in August 2004. (Doc. 136; DV-Doc. 47, Ex. A.)

III. Trial

A. State's case-in-chief

The State presented testimony from lay witnesses, law enforcement officers, doctors, and crime lab personnel.

Stacy Brown testified that the blood found on the center band of Rutherford's Maglite had a mixture of DNA consistent with Jackson as the major contributor. (TR-13 at 94-95.) Brown found blood on three parts of Rutherford's gun, but none on the grip. (*Id*. at 87-98, 159.) The blood on the muzzle was insufficient for DNA testing. (*Id*.) The spatter on the top of the gun's barrel

contained Rutherford's DNA. (*Id*.) Swabs from above and the side of the trigger area had a mixture of DNA, for which Brown "could not eliminate Larry Jackson as being a contributor" and "could not draw any conclusions" as to Janis or Rutherford being contributors. (*Id*. at 89.)

Brown tested two shell casings fired from Rutherford's gun located near Grid-27:[4] S8 contained a weak partial DNA profile for Rutherford; and S10 contained blood on the interior and exterior of the shell with Rutherford as the major contributor and Jackson as the minor contributor. (TR-13 at 76-77, 83-87.)

Brown tested the 16 blood samples collected at the scene only for the presence of human blood. (TR-13 at 47-175.) After receiving Sweeny's report, the State had 5 of those samples tested for DNA with the following results: B1, B2, and B8 contained Janis' DNA; B9 contained Rutherford's DNA; and B11 contained a mixture of Jackson's and Rutherford's DNA. (*Id*. at 114-30, 136-40; TR-10 at 147-83; 9/28/04 Tr. at 49-53; Doc. 163.) Samples B8 and B9 came from large pools of blood located within Grid-12 and, given that they were located near Janis' pepper spray cannister and asp, detectives concluded that was where Rutherford and Janis were shot. (*Id*.)

[4]*See* State's Ex. A-1 (for convenience, a replica of Ex. A-1 is attached as App. 2).

Brian Bouley explained that Rutherford's Glock could not have unintentionally fired from pressure on the side of the trigger or from being dropped. (TR-12 at 169-77; TR-13 at 26-27.) Bouley determined that Rutherford's gun had been fired 7 times and Janis' gun had been fired 10 times. (TR-9 at 155-88; TR-10 at 42-45; 105-41; TR-12 at 190-205; TR-13 at 2-47.) Two shells from Rutherford's gun were in Grid-12 and 5 shells were found about 60 feet way, near the southeast corner of the substation where Rutherford's gun and S10 and S8 were located. (*Id*.) Five shells from Janis' gun were found about 30 feet south of Grid-12 and 5 more shells were located closer to the southeast corner of the substation (Grids-18, 22). (*Id*.)

The location of the 17 shells and DNA from blood found in the field corroborated Janis' description of the shooting. (TR-3 at 110-18, 127, 170-81; TR-4 at 3-15.) The location of Janis' asp and pepper spray, and Rutherford's gun and Maglite, further corroborated Janis. (*Id*.) Janis did not see Rutherford draw his gun or know how Jackson obtained Rutherford's gun. (TR-3 at 140; TR-4 at 34.) Janis testified that he did not shoot himself or Rutherford and he did not believe Rutherford accidentally shot Janis, or himself. (TR-3 at 128-39.) Janis explained that while he did not see Jackson fire the shots into Rutherford's chest or his arm, he believed Jackson shot them, explaining that:

> For the fact that when Josh was standing up telling me he was shot, and I was telling him that I was shot, and I hear this

> boom, I look off to the right, and, like I stated earlier that I know this and ID'd Jackson, because when I sprayed him, there was no one else out there, and a muzzle flash coming right at me. Who else could it be?

(TR-4 at 22, 34.)

B. Defense case-in-chief

Theresa Petersen, RN, who saw Janis immediately after the shooting, testified that Janis seemed indecisive about what had happened, and had said something like, "I shot Josh, or did I shoot Josh?" as if he was "questioning what's gone on . . . ." (TR-14 at 57.) Dr. Barbra Currie testified that Janis said he was on the ground when he was shot. (TR-11 at 129.)

Drs. Rich and Michael Stratford testified that Jackson was likely in an "alcohol blackout" at the time of the crimes which explained why he did not remember anything. (TR-14 at 170-72, 196.) Over objection, the court permitted the doctors to testify about Jackson's state of intoxication and held that Jackson could present testimony about voluntary intoxication to challenge whether Jackson acted voluntarily (actus reus) but not for determining the existence of his mental state (mens rea). (Doc. 177; TR-14 at 2-20.)

Winters testified that Rutherford and Janis had not performed in line with the policies and procedures of BCSO and the Montana Law Academy. (TR-14 at 66-159.) Winters faulted Rutherford for immediately chasing Jackson instead of learning what had occurred at the trailer because, at most, Jackson may have

committed only minor nonviolent crimes. (*Id*.) Winters believed the deputies' responses in the field were improper escalations and faulted Janis for using his aps, rather than helping Rutherford handcuff Jackson. (*Id*.) Winters also pointed to serious errors in how the crime scene was managed. (*Id*.)

Following *voir dire* by the State and the court, the court found that Sweeny qualified as an expert in crime scene reconstruction and forensic examination of evidence. (TR-15 at 1-49.) Sweeny had a bachelor's degree in chemistry and after working as a police officer, became a "criminalist" in the crime labs at the Seattle's Police Department and the King County Sheriff's Office. (*Id*.) Sweeny assisted in combining the two labs into one where he was the chief criminalist and, later, the director. (*Id*.) Sweeny was the Director of the Washington State Crime Lab for 29 years and estimated that he had been involved in over 700 death investigations and testified in over 3,700 cases. (*Id*.) After retiring, Sweeny established KMS Forensics, Inc., an independent forensic laboratory. (*Id*.)

Sweeny's experience as a criminalist included collecting evidence, conducting and reviewing forensic tests (*i.e*., blood and chemical analysis, trace, firearms, etc.), and reconstructing crime scenes. (TR-15 at 1-50.) Sweeny had done blood serology testing, but not DNA testing. (*Id*.) Sweeny had been a forensic firearms examiner and conducted microscopic examinations and chemical testing of materials to identify them. (*Id*.) Sweeny was a certified member of the

American Board of Criminalistics and Northwest Association of Forensic Scientists and fellow of the American Academy of Forensic Scientists. (*Id*.)

Sweeny concurred that evidence had been lost or compromised because of how the crime scene was managed. (TR-15 at 50-65.) Sweeny questioned why the Montana Crime Lab had not conducted any blood spatter interpretation or analysis and took issue with the State's failure to test 2 blood drops found near Rutherford's gun. (*Id*.) Sweeny explained that although 5 of the 16 blood samples had eventually been tested, it still left many untested which hindered development of a complete picture of what occurred. (*Id*.)

Sweeny explained that neither Janis' pepper spray cannister nor asp had been sent for testing. (Tr-15 at 144-50.) Sweeny found no traces of blood on the asp which he had expected to find given that Jackson's pants had blood on them. (*Id*.) Sweeny agreed with Brown's conclusions about the DNA from S8 and S10, but had additionally observed that the blood on S10 was high velocity blood spatter which Sweeny determined likely came from Rutherford spitting or coughing. (*Id*. at 61-92, 184-87.)

Sweeny focused on evidence that demonstrated Jackson had not handled Rutherford's gun. (TR-15 at 61-92, 187-93.) First, no blood was found on the face of the trigger which was required to fire the Glock. (*Id*.) Second, the undisputed close contact Jackson had with Rutherford explained why Jackson could not be

eliminated as a contributor on the smudge taken from the side of the trigger. (*Id*.) Third, Sweeny contrasted the lack of any blood on the gun trigger face or grip (which, Sweeny noted, was textured and would collect blood) with the large amount of Jackson's DNA on the Maglite he took from Rutherford and undisputed evidence that Jackson's hands were smeared with blood at the jail. (*Id*.)

In Sweeny's opinion, the bullet that struck Rutherford was tumbling.[5] (Tr-16 at 109-19, 196-99; TR-16 at 1-40; Exs. 14, 17.) Sweeny based this opinion on the elliptical shape of the entry wound that was slightly larger than the exit wound and the bullet's trajectory showed it stayed on the left side of Rutherford's body instead of continuing along the path of the entry wound. (*Id*.) Sweeny looked for microscopic trace evidence on Rutherford's shirt near the bullet holes that could have been deposited by a tumbling bullet and identified flat globules. (*Id*. at 1-40; TR-15 at 113-19, 136-44, 206-09.) Sweeny reasoned that since there were no fatty particulates on the inside of Rutherford's shirt, those on the outside were not blowback from the bullet entrance. (*Id*.)

Sweeny theorized the fatty tissue could have been deposited by a bullet that had struck either Janis or Jackson. (TR-15 at 119-44, 200-08.) Citing the linear striations on Jackson's abdominal wound, Sweeny hypothesized that a bullet could

[5]During cross-examination, Dr. Dale agreed he could not say that the bullet had not gone through something else prior to striking Rutherford. (TR-14 at 46.)

have grazed Jackson and then struck Rutherford. (*Id*.) Sweeny posited that Janis could have accidentally shot Rutherford if he had fired at Jackson as Jackson stood up and turned away from Rutherford with the bullet grazing Jackson and entering Rutherford. (*Id*.)

Sweeny acknowledged that DNA results for the fatty tissue concluded Rutherford could not be eliminated as a contributor, but explained that could be because the tissue was in contact with Rutherford's shirt which had his blood and sweat on it. (TR-15 at 170-209; TR-16 at 1-40.) Sweeny conceded that he could not say it was impossible for the fatty tissue to be Rutherford's and agreed he was not a pathologist. (*Id*.) But, based on his experience, maintained that the fatty tissue could have been from one of the other bullet wounds on Janis or Jackson. (*Id*.)

Sweeny identified blood spatter on the front of Janis' shirt that no one from the State had evaluated, concluding that it travelled from left to right, which was consistent with blow-back from a firearm discharge if the entry wound was on the inside of Janis' forearm. (TR-15 at 119-44, 200-08.) Sweeny suggested that the lack of abrasion around the circular wound on the outside of Janis' forearm indicated it was the exit wound, not the entrance wound. (*Id*.) Sweeny's opinion was based on photographs and documentation from Janis' medical records that noted gunshot powder/residue around the wounds. (*Id*.)

C. State's rebuttal

Brown did not endorse Sweeny's attempt to "wash off" blood on the fat globules from Rutherford's shirt before testing and posited that a fat globule from one person that was covered in blood of another person would create a mixed DNA result. (Tr-16 at 42-47.)

Dr. Dale maintained the bullet that killed Rutherford came in at an angle and posited the wound track was affected by Rutherford's shirt and collarbone, but conceded that it was possible a bullet traveled through Janis' arm and into Rutherford, which would be tumbling. (TR-16 at 55-57, 75-111.) Dr. Dale did not believe that the fatty tissue on Rutherford's shirt was deposited by the bullet but agreed he had not collected or examined it because he presumed it was Rutherford's and not significant. (*Id*. at 47-57.)

Dr. Dale believed Jackson's abdominal wound was likely caused by a bite or some pinching mechanism, not a bullet graze. (TR-16 at 75-78, 97-111; TR-12 at 99-154.) Over Jackson's objection, Dr. Dale testified that he believed the bullet that struck Janis' arm entered from the outside and exited the fleshy area near the elbow crease. (*Id*. at 57-68, 112-14, 139-41.)

IV. Motions for new trial; sentencing; direct appeal

Jackson moved for a new trial, asserting that the jury's deliberation was insufficient, the State had not proven Jackson fired the bullet that struck Rutherford, and the verdict was contradicted by the evidence. (Docs. 199, 204, 211, 214.) The court denied the motion after a hearing. (2/17/05 Tr.; Doc. 277.)

To establish mitigating factors during the eight-day sentencing hearing, Counsel presented testimony from Jackson's family, a capital mitigation expert, and several court-approved doctors, as well as Jackson's neuropsychology exam and MRI scan.[6] (Sent-2 through Sent-7.) The court found the cumulative effect of nonstatutory mitigating circumstances was sufficiently substantial to justify leniency and sentenced Jackson to life imprisonment without parole for killing Rutherford. (Sent-8 at 2-29; Doc. 301.) For Count II, the court imposed a consecutive term of life in prison without the possibility of parole. (*Id*. at 48-51; Doc. 306.)

Jackson filed a second motion for a new trial claiming Janis' victim statement constituted newly discovered exculpatory and impeachment evidence. (Doc. 308.) In his statement, Janis explained that "when Josh died several people blamed me for Josh [and] I started to believe this," but his friends helped him understand it was not his fault. (Sent-8 at 34-39; Ex. Z.) Following an evidentiary

[6]The sentencing transcripts are cited as "Sent-1" through "Sent-8."

hearing, where Petersen testified about their defense strategy, the court denied the motion. (Docs. 313, 314, 319; 3/23/06 Tr.)

This Court affirmed Jackson's conviction after considering the following claims: (1) insufficient evidence; (2) State's presentation of DNA evidence violated due process; (3) the court erred when it denied Jackson's second motion for new trial based on the State allegedly withholding exculpatory information; and (4) the court abused its discretion by (a) authorizing use of a non-visible leg restraint; (b) denying Jackson's request to show a witness his abdominal wound; and (c) allowing the State to present expert testimony in rebuttal. *Jackson, supra*.

V. Postconviction

In late 2011, because of potential IAC claims, the court assigned substitute counsel to file an amended petition and invited counsel to obtain "additional evidence in the form of an affidavit or deposition § 46-21-201(5), MCA" before it decided if a hearing was necessary. (DV-Doc. 21 at 2.) Jackson filed a motion for an order pursuant to *In re Gillham*, 216 Mont. 279, 704 P.2d 1019 (1985), which was granted in early 2012. (DV-Docs. 23-24.)

In August 2014, Jackson contacted Tom Griffin (an expert in reconstructing shooting incidents) and Griffin generated a report in July 2018. (DV-Docs. 30-31, 47, Ex. E.) In his report, Griffin did not comment on Sweeny's report or reference

any evidence generated by Sweeny. (*Id*.) Other than copies of photos he attached to his report and references to Janis' deposition, it is unknown exactly what information Griffin reviewed, but it appears he did not review the trial transcript. (*Id*.) Griffin found most of Janis' deposition statements could neither be confirmed nor refuted. (*Id*. at 15-18.) Griffin noted nine examples of Janis' statements that were supported by the evidence, and only one possible inconsistency (two shell casings found in Grid-12 versus Janis' statement that he heard three shots). (*Id*.)

Griffin's report supported several aspects of the State's theory of the crimes: two wound-producing gunshots occurred at Grid-12 where the officers struggled with Jackson; Rutherford's Glock was handled by Rutherford, Jackson, or both, but Rutherford was not holding it when he was shot; the gun that shot Rutherford was at least 30" away and the muzzle was on the same plane as Rutherford's chest; and the bullet that went through Janis' arm became a deformed projectile so it could not have been the bullet that struck Rutherford. (*Id*. at 10-11.)

Jackson's amended PCR petition asserted cumulative error, a general appellate IAC claim, and five trial counsel IAC claims. (DV-Doc. 42 at 271-72.) Jackson argued that Counsel: (1) failed to (a) consult and retain appropriately qualified experts to effectively assist in his defense; (b) and (c) present and develop a coherent, compelling, and effective defense strategy and summation; and (d) timely object to portions of the State's summation that constituted prosecutorial

misconduct; and (2) unreasonably and unnecessarily advised the jury of Jackson's status as a felon and probationer, and failed to object or otherwise take curative measures. (DV-Doc. 42 at 271-72.) Jackson simultaneously filed a supporting memorandum with five exhibits, but did not include affidavits from either Sheehy or Petersen or describe any difficulty in obtaining affidavits. (DV-Docs. 43-47.)

The State responded that Jackson was not entitled to an evidentiary hearing and refuted all of his claims, noting that they were based on only conclusory allegations. (DV-Doc. 60.)

The court denied Jackson's amended PCR petition without conducting an evidentiary hearing and concluded that Jackson had not met either prong under *Strickland v. Washington*, 466 U.S. 668 (1984), for any of his claims. (App. A.)

STANDARD OF REVIEW

A court's order declining to conduct a PCR evidentiary hearing is reviewed for abuse of discretion. *Main v. State*, 2024 MT 215, ¶ 14, 418 Mont. 159, 556 P.3d 940.

Claims of IAC present mixed questions of law and fact that this Court reviews *de novo*. *Oliphant v. State*, 2023 MT 43, ¶ 29, 411 Mont. 250, 525 P.3d 1214. This Court reviews an order denying PCR to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are

correct. *Id*. "A petitioner seeking to overturn a district court's denial of [PCR] based on an [IAC] claim bears a heavy burden." *Oliphant*, ¶ 38.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it determined additional PCR proceedings were not required. Given the significant record from Jackson's criminal proceedings and the conclusory nature of Jackson's claims, the court did not act arbitrarily when it chose not to conduct an evidentiary hearing prior to reviewing Jackson's IAC claims.

Jackson has not met his heavy burden to establish the court's findings were clearly erroneous or that the court's application of *Strickland* was incorrect. The court correctly applied the strong presumption that Counsel performed within the wide range of reasonable professional conduct in securing expert testimony and presenting a general denial offense. Jackson's critiques of Counsel were conclusory speculation improperly developed from hindsight. Thus, Jackson failed to demonstrate that Counsel exercised unreasonable judgment by presenting Sweeny's alternative theory of events and a general denial defense that focused on sewing reasonable doubt and holding the State to its burden.

The court also correctly concluded that even if it presumed Counsel had performed deficiently, Jackson failed to establish there was a reasonable

probability that the outcome would be different. The State presented compelling and overwhelming evidence that Jackson shot the two deputies.

ARGUMENT

I. The district court properly exercised its discretion in denying Jackson's amended PCR petition without conducting a hearing.

"Not all circumstances require the district court to hold an evidentiary hearing on a petition for post-conviction relief." *Heath v. State*, 2009 MT 7, ¶ 21, 348 Mont. 361, 202 P.3d 118. The appropriate inquiry regarding the sufficiency of a PCR petition turns on whether the evidence and supporting attachments provide the necessary facts to establish the claims. *Herman v. State*, 2006 MT 7, ¶ 17, 330 Mont. 267, 127 P.3d 422. To successfully establish an IAC claim, the petitioner must prove both deficient performance and prejudice. *Strickland*; *Whitlow v. State*, 2008 MT 140, ¶ 21, 343 Mont. 90, 183 P.3d 861.

The petitioner must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" contemplated by the Sixth Amendment. The petitioner bears a "heavy burden" to overcome this presumption. *Strickland*, 466 U.S. at 689. Prejudice will not be presumed and must be proven with evidence that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Jackson faults the court for ignoring "270 pages of facts" in his amended petition. (Opening Brief (Br.) at 11-12.) However, as this Court has astutely explained, "Section 46-21-104(1)(c), MCA, does not require volume; it requires that a petition identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records or other evidence establishing those identified facts." *Herman*, ¶ 17. Jackson did not demonstrate why additional proceedings were necessary. *See State v. Finley*, 2002 MT 288, 312 Mont. 493, 59 P.3d 1132 (unsupported IAC allegations and no supporting affidavit subjected petition to summary dismissal).

Jackson alleges that without a hearing he was denied the opportunity to "develop additional evidence to support his IAC claims and deprived the court of a genuine opportunity to explore fully counsel's decisions." (Br. at 13.) However, PCR "proceedings are not a discovery device in which a petitioner, through broad allegations in a verified pleading, may establish the right to an evidentiary hearing." *Smith v. State*, 2000 MT 327, ¶ 28, 303 Mont. 47, 15 P.3d 395; *Heath*, ¶ 27 (PCR provisions do not permit petitioners to "conduct a 'fishing expedition' in an attempt to establish the right to an evidentiary hearing").

Jackson's argument that the court's decision to not hold a hearing was counter to subsequently considering the merits of his claims (Br. at 13-14) is not compelling. The court's order simply observed that Jackson's petition lacked sufficient facts to warrant additional proceedings. The circumstances here are quite different than *State v. Lawrence*, 2001 MT 299, ¶ 16, 307 Mont. 487, 38 P.3d 809, and *State v. Schaff*, 2001 MT 130, ¶¶ 10-11, 305 Mont. 427, 28 P.3d 1073, where this Court held that the courts abused their discretion by not holding an evidentiary hearing because the postconviction record did not contain sufficient evidence to resolve the claims at issue.

Here, the criminal record[7] and PCR pleadings contained ample information and evidence to rule on the merits of Jackson's claims. Particularly, as the court found, the criminal proceedings presented overwhelming evidence of Jackson's guilt and, as such, provided the court with sufficient evidence to determine that Jackson could not meet *Strickland's* prejudice prong for either IAC claim. Thus, the court did not act arbitrarily, without conscientious judgment, or outside the bounds of reason by not conducting a hearing before denying Jackson's amended PCR petition. *Henderson v. State*, 2024 MT 253, ¶ 10, 418 Mont. 431, 558 P.3d 749; *Main*, ¶ 14.

[7]Which includes over 300 court documents (pretrial and posttrial), a 17-day trial transcript, and 240 pieces of evidence.

II. The district court did not err when it denied Jackson's amended PCR petition.

Jackson challenges only the court's order relative to Counsel's alleged failure to: (A) consult and retain qualified experts; and (B) effectively present a compelling theory that was supported by substantial evidence.[8] (Br. at 14-53.)

A person requesting postconviction relief based on IAC must establish both *Strickland* prongs by a preponderance of the evidence. *Oliphant*, ¶ 38; *Garding v. State*, 2020 MT 163, ¶ 15, 400 Mont. 296, 466 P.3d 501. Given that "[t]his Court presumes effective assistance of counsel," the petitioner bears a heavy burden. *Id.*

Counsel's performance is deficient if it fell below an objective standard of reasonableness considering all the circumstances. *Whitlow*, ¶¶ 12-20; *Strickland*, 466 U.S. at 688. "[E]very effort must be made '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). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the defendant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

[8]Although Jackson alleges the court erred in denying relief to "Jackson's five substantive IAC claims" (Br. at 6), he did not provide argument or legal analysis for three of the five claims and has thus abandoned those claims. *Ford v. State*, 2005 MT 151, ¶ 35, 327 Mont. 378, 114 P.3d 244.

Strickland, 466 U.S. at 689 (internal quotation marks omitted). The presumption is even stronger when reviewing the performance of an experienced trial counsel. *See Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc).

To meet the second prong, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Oliphant*, ¶ 44. When considering this prong, the court must consider the totality of the evidence. *Strickland*, 466 U.S. at 695.

A. Qualified experts

The court found that the "trial court determined that Mr. Sweeny had sufficient knowledge to render opinion testimony under Rule 702." (App. A at 6.) The court found Sweeny "conduct[ed] an investigation and analysis" that provided "a favorable opinion" for Jackson at trial. (*Id*.) The court also noted Winters' expert testimony about the "mistakes made by both officers to strengthen the defense theory that this may have been an accidental shooting between these officers," and noted Counsel had additional experts review evidence. (*Id*.)

The court found that while "not all experts retained were called at trial, a diligent effort was made by defense counsel to explore potential defenses on behalf

of the Petitioner." (*Id*.) Finally, concerning Sweeny's allegedly deficient credentials, the court found Jackson's "argument is without merit," adding that:

> In virtually every case there may be an expert that has better credentials or greater knowledge in a particular subject. The key issue is that the trial court made an appropriate inquiry and determined Mr. Sweeny had the necessary credentials to testify as an expert witness.

(*Id*. at 7.)

The court correctly found that Jackson presented only conclusory criticisms about Counsel, not any evidence about their decision making or reasoning demonstrating their performance fell below the "range of acceptable professional assistance." *See Oliphant*, ¶ 29. Jackson asserts the State failed to rebut his IAC claims by not attaching affidavits from Counsel in its response. (Br. at 4.) However, the State does not bear the burden in PCR proceedings.

"The burden of rebutting the presumption [that counsel performed reasonably] 'rests squarely on the defendant,' and 'it should go without saying that the absence of evidence cannot overcome it.'" *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (citation omitted). "In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if [t]he record does not reveal that counsel took an approach that no competent lawyer would have chosen." *Id*. IAC claims require facts, not merely conclusory allegations. *State v. Wright*, 2001 MT 282, ¶ 31, 307 Mont. 349, 42 P.3d 753.

Jackson offered no information about Counsel's efforts to retain a crime scene reconstructionist or the availability of such a "qualified" person. There is no evidence that Counsel failed to properly vet Sweeny. Describing the circumstances of Sweeny's cross-examination does not establish Counsel had been derelict in choosing Sweeny to testify. Argument is not proof. Jackson merely speculates that Counsel made insufficient efforts to locate and screen an expert.

Jackson faults the Defense for allowing Sweeny, who was not a pathologist or wound expert, to present his theory that the bullet that struck Rutherford first struck either Janis or Jackson. (Br. at 14-26.) Jackson's vague suggestion that Sweeny was not qualified enough to explain the deficiencies in the State's case or point out "glaring discrepancies" in the physical evidence is unsupported by Sweeny's 30-plus years as a criminalist. (*Id*.) Jackson's claim also fails to appreciate that Sweeny's role was to sew reasonable doubt, not to necessarily prove that Jackson did not shoot the officers. Sweeny provided exactly the services the Defense asked him to.[9]

Jackson presumes that Counsel must have failed to make any effort to find a better expert because, in Jackson's hindsight opinion, Sweeny was not effective.

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[9]Sweeny had been asked to comment on the validity of the State's theory of the case based on the physical evidence and Janis' deposition and to "try to assist [the Defense] in preparing your defense to those facts, if there is any defense, based on what information I do have about the physical evidence and speculations about what the physical evidence" may show with additional testing. (Doc. 119, Ex. 2.)

This claim is a logically flawed, tautological argument and presumes that since some of Sweeny's theories were challenged at trial, Counsel must not have made any attempts to locate a better, more qualified expert who could undermine the State's theories. "For a petitioner to succeed on a claim of ineffective assistance of counsel based on their counsel's failure to present expert testimony, they must do more than merely speculate that such an expert exists or that the expert would testify persuasively to an alternate diagnosis." *Oliphant*, ¶¶ 41, 43.

During the seven years it took to file his amended PCR petition, Jackson did not find an expert to undermine the State's theory of the case, including an expert in pathology or wounds or provide any information about what pathologists or wound experts were available in 2004. Let alone if there were any who would support a "friendly fire" theory which Sweeny did provide. Without such evidence, Jackson could not overcome the heavy measure of deference that the court was required to afford Counsel.

Jackson also failed to present expert opinion to support a "friendly fire" defense or even establish Griffin would have been available to testify in 2004 (notably, Griffin's 2018 report relies upon references produced *after* Jackson's trial). Jackson's claim that Griffin's report offered a "new interpretation" of the evidence that would have "severely undermined the State's case" is unsupported. (Br. at 38-39.) Griffin's report only highlighted possible cross-examination

questions to challenge Janis' pretrial version of events (which Counsel did during cross-examination), and in fact confirmed parts of the State's theory.

In contrast, Sweeny's testimony provided Counsel a plausible alterative theory of how the shooting occurred. Sweeny's theory attempted to explain all the evidence, which included discrepancies between the evidence and Janis' statements (*e.g.*, no blood on Rutherford's gun grip while Jackson's hands and Rutherford's Maglite were covered in blood; no evidence on Jackson's legs that he was hit with asp and no blood on asp) and critiquing the investigation (*e.g.*, only testing blood samples from the field for human blood; not sending samples B16 and B17 for any testing; Rutherford's body was moved; no documentation of Rutherford's holster position; and neither the pepper spray cannister nor asp had been examined at the crime lab).

Notably, the State offered no rebuttal testimony concerning Sweeny's opinion about the blood spatter on Janis' shirt as blow back, which corroborated his theory that the entry wound on Janis' forearm was near the elbow crease. The State did not offer any rebuttal opinions about the high velocity spatter Sweeny noted on S10 and the top of Rutherford's gun or Sweeny's observations that there was no blood on Janis' asp as he would expect, given the blood on Jackson's pants.

Contrary to Jackson's suggestion that Counsel kept themselves "in the dark" (Br. at 21), the record demonstrates that Counsel made a strategic decision to

present Sweeny's friendly fire theory despite being aware of possible attacks this theory may suffer. As of April 2004, the Defense was aware of Dr. Johnson's opinion that Jackson's abdominal wound was a bite and the defense odontologist agreed. As of the summer of 2004, the Defense was aware the fatty tissue taken from Rutherford's shirt did not contain Jackson's DNA. Just before the trial, Counsel learned that Dr. Dale believed that Jackson's abdominal injury was a bite mark. Additionally, the Defense knew Sweeny had relied on the documentation of Janis' doctors in Billings that there was gunshot powder on his arm, indicating a close contact wound; but at trial, the doctors had walked back those observations.

Counsel presented Sweeny's theories fully aware of these limitations. Absent evidence to the contrary, their trial strategy was entitled to the strong presumption of reasonableness *Strickland* requires. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) ("*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'"). "Counsel's decisions related to presenting the case, including whether to introduce evidence or produce witnesses, generally constitute a matter of trial tactics and strategy, and we will not find ineffective assistance of counsel in such tactics." *McGarvey v. State*, 2014 MT 189, ¶ 25, 375 Mont. 495, 329 P.3d 576. Jackson failed to establish Counsel had not performed reasonably, particularly when considering Sheehy and Petersen were

veteran defense attorneys with years of criminal trial experience, *Chandler*, 218 F.3d at 1316, and the limitation of possible defenses that were available for Jackson.

Jackson's critique of the Defense's presentation constitutes improper second-guessing that *Stickland* prohibits. As this Court explained in *Garding*, to find deficient performance, it would have:

> to engage in second guessing with "20/20 hindsight" of the choices made by her counsel. Only after a trial and guilty verdict can it be known that "Plan A defense" did not succeed, and raise interest in a "Modified Plan A defense" or an alternative "Plan B defense," but the law expressly prohibits such consideration. Instead of strategic alternatives, we are to consider whether the performance actually rendered by counsel constituted reasonable professional service under the circumstances, with a strong presumption that it did.

Garding, ¶ 22 (internal citations and quotations omitted). *See also Garding v. Mont. Dep't of Corr.*, 105 F.4th 1247 (9th Cir. 2024). Just as here, Garding's Counsel provided multiple theories about what occurred through cross-examination of law enforcement officers and eyewitnesses and highlighted flaws in the investigation. *Id*., ¶¶ 18-21 (held, not hiring an accident reconstruction expert was within the "wide range of professionally competent assistance"). *Garding*, ¶ 23.

The Defense's strategies, including presenting Sweeny's theories, were reasonable given the strength of the State's case. Jackson's criticisms about Counsel not finding a more qualified expert does not demonstrate an "error so

serious" that their performance fell below the constitutional standard of assistance identified by the first prong of *Strickland*.

The court's finding, that "diligent effort was made by defense counsel to explore potential defenses," is fully supported in the record. (App. A at 6.) Counsel immediately retained an investigator and secured expert witnesses who provided various platforms from which to attack the State's case. Counsel evaluated the evidence and expert opinions relative to the evidence in formulating trial strategies. Significantly, the Defense secured a sworn pretrial statement from Janis that Winters and Sweeny could review and Counsel used to impeach Janis at trial.

The Defense relied upon a general denial defense and attacked the State's case through various means. Through the testimony of Drs. Rich and Stratford, the Defense argued that Jackson had been in an alcoholic blackout and perhaps could not be held accountable for his physical acts. Winters thoroughly criticized how the crime scene was processed to undermine all the conclusions the State drew therefrom. Winters also pointed to mistakes the deputies made that escalated the situation and in questioning Janis' performance, undermined his credibility. Finally, Counsel presented plausible, albeit challengeable, alternative theories of the offense through Sweeny. Jackson did not establish that Counsel's efforts to create reasonable doubt in the State's case constituted deficient performance.

This Court "accords great deference to Counsel's exercise of judgment in determining appropriate defenses and trial strategy," *Oliphant*, ¶ 43. In *Oliphant,* this Court affirmed denial of PCR relief because the petitioners's IAC claim relied upon considerable speculation in contrast to *Wilkes v. State*, 2015 MT 243, ¶ 26, 380 Mont. 388, 355 P.3d 755, where the appellant established counsel had been ineffective by going "beyond mere speculation by identifying multiple experts their counsel could have called at trial". *Oliphant,* ¶ 40. This Court further found that Oliphant's counsel's decisions regarding expert testimony, "could be explained by manifold, acceptable rationales such as the nonexistence of an expert who could persuasively counter the overwhelming testimony provided by the five State experts." *Id.* The same "acceptable rationale" applies here.

Jackson has not presented any alternative expert opinion that could have overcome the State's evidence. It is insufficient to simply suggest different actions by his counsel could have altered the trial's outcome. *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122.

Even if Jackson had met his burden to establish that Counsel should have done a "better" job consulting experts and retaining "more qualified experts," he has not demonstrated that there is a reasonable probability the outcome of his trial would have been different had Counsel not called Sweeny to testify. *Oliphant,* ¶ 44.

As the court correctly concluded, even if Counsel had performed deficiently, Jackson could not meet the second *Strickland* prong. The court found that "[t]he State presented a compelling case that Petitioner was guilty," noting that the State:

> presented 53 witnesses and 240 items of physical evidence. In addition, Deputy Janis testified that he saw Jackson holding the gun immediately after two shots were fired, and he returned fire. He further testified that he did not shoot Deputy Rutherford or himself and that he did not believe that Deputy Rutherford accidentally shot him. The evidence presented at trial overwhelmingly supported a guilty verdict.

(App. A at 9-10.)

A petitioner cannot demonstrate that his counsel's failure to hire an expert was prejudicial if he fails "to establish that an expert could be found who would testify affirmatively about her defense theory." *Elliot v. State*, 2005 MT 10, ¶ 10, 325 Mont. 345, 106 P.3d 517. Jackson has not shown an alternative expert opinion that Sweeny missed or would have refuted the State's theory to alter the outcome of his trial. Rather, Griffin's report simply repackaged the evidence that Counsel highlighted during Janis' cross-examination and argued to the jury. *See Stock v. State*, 2014 MT 46, ¶ 22, 374 Mont. 80, 318 P.3d 1053 (when alleged lacking expert would have testified to something that was already established in record petitioner cannot establish that but for failure to get better expert, there was a reasonable probability that the result of the trial would have been different).

Nothing in Griffin's report *refuted* the physical evidence the State relied upon to corroborate Janis' testimony. In fact, Griffin verified several aspects of the State's theory; only three men were in the field, two were armed; Rutherford could not have shot himself; Rutherford's gun was fired twice in Grid-12 where large pools of blood from both deputies were found; the location of the shell casings, asp, and pepper spray cannister matched evolution of events as described by Janis.

Additional corroborating evidence came from Janis' repeated exclamations that Jackson had shot him and Rutherford and the witnesses' description of Janis' authentic reaction to Jackson coming towards them that confirmed Janis truly believed Jackson was still armed. Jackson's excited utterances were also corroborative and indicative of guilt (*e.g.*, declaring he was not going back to prison and that he brought this on himself; attempting to deflect responsibility by claiming he was covering up for someone else).

Combining these corroborating pieces of evidence with the physical evidence that supported Janis' description of events confirms the court's conclusion that the State presented an overwhelmingly strong case against Jackson. *See also Jackson*, ¶ 32 (concluding Janis' testimony was supported by "substantial circumstantial evidence . . . from which the jury could have concluded that Jackson wrestled the gun from Deputy Rutherford and discharged the firearm, killing Deputy Rutherford and wounding Janis").

Jackson references several federal cases which are not compelling as they are factually/procedurally distinguishable. For instance, in *Duncan v. Ornoski*, 528 F.3d 1222 (9th Cir. 2008), the court found Counsel performed deficiently by failing to investigate the potential for blood evidence to lessen Duncan's culpability when an expert testified during the collateral proceeding that potentially exculpatory serological evidence had been available but not discovered by counsel. *Id*. *See also Hinton v. Alabama*, 571 U.S. 263 (2014) (three expert witnesses testified in collateral proceedings to establish deficient performance of attorney who failed to pursue additional funds for expert despite court invitation). Jackson provided no such indication or suggestion that such compelling collateral evidence existed as he failed to produce an expert who could support the "friendly fire" defense or undermine the State's theory with more than one example of how Janis' deposition may have conflicted with the physical evidence.

Jackson did not meet his heavy burden to establish that the court's findings of fact were clearly erroneous or that it incorrectly applied *Strickland* by denying this IAC claim. *Oliphant*, ¶¶ 29, 38.

B. Defense theories

The court rejected Jackson's claim that Counsel was ineffective by not pursuing a better defense theory, explaining that:

> The Defense presented a general denial defense relying primarily on the theory that Deputy Rutherford's death was caused by

> an accidental shooting or friendly fire from Deputy Janis. This theory was conveyed to the jury consistently throughout the trial. The alleged failure of Defense counsel to use certain key phrases such as "friendly fire" or "glaring discrepancy" often enough does not detract from the theory being presented to the jury [throughout] this case.
>
> Petitioner discusses counsels' closing argument at trial numerous times as evidence of their ineffective assistant [sic]. Defendant repeatedly highlights a statement where defense counsel advised the jury during closing that they may discount part of Mr. Sweeney's testimony. Petitioner treats this statement as equivalent to defense counsel completely abandoning their defense strategy during closing. However, instructing the jury that they are free to discount testimony they do not find credible, especially when it is from defense witnesses, is not equivalent to sabotaging your own case, intentionally or otherwise. In fact, it seems likely the strategy was to preserve defense counsel's credibility, even at that late stage, to discount the parts of the defense theory that did not appear to be finding purpose with the jury.
>
> In nearly each example Petitioner references where defense counsel makes a statement contrary to Mr. Sweeney's testimony, it is followed up with an argument that supports another part of Mr. Sweeney's theory. Again, as part of a general denial defense, counsel is trying to poke holes in the State's case, which does not necessitate building a plausible case of their own. It simply necessitates causing jurors to doubt the State's case. Discounting parts of the defense theory that did not appear to be finding traction with the jury in order to bolster defense's credibility for the points they still could make, is a sound strategy, especially when the facts were strongly in the State's favor to begin with. It is not uncommon for defense counsel to make adjustments during trial based on what does and does not appear to be working.

(App. A at 7-8.) The court's findings were not clearly erroneous.

Here, Counsel was constantly exploring possible defense strategies. Initially, the Defense gave notice of justifiable use of force (JUOF) and mistaken identity defenses. (Doc. 62.) The Defense had expert testimony from Winters

available to support a JUOF defense. (Doc. 143 at 8.) Ultimately, Counsel did not present affirmative defenses and instead pursued a general denial defense using various tactics to create reasonable doubt (*i.e.*, pointing to missing or contradictory evidence; providing plausible alternative explanations of the evidence; attacking credibility of State witnesses). The Defense was not obligated to present infallible alternative theories or prove that Jackson did not shoot the deputies. As Petersen explained during the hearing on Jackson's second motion for new trial, "It is not our job to prove that Mr. Jackson did not do this, [i]t's not our job to prove that Mr. Janis did do this. Our function as Counsel is to point out why there is reasonable doubt in a case." (3/23/06 Tr. at 119-20.)

Counsel met this obligation by presenting strong critiques about how the crime scene was handled and the breaches in procedure and policy that called the deputies' actions into question. Sweeny provided an alternative theory of how the shooting occurred that took full advantage of the lack of evidence tying Jackson to Rutherford's gun. The Defense also questioned whether Jackson's intoxicated state left him unable to act voluntarily. Finally, Counsel conducted thorough and robust cross-examination of the State's witnesses, particularly Janis. Janis' cross-examination was even more effective because Counsel had deposed Janis so they had several avenues to challenge his inconsistent statements.

Jackson points to Counsel's post-trial pleadings (Br. at 45) to suggest they believed the "glaring discrepancies" was the "better" theory and to bolster his allegations that Counsel failed to "effectively" develop and present this theory at trial. This is exactly the type of second-guessing *Strickland* prohibits. "[T]he *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. 86 at 105 (2011). The relevant inquiry under *Strickland* is not what Counsel could have pursued, but rather whether the choices made by Counsel were reasonable. 466 U.S. at 690.

The court correctly found that Jackson mischaracterized Counsel's closing arguments as abandoning or discounting Sweeny's testimony. The court also correctly found that Counsel constantly challenged whether the State had met its burden. Throughout the case, from *voir dire* through closing arguments, the Defense consistently reminded the jury that it was not Jackson's burden to prove anything while simultaneously sowing seeds of doubt about the State's interpretation of the evidence. To compliment the theory that the State could not meet its burden, Counsel provided an alternative explanation of the events.

Pursuing alternative theories does not constitute deficient performance. There is no one formula for defending against criminal charges. "There are countless ways to provide effective assistance in any given case. Even the best

criminal defense attorneys would not defend a particular client the same way." *Strickland*, 466 U.S. at 669. "[C]ourts must indulge [the] strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment [and are] required not simply to give [the] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons Counsel may have had for proceeding as they did." *Pinholster*, 563 U.S. at 196 (internal citations omitted).

Again, Jackson references several federal cases that are not helpful given the factual and procedural differences. *See Fugate v. Head*, 261 F.3d 1206 (11th Cir. 2001) (No IAC when trial counsel described reasons behind decisions about investigations and calling witnesses and alleged missing information would not have impacted outcome in guilt or sentencing phases); *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993) (IAC established when trial counsel, who erroneously believed the defenses would be inconsistent, relied solely on alibi defense that was supported only by defendant's father and did not further investigate possible expert urologist testimony that defendant was physically incapable of rape). Unlike *Fugate* and *Foster*, Jackson offered only speculation about Counsel's strategic decisions and failed to proffer any evidence to establish how a different or better argued defense strategy was available and would have resulted in a different outcome.

As this Court has reiterated, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Whitlow*, ¶ 32. Jackson's argument improperly presents a subjective question that relies entirely upon conjecture rather than adhering to the proper test from *Strickland*: petitioner must establish counsel's performance fell below an *objective* standard of reasonableness considering all the circumstances. *Whitlow*, ¶¶ 12-20. Simply alleging that counsel could have done "better," *State v. Hagen*, 2002 MT 190, 311 Mont. 117, 53 P.3d 885, or that a different attorney would have acted differently, *Hartinger v. State*, 2007 MT 141, ¶¶ 21, 31, 337 Mont. 432, 162 P.3d 95, is wholly insufficient under *Strickland*.

"The object of an ineffectiveness claim is not to grade counsel's performance." *Strickland*, 466 U.S. at 697. Rather, the court was tasked with determining if Counsel's performance was "the result of reasonable professional judgment" and within "the wide range of professionally competent assistance" considering all the circumstances. *Id*. at 690. The court correctly determined that it was.

Jackson advanced hindsight critiques and conclusory allegations, not actual evidence to discredit Counsel's decision-making and performance. Jackson failed to meet his "heavy burden" required to establish the court erred when it found Counsel's defense strategy was not deficient. *Whitlow*, ¶ 14. Nor did Jackson

carry his burden to establish that but for Counsel's presentation of Jackson's defense, the outcome would have been different, especially when considering the totality of the evidence. *Strickland*, 466 U.S. at 694-95.

Even if Counsel could have emphasized the "glaring discrepancy defense" more thoroughly in *voir dire*, opening, and through testimony, the outcome of the trial would not have been different given the strength of the State's case against Jackson. Additionally, the main "discrepancy" theory Jackson relies upon—lack of his blood on Rutherford's gun—is flawed.

This theory improperly presumed the condition of Jackson's hands at the jail was unchanged since Rutherford's gun was dropped and ignores that Jackson was bleeding from two cuts on his head and his abdominal wound after he dropped the gun. It also ignores that Janis, Scott Baker, and Fred Green saw Jackson reaching down with his right hand, which was where his abdominal wound was bleeding. Rutherford's Maglite and Jackson's pants were covered in Jackson's blood and found near each other. Thus, when Jackson was still carrying the Maglite and walking towards the patrol car, his hands were exposed to blood coming from his wounds which explains the blood on the Maglite and Jackson when he was in the patrol car and later at the jail.

Thus, even if Counsel had focused "more" on the "glaring discrepancy" defense rather than presenting Sweeny's alterative theory, given the strong

evidence of Jackson's guilt as discussed above, Jackson cannot establish he was prejudiced, and his second IAC claim must also fail. As the Ninth Circuit has observed, often "the law and facts will be so overwhelmingly in favor of the government that Counsel can do little more than try to poke holes in the government's case in cross-examination and when presented with a difficult case to defend, the Sixth Amendment does not condemn an attorney for having to "pursue a bad strategy . . . where no better choice exists." *Hendricks v. Calderon*, 70 F.3d 1032, 1042 (9th Cir. 1995).

Counsel's defense strategy did not deprive Jackson of a fair trial. Jackson did not meet his "heavy burden" to establish the court's findings of fact were clearly erroneous or its application of the law was incorrect. *Oliphant*, ¶¶ 29, 38.

CONCLUSION

The district court's order denying Jackson's amended postconviction petition should be affirmed.

Respectfully submitted this 14th day of May, 2025.

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By: */s/ Katie F. Schulz*
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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 9,951 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Katie F. Schulz
KATIE F. SCHULZ

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.

APPENDIX

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-14-2025:

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