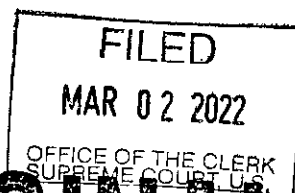


No. 21-7409



ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JORY RUSSELL STRIZICH — PETITIONER

(Your Name)

VS.

STATE OF MONTANA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF MONTANA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jory Russell Strizich

(Your Name)

900 Highland Avenue

(Address)

Cheshire, CT 06410

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

Whether the Sixth and Fourteenth Amendment right to defend in a criminal case can be denied on unique state evidentiary rulings? Stated another way, does the state court's evidentiary ruling on admissibility of flight evidence deny the Sixth and Fourteenth Amendment right to defend in a criminal case under Holmes v. South Carolina, 547 U.S. 319 (2006)?

LIST OF PARTIES

- [X] All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- State v. Daniels, No. BDC-2017-20, District Court of the First Judicial District, In and For the County of Lewis and Clark, Montana. Judgment entered September 17, 2017.
- State v. Daniels, No. DA 17-0685, Supreme Court of Montana. Judgment entered September 10, 2019.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at State v. Strizich, 2021 MT 306; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Montana First Judicial District court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 11-30-2021.
A copy of that decision appears at Appendix ____ A ____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments VI and XIV to the United States Constitution, which provide:

Amendment VI

In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

Jory Russell Strizich was charged by second amended information in the First Judicial District Court in Lewis and Clark County, Montana, with the following: Count I - Aggravated Burglary (Victim: Marshall and Sonja Buus), in violation of Mont. Code Ann. § 45-6-204(2)(b)(ii), or in the alternative, Count II - Lack of Accountability to Aggravated Burglary, in violation of Mont. Code Ann. §§ 45-2-301, 45-2-302(3), 45-6-204(2)(b)(i); Count III - Burglary (Victim: Dale and Maryanne Mayernik), in violation of Mont. Code Ann. § 45-6-204(1)(a); Count IV - Tampering with or Fabricating Physical Evidence (Victim: Kelsey Lippert), in violation of Mont. Code Ann. § 45-7-207(1)(a); and Count V - Criminal Possession of Dangerous Drugs (methamphetamine), in violation of Mont. Code Ann. § 45-9-102(1). All counts were alleged to have occurred on December 28, 2016. (D.C. Dkt. 65).

It was the State's theory of the case that Strizich and his armed friend Kaleb Daniels drove, in Strizich's vehicle, to Wolf Creek, MT, to break into cabins to steal items inside. That cabin Marshall and Sonja Buus surprised Strizich and Daniels in the act of burglarizing their cabin. When confronted Daniels attempted to shoot Marshall and then ran for cover. Strizich then caused Marshall bodily injury by walking towards him. After shooting Strizich in the leg Marshall and Daniels opened fire on each other. Strizich

and Daniels then fled the scene. That Strizich, who had been shot in the leg, crawled approximately half a mile through the woods and creeks and broke into Dale and Maryanne Mayernik's cabin to hide from (i.e., obstruct) law enforcement. That inside the Mayernik's cabin Strizich concealed a valuable belt buckle previously stolen from Kelsey Lippert to avoid being held legally accountable for it. That upon a search of Strizich's vehicle, pursuant to a search warrant, law enforcement discovered a glass pipe, which contained meth. (D.C. Dkt. 2; 27, 63).

Daniels proceeded to trial in July of 2017. He was ultimately convicted of attempted deliberate homicide, aggravated burglary and tampering with or fabricating physical evidence. On September 17, 2017, the district court sentenced Daniels to a total term of 120 years imprisonment. State v. Daniels, 2019 MT 214, 397 Mont. 204, 448 P.3d 511.

Strizich's five day jury trial began on October 2, 2017, before the Honorable Michael McMahon. The State was represented by County Attorney Leo Gallagher and Deputy County Attorney Jeff Sealéy. Strizich was represented by defense attorney Bryan Norcross. The first order of business was to arraign Strizich on the second amended information. (Tr. Vol. I at 13).

Before opening statements the State indicated that it intended to put on evidence that, three weeks after the crimes Strizich was alleged to have committed, he left a medical facility and got into the passenger seat of a vehicle driven by a juvenile W.L. who,

along with occupants of a second vehicle, led police on a high-speed chase and crashed. (Id. at 134-140). That weeks prior to leaving the medical facility detectives informed Strizich that there was a warrant for his arrest. (Id.). That W.L. later pled guilty in youth court to criminal endangerment because of his actions. (Id. at 140). According to the State this evidence "demonstrated [Strizich's] consciousness of guilt." (Id. at 142).

Strizich's counsel objected to the admissibility of this evidence:

In terms of the fleeing from Elkhorn. I'm going to object to that. That's not a listed offense, he's not charged with escape. So it has nothing to do with the burglary that he's alleged to have committed. It is not an offense charged and it is other acts that the State is trying to bring in simply to establish that my client is a bad person or that he was fleeing from a crime. That's not the case.

(Id. at 134). Strizich's counsel also pointed out that the departure from the Elkhorn medical facility happened three weeks after the alleged burglary, and that Strizich would not have been aware of what detectives told him because he had been shot and undergone surgery and was under the influence of medication at that time. (Id. at 140-141).

The district court ultimately overruled Strizich's objection, stating:

[T]he Montana Supreme Court has said numerous times that testimony showing or tending to show flight or concealment by the defendant may be taken into consideration by a jury in determining whether he's guilty of the offense charged. Flight or concealment may be...considered by the jury as a circumstance tending to prove the consciousness of

ment may be...considered by the jury as a ~~circum~~ circumstance tending to prove the consciousness of guilt,...

The Court believes that the evidence with respect to Mr. Strizich's fleeing from Elkhorn facility is relevant because it tends to show consciousness of guilt and therefore tends to show the commission of the crimes charged and the defendant's responsibility for it.

(Id..at 168-169)(~~emphasis added~~): Further, Citing State v. Moore, 254 Mont. 241, 836 P.2d 604 (1992), the district court ruled that "Rule 404(b), as the Montana Supreme Court [h]as indicated in these situations, as to other crimes does not apply[.]" (Id.).

Furthermore, Strizich's counsel noted that the allegation the vehicle W.L. was driving was stolen was not "an accurate representation of the facts." (Id. at 170). The State responded "It was a stolen car, but we don't have to say that." (Id. at 171). The district court agreed with the State and excluded any reference to the fact that the vehicle W.L. was driving was stolen. (Id.).

On the third day of trial the State explained:

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

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

(Tr. Vol. III at 253-254).

Strizich's counsel objected:

Mr. Strizich was a passenger, was not a driver, was not charged with any offense related to any high speed chase, anything in the vehicle or anything else. If the State wants to say that this individual committed a crime going on a high speed chase, I think it's not relevant to the charge Mr. Strizich is facing now.

(Id. at 254).

On the fourth day of trial the State elicited testimony from three witnesses, including two deputies from the Lewis and Clark County Sheriff's Office, providing details of Strizich's departure from Elkhorn and W.L.'s high-speed chase and crash. (Tr. Vol. IV at 152-174). Upon the State's motion, the district court then took judicial notice the youth court dispositional order, including W.L.'s admissions to the crime of criminal endangerment and details surrounding his high-speed police chase and crash with Strizich as his passenger. (Id. at 176-179).

The district court then instructed the jury:

Ladies and gentlemen of the jury, at this time the Court is going to notify you that it has taken judicial notice of cause number DJ 2017-1, in the matter of [W.L.]. The Court in this regard, the Court takes judicial notice that [W.L.] admitted to the offense of criminal endangerment in that on or about January 21, 2017, at approximately 6:46 p.m., he knowingly engaged in conduct that created a substantial risk of death or serious bodily injury to another when he was observed driving a silver Honda four-door passenger car with a male in the passenger seat in excess of 135 miles an hour northbound on Interstate 15 through the Sieben Flats area while being pursued by law enforcement vehicles who had their lights on. After he exited the interstate highway onto Recreation Road driving

65 miles an hour, he lost control of the car and spun into a snowbank.

In this regard the Court takes further judicial notice of Judge Seeley's February 24, 2017 order in DJ 2017-1, and the petition in that matter filed on or about January 27, 2017.

(Id. at 179-180). (emphasis added).

Marshall and Sonja Buus testified that on December 28, 2016, they drove to their cabin in Wolf Creek. (Tr. Vol. II at 52). As they approached the cabin they noticed an unknown vehicle parked in their driveway. (Id. at 62). As Marshall was driving up the driveway he saw through the window of the cabin that lights were on inside and told Sonja "they have broken into the cabin." (Id. at 64-65). As Marshall pulled around the front of the cabin Sonja exclaimed "there they go." (Id. at 66). Sonja had seen two individuals (Daniels and Strizich) go around the bottom corner of the cabin as Marshall parked. (Id. at 205).

Marshall testified that he put his truck in park, told Sonja "grab my gun" and got out of the truck and ran back down the driveway towards the fleeing suspects' vehicle. (Id. at 67, 119). As Marshall approached, Daniels got into the driver seat and started the vehicle. (Id. at 67). Marshall opened the front passenger door, leaned inside the vehicle and yelled at Daniels, "What the hell are you doing here?" (Id.). Daniels pulled a chrome-plated pistol out of his pocket and "stuck it in [his] face." (Id.). Daniels yelled either "stay the hell back or get the hell back." (Id.). Marshall stepped away from the vehicle and his wife Sonja handed him his own .45 caliber pistol. (Tr. at 68).

his wife Sonja handed him his own .45 caliber pistol. (Id. at 68). Daniels got out of the vehicle and, leaning over the top, tried to shoot Marshall. (Id.). Marshall then racked the slide of his pistol to load a live round, at which point Daniels moved away. (Id.).

Marshall then leaned back inside the vehicle to shut it off and take the keys. (Id. at 68-69). That is when he noticed Strizich walking up the driveway. (Id.). He began telling Strizich "stay the hell away" and pointed his pistol at him. (Id. at 69).

Marshall testified that Strizich did not have a gun or anything else in his hands, nor was Strizich saying anything threatening to Marshall. (Id. at 142-143). All Marshall perceived was Strizich's "form" coming towards him. (Id. at 143).

Marshall fired a warning shot into the ground and repeatedly told Strizich to "stay the hell away." (Id. at 69). According to Marshall, Strizich continued walking towards him. (Id.). Marshall then fired a second warning shot towards the ground. (Id.). When Marshall fired the second shot, however, Strizich stepped into the pathway of the bullet causing it to strike his leg, shattering his tibia. (Id. at 69-70). Strizich went down and exclaimed "you shot me", and began crawling away. (Id. at 70).

Marshall and Daniels then opened fire on each other. (Id.). Daniels fled the scene on foot. (Id. at 71). Strizich crawled away. (Id. at 79).

Sonja Buus testified that many of the Buus' belongings were out of place and that the condition of the cabin was different from how she left it. Someone had opened the cupboards, closets, and nightstand drawers, removed the vacuum from the hallway closet, unplugged the television, and left a pile of the Buus' items, including a fuel canister, ammunition, and torches, on the kitchen island. (Tr. Vol. II at 219-222). Guns were stacked by the back door that had been removed from their bedroom closet. (Id. at 224). Sonja also found a hammer that did not belong to them. (Id. at 225).¹

Sonja also testified to Marshall's demeanor immediately after the incident. (Id. at 229). According to Sonja, Marshall was "shook up" and "upset." (Id.). In the months after the incident Marshall was not sleeping real well and "gets really upset about it." (Id. at 227). Sonja attributed Marshall's emotional distress to having a gun stuck in his face. (Id. at 230).

1: The Montana Supreme Court's finding that "bolt cutters" were discovered inside the cabin that did not belong to the Buus' is factually incorrect. See Strizich, 2021 MT 306, P8. The State's evidence shows that the bolt cutters were actually found inside of Strizich's vehicle. (Tr. Vol. IV at 70-71). Sonja Buus testified that the bolt cutters were not hers and did not come from inside her cabin. (Tr. Vol. II at 226).

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The State called DNA analyst Joe Pasternak, who analyzed several pieces of evidence collected from the Buus' cabin, including a cigarette butt. (Tr. Vol. III at 210). The DNA profile developed from the cigarette butt matched the known DNA profile of Daniels. (Id.). Strizich's DNA was not located on any items collected from the Buus' cabin. (Id. at 208-220).

Latent fingerprint examiner Chad Day testified that he examined several latent prints recovered on various pieces of evidence, including a plastic bin collected from the Buus' cabin. (Tr. Vol. IV at 145). Day determined that the print recovered from the plastic bin was that of Daniels' left ring finger. (Id. at 143). Strizich's fingerprints were not on any of the items. (Id. at 150).

Strizich testified in his own defense. (Tr. Vol V at 45-146). Strizich maintained that he did not burglarize the Buus' cabin or cause or attempt to cause bodily injury to anyone.

Strizich testified that on December 28, 2016, he and Daniels wanted to get "out of town for the day" and go on a scenic drive. (Id. at 46-52). With Strizich driving his Dodge Durango the pair ultimately decided to drive around the Wolf Creek area. (Id.). The weather was cold, with freshly fallen snow and ice on the ground. (Id. at 53). Unbeknownst to Strizich, Daniels was armed with a pistol concealed in his pocket. (Id. at 95).

Strizich and Daniels drove around for awhile, got stuck a couple of times and eventually ended up on Little Wolf Creek Road. (Id. at 114-115).

(Id. at 53-54). At some point, Strizich heard the low-fuel indicator in his vehicle start to ping. (Id. at 54). Concerned about getting stranded in the mountains without gas, cell service, or internet the pair decided to inquire at a nearby cabin if someone might be able to provide gas and directions to the nearest service station. (Id. at 54-56). The cabin they pulled up to, which had fresh tracks in the driveway indicating someone might be home, was owned by Marshall and Sonja Buus. (Id. at 55). As Strizich and Daniels would soon learn, although the Buuses were not at their cabin, they were on their way to it.

Strizich parked in the driveway of the Buus' cabin, gave Dani Daniels \$10 and instructed him to ask the occupants if they could purchase some gas. (Id. at 120). Strizich stayed in the vehicle listening to music and "absent-mindedly" playing with his phone. (Id. at 59).

After waiting approximately ten minutes for Daniels to return, Strizich went in search of him. (Id. at 123-124). Strizich discovered Daniels burglarizing the cabin. (Id. at 60-61). Strizich entered the cabin "to talk sense into" Daniels and stop what he was doing. (Id. at 61). However, Daniels would not listen, so Strizich left the cabin to return to his vehicle. (Id. at 62)..

As he was returning to his Durango, Strizich saw another vehicle approach his own. (Id. at 62-63). Surprised and wanting "no part of any of this," Strizich went around the other side of

the cabin. (Id. at 63). His goal was to get into his Durango and drive away. (Id.). Daniels, who had also seen the approaching vehicle, ran past Strizich toward the Durango. (Id.).

That is when Strizich saw another individual (Marshall Buus) approach at a run "screaming something." (Id. at 64). This is what Strizich was trying to avoid. (Id. at 64-65).

Marshall approached the Durango, which was now occupied by Daniels. (id.). Strizich then watched Marshall turn around and return toward his own vehicle. (Id.). Marshall's wife Sonja met Marshall half-way and handed him a pistol. (Id. at 65). Marshall took the pistol, "racked the slide," and again approached the Durango. (Id.). Strizich "took off running" for cover. (Id. at 65-66).

By this time Daniels was in the driver seat of the Durango. (Id. at 66). From his "hunkered down" vantage point, Strizich witnessed Marshall pointing his gun at Daniels. (Id.). Strizich did not witness Daniels point his own gun at Marshall, likely because of his position. (Id. at 67-68; Daniels, 2019 MT 214, ¶13, 397 Mont. 204, 448 P.3d 511). Nonetheless, Strizich decided the time had come for him to "deescalate the situation and just explain to [Marshall] what had happened." (Id. at 66-67).

Strizich put his "hands up" and "began walking back towards the vehicle toward where things were happening." (Id. at 67). As Strizich approached, he could see Marshall with his gun trained

on Daniels. (id.). He could also hear both screaming at each other. (Id.). Daniels was pleading with Marshall. (Id.). Daniels got out the Durango and told Marshall "I'm sorry, sir, I'm sorry," and then took off running. (Id.).

Strizich implored Marshall to calm down. (Id. at 68). Marshall turned, pointed his pistol at Strizich, and told Strizich to "stay the hell back." (Id.). Marshall entered the Durango, took out the keys, and then "crawled back out." (Id. at 68-69). While this was happening, Strizich - with his hands still in the air -² moved out into the open. (Id.).

As Strizich tried to explain to Marshall and Sonja what had happened, Marshall came around the back of the Durango and fired the pistol. (Id. at 71). Even at trial, Strizich did not know if the shot was accidental or intentional. (Id.). Regardless, the bullet went into the ground and "a bunch of rocks shot up from the ground." (Id.). Particles of rock hit Strizich, and he flinched. (Id.). Marshall then raised the gun and pointed it directly at Strizich's chest. (Id.).

Strizich knew Marshall was going to shoot him. (Id. at 71-72). He yelled, "stop, stop," and was waiving his hands. (Id. at 72). Then, Marshall shot Strizich. (Id.).

2: Sonja Buus testified that when she saw Strizich approach from the driveway he had his hands up and was yelling at Marshall to "stop." (Tr. Vol. II at 239).

Strizich fell backwards and hit the ground. (Id.). He did not know he had been shot. (Id.). "I just thought I got jelly legs." (Id.). Marshall continued to train his gun on Strizich. (Id.). Then Marshall turned and "fired another shot into the ground." (Id.).

After attempting to stand back up, Strizich realized he had been shot. (Id.). Strizich grabbed his leg and exclaimed "you shot me." (Id.) He had been shot a few inches below the kneecap, breaking his tibia. (Id. at 72-73). Unable to run Strizich began crawling. (Id. at 73). Hearing gunshots and believing Marshall was trying to "finish [him] off," Strizich began "scrambling, kind of rolling in the snow, just trying to make [himself] a harder target to hit." (Id.). In reality, the gunshots were Marshall and Daniels shooting at each other.

Strizich was able to crawl between some trees by the cabin. (Id. at 74). From that vantage point, he saw Daniels running. (Id.). He saw Daniels fall and slide in the snow. (Id. at 75). When Daniels got back up Strizich yelled after him, "help me," but Daniels just took off running down the road. (Id.).

Strizich testified he then witnessed Marshall pursue Daniels down his driveway and "fire[] two more shots at [Daniels] when he was running away, trying to shoot [Daniels] in the back." (Id.). Neither shot hit Daniels, and Strizich did not see Daniels return fire. (Id.).

Strizich, who could still see Marshall, asked Marshall why he

Strizich, who could still see Marshall, asked Marshall why he had shot him. (Id. at 76). Marshall replied, "stay there," and ran back up the driveway toward the cabin. (Id. at 77). Having just been shot, heard all the gunfire, and watched Marshall try to shoot Daniels in the back, Strizich was "scared for [his] life" and set off crawling. (Id. at 77-78).

Strizich "crawled across the road into the woods...and just kept crawling as fast as [he] could." (Id. at 78). Strizich crawled through deep snow and a creek until he came to an empty cabin owned by Dale and Maryanne Mayernik. (Id. at 78-79). He was "frozen solid" and "in pain." (Id. at 79).

Not wanting to cause "a bunch of damage," Strizich broke a window in the Mayernik cabin and entered. (Id.). Strizich could not find a phone, but was able to locate rudimentary medical supplies. (Id. at 80). He found a tampon to apply to his leg, some pain reliever, and scissors. (Id.). He also drank a couple glasses of water because he was "really dehydrated." (Id.).

Using a wooden chair as a walker, Strizich made his way to the fireplace. (Id.). He lit a fire, moved a chair to the fire and covered up with a blanket. (Id. at 81-82). He took off his coat, stripped off his clothes (keeping his underwear on) and laid them out to dry. (Id.). He used the tampon on his wound and his belt as a tourniquet. (Id.). It was "very painful," but he "wanted to try and reduce the bleeding." (Id. at 82). "[P]hysically, mentally, emotionally exhausted," Strizich fell asleep. (Id. at 84).

When he awoke, the cabin was "lit up." (Id.). He could hear someone yelling commands like "if you're in there, come to the door. Open it." (Id.). As fast as he could, Strizich began putting on his clothes. (Id.). However, he was "in way too much pain" at that point. (Id. at 85). He settled back onto the ottoman and called out to the officers outside the cabin. (Id.). Unable to gain entry through the door, one officer entered through the same window through which Strizich entered. (Id. at 85-86).

After securing the cabin for their own safety and treating Strizich, an ambulance transported Strizich to St. Peter's Hospital in Helena, MT. (Id. at 86-88). Strizich underwent surgery where doctors placed a steel rod in his leg and several screws to hold it together. (Id. at 95). Strizich was "being given a lot of heavy pain meds" while at the hospital. (Id. at 96).

Strizich testified that his memory of being at the hospital was "foggy" because of the pain medications he was on. (Id.). Strizich vaguely remembers detective William Pandis visiting him in the hospital, but does not recall the detective displaying a warrant for his arrest or telling him there was an arrest warrant for him. (Id.).

After spending a couple of weeks at St. Peter's Hospital, Strizich was released to the Elkhorn Physical Rehabilitation Center in Clancy, MT. (Id.). He was there for approximately "a week-and-a-half to two weeks." (Id.).

Strizich testified that he eventually discovered he had an arrest warrant out and a \$100,000 bond. (Id. at 97). He "didn't want to go to jail and [he] was just scared." (Id.). His fear led him to recruit some friends to come to Clancy and "get [him] out of there." (Id.). Strizich's departure from Elkhorn resulted in a high-speed chase with law enforcement north on Interstate 15. (Id. at 97-98). The chase ended around the south end of Wolf Creek Canyon. (Id. at 98). Strizich was taken into custody to face trial for the events that occurred at the Buus and Mayernik cabins. (Id.).

Strizich admitted to possessing methamphetamine. (Id. at 102). As to the belt buckle, Strizich testified that he purchased it from someone on Facebook's online marketplace. (Id. at 81). He took the belt buckle off inside the Mayernik cabin so he could use the belt as a tourniquet to reduce the bleeding from his gunshot wound. (Id. at 81-82).

The jury ultimately found Strizich not guilty of Count III - Burglary and Count IV - Tampering with or Fabricating Physical Evidence. (Id. at 237). The jury found Strizich guilty of Count I - Aggravated Burglary, Count III ~~as Criminal Trespass or Property~~ (a lesser included offense to Burglary) and Count V - Criminal Possession of Dangerous Drugs (meth.). (Id. at 236-237).

~~The district court held a sentencing hearing on January 7, 2018.~~
(Tr. Sentencing at 1). For Aggravated Burglary, the district court

sentenced Strizich to 40 years imprisonment. (Id. at 77). For Criminal Possession of Dangerous Drugs, the district court sentenced Strizich to 20 years imprisonment, with 15 years suspended, to run consecutive to the 40 year sentence. (Id. at 78-79). For Criminal Trespass to Property, the district court sentenced Strizich to 6 months imprisonment, all time suspended, to run concurrent with the 40 year sentence. (Id. at 77, 79).

Strizich timely appealed his conviction and sentence. A divided Montana Supreme Court affirmed Strizich's conviction and sentence 4-3. Strizich, 2021 MT 306.

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

A. Importance of the Question Presented - Flight Evidence

The question presented in this case is of great importance because it affects the length courts in all 50 states and the District of Columbia may go regarding the admissibility of flight evidence in a criminal case. In view of the innocent who often flee the scene of an actual or supposed crime through fear or other emotion, guidance on the question is also of great importance to criminal defendants, because it affects their ability to defend and receive a fair trial which may result in an unjust criminal conviction and years of imprisonment.

The issue's importance is enhanced by the lower courts' egregious departure in this case from this Court's holding in Holmes v. South Carolina, 547 U.S. 319 (2006). This Court held in Holmes that a criminal defendant's Sixth and Fourteenth Amendment right to a meaningful opportunity to present a defense is abridged by evidence rules that "infringe upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Id. at 324-325.

The Montana Supreme Court majority concluded in this case that the evidence of Strizich's flight and W.L.'s high-speed chase and convictions did not violate Strizich's constitutional rights because it is probative of his "desire to avoid legal

responsibility for the charged offense." Strizich, 2021 MT at ¶ 25-26. Further, "Strizich had ample opportunity to 'dissipate any prejudice' and explain his flight from Elkhorn." Id. at ¶ 36 (citation omitted). Moreover, assuming the admission of the evidence was error, the majority concluded that "the error was harmless" because the evidence was admitted to prove "consciousness of guilt and did not go to an element of the offenses charged," and there was "considerable evidence of Strizich's guilt" of the aggravated burglary. Id. at ¶ 41.

In Wong Sun v. United States, 371 U.S. 471, 483 n. 10 (1963), this Court noted: "we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." Following that decision, a number of courts have begun exercising caution on the issue. See, e.g., United States v. Rodriguez, 53 F.3d 1439, 1451 (7th Cir. 1995) ("we...reassert our position that flight instructions should be given with caution, if at all."); United States v. Williams, 33 F.3d 876, 879 (7th Cir. 1994) (explaining that evidence of flight requires "careful deliberation in its admission"); United States v. White, 488 F.2d 660, 662 (8th Cir. 1973) (noting the unreliability of flight as an indication of guilt, finding that evidence of flight was too speculative to draw an inference of consciousness of guilt); United States v. Robinson, 475 F.2d 376, 384 (D.C. Cir. 1973) (describing evidence of flight as "marginally probative").

probative" of guilt or innocence and commenting that justice is "best served if this matter is reserved for counsel's argument, with little if any comment from the bench").

Here, Strizich was not fleeing the crime scene of the aggravated burglary for which he was eventually charged, nor was he fleeing from an arresting officer who intended to apprehend him for the aggravated burglary offense. The circumstantial evidence the majority relies upon to support its conclusion that Strizich was conscious of his guilt for the charged aggravated burglary offense is that Strizich left a medical rehabilitation center three weeks after the offense and was a passenger in a vehicle driven by W.L. However, it was W.L., not Strizich, who led police on a high-speed chase, it was W.L., not Strizich, who ultimately was charged with criminal endangerment following those events. The dissent is correct, "(1) the evidence surrounding Strizich's departure from Elkhorn had no relevance or connection to the charged burglary offenses; (2) Strizich's leaving Elkhorn was not circumstantial evidence of any consciousness of guilt for the charged burglary offenses; (3) there is no consciousness of guilt that infers consciousness of guilt for the charged burglary offenses; and (4) an inference of actual guilt based on this evidentiary record is analytically improper." Strizich, at ¶ 54 (McKinnon, J., Gustafson, J., Sandefur, J., dissenting).

Analytically, flight evidence is generally considered "admission by conduct." United States v. Myers, 550 F.2d 1036,

1049 (5th Cir. 1977). It cannot be said, with any degree of certainty, that Strizich's departure from Elkhorn in a vehicle driven by W.L., three weeks after the aggravated burglary offense occurred, is an admission of guilt by Strizich of the aggravated burglary.

~~Even~~ assuming Strizich's departure from the Elkhorn medical facility had any probative value, the lower court went too far by allowing the State to present testimony from multiple witnesses and then taking judicial notice of W.L.'s conviction. First, Elena Applin testified. She is a nurse at the Elkhorn facility. (Tr. Vol. IV at 152). She testified that Strizich fled the facility through a window. This evidence would have been sufficient to meet the State's need for a demonstration of consciousness of guilt.

However, the testimony that followed Nurse Applin's crossed over from probative to unfairly prejudicial. Lewis and Clark County Sheriff's deputy Greg Holmlund was the next witness to testify after nurse Applin. He testified he heard a report that Strizich had fled Elkhorn in a silver Honda Accord and decided to park under "the Cedar Street overpass" to wait to see if he saw the car. (Id. at 162-163). He eventually saw the vehicle pass and began to follow it. He estimated the Accord's speeds were "between 85-95" miles per hour. He also described the driver of the Accord and the driver of another car (which was affiliated with W.L.) as "playing a cat and mouse game. When they came upon

other vehicles, they would switch lanes real abruptly and real fast." (Id. at 164). Deputy Holmlund also opined that "they did not want me behind that Honda." (Id.). As the vehicles approached the mouth of the Wolf Creek Canyon, Deputy Holmlund maintained speeds of "probably around 90, 95 miles an hour," (Id. at 165). Deputy Holmlund then heard that the Honda had crashed and came upon the scene to find officers with weapons drawn and Strizich being held at gunpoint. (Id.).

The State continued then with Deputy Joshua Schmidt. (Id. at 169). Deputy Schmidt stated he had also known Strizich had fled Elkhorn in a silver Honda. (Id. at 170). Deputy Schmidt responded and heard Deputy Holmlund giving updates over the radio. Deputy Schmidt estimated the vehicle was traveling between 90 and 100 miles an hour. (Id. at 171). Deputy Schmidt described the two vehicles as "eluding law enforcement," and accelerating "to speeds at one point in excess of 135 miles an hour[.]" (Id. at 172). Deputy Schmidt testified that following the crash he and another deputy, Chris Weiss, drew their pistols, handcuffed Strizich and took him into custody. (Id. at 174).

The prejudicial impact of three witnesses, including two deputies from the Lewis and Clark County Sheriff's Office, providing details of a sensational escape and high-speed chase substantially outweighed any value provided and unfairly prejudiced the jury against Strizich. The trial court's decision to take judicial notice of W.L.'s youth court disposition,

concerning an offense which all parties agreed Strizich was not charged for, only further emphasized the prejudicial effect of the evidence to the jury. The impact on the jury, after hearing from three witnesses of this sensational escape and high-speed chase, was magnified by the trial court when it instructed the jury:

Ladies and gentleman of the jury, at this time the Court is going to notify you that it has taken judicial notice of cause number DJ 2017-1, in the matter of [W.L]. The Court, in this regard, the Court takes judicial notice that [W.L.] admitted to the offense of criminal endangerment in that on or about January 21, 2017, at approximately 6:46 p.m., he knowingly engaged in conduct that created a substantial risk of death or serious bodily injury to another when he was observed driving a silver Honda four-door passenger car with a male in the passenger seat in excess of 135 miles an hour northbound on Interstate 15 through the Sieben Flats area while being pursued by law enforcement who had their lights on. After he exited the interstate highway onto Recreation Road driving 65 miles an hour, he lost control of the car and spun into a snowbank.

In this regard the Court also takes further ~~judicial~~ judicial notice of Judge Seeley's February 24, 2017 order in DJ 2017-1, and the petition in that matter filed on or about January 27, 2017.

(Tr. Vol. IV at 179-180).(emphasis added). The unfairly prejudicial impact of W.L.'s disposition, which only served to associate Strizich with bad actors, outweighed any probative value of his consciousness of guilt.

The evidence, at its heart, is bad acts evidence of W.L., who did not appear at trial. The testimony of two law enforcement officers regarding the details of a sensational high-speed chase

and the judicial notice of W.L.'s convictions constituted improper evidence of W.L.'s character to infer Strizich's guilt. The State sought to align the reckless and sensational acts of W.L. with Strizich's underlying offense, which was likewise sensational. The State's focus on Strizich's flight was not an idle, inconsequential aspect of the trial, but was calculated by the State to cast Strizich in the same reckless disregard of safety for others as W.L.

The admission of Strizich's departure from Elkhorn and apprehension also opened the door for the State to introduce other unfairly prejudicial evidence, such as Strizich's pretrial incarceration. (Tr. Vol. V.at:99). The State wanted the jury to judge Strizich by the company he kept or his guilt by his association to Daniels, W.L. and others.

Furthermore, taking judicial notice of the youth court dispositional order and reading to the jury W.L.'s out-of-court admissions of both his guilt to the crime of criminal endangerment and the details surrounding his high-speed chase and crash with Strizich as his passenger, denied Strizich the opportunity to cross-examine W.L. There is nothing in the record indicating that W.L. was unavailable or that Strizich had a prior chance to cross-examine him on his out-of-court admissions. See Crawford v. Washington, 514 U.S. 36 (2004). Had W.L. testified, at trial, he likely would have stated that he led police on the high-

high-speed chase because the car he was driving was stolen and contained illegal articles. The trial court excluded any reference to the fact that the vehicle W.L. was driving was stolen. (Tr. Vol. I at 171). Consequently, Strizich was denied the opportunity to present evidence that W.L.'s high-speed chase was unrelated to Strizich's departure from Elkhorn.

Further underscoring the prejudicial impact of this evidence is the fact that the jury acquitted Strizich of every charge which he denied in this case, except the aggravated burglary. The evidence presented by the State against Strizich of the aggravated burglary offense was not "overwhelming" as the majority suggests. See Strizich, at ¶ 38. Though Strizich admitted to entering the Buus cabin, he testified that he only did so to get Daniels to stop burglarizing. (Tr. Vol. V at 61). It was Daniels' DNA and fingerprints, not Strizich's, that were located on items from the Buus cabin. (Tr. Vol. III at 210-220; Tr. Vol. IV at 143-150). The only item removed from the Buus cabin was a flashlight, which was discovered in Daniels' tracks. (Tr. Vol. IV at 125). The record is also devoid of any evidence that Strizich inflicted or attempted to inflict bodily injury upon anyone, or that Marshall Buus suffered an actual bodily injury. But for the prejudicial evidence explained above, a reasonable juror would have acquitted Strizich of aggravated burglary outright, or found Strizich guilty of a lesser included offense to aggravated burglary.

such as burglary or criminal trespass to property.

The state courts' wholesale admission of the flight evidence in this case violated Strizich's Sixth and Fourteenth Amendment right to a meaningful opportunity to present a defense. As stated by the dissent: "Evidence of [W.L.'s] criminal endangerment conviction served no valid purpose in the proceedings against [Strizich, nor did the testimony of the details surrounding the high-speed chase." Strizich, at ¶ 70. (emphasis added). This is what this Court's holding in Holmes, supra, prohibits.

Thus the court below egregiously departed from Adams,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: 2-28-2022