No.

In the
Supreme Court of the United States

AARON JOEL OLIPHANT,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A jury convicted Oliphant of assaulting his infant son based solely on a medical diagnosis of abusive head trauma ("AHT"). His trial counsel failed to consult or hire any medical expert, was dying of esophageal cancer at the time of trial, could not hear the witnesses, did not prepare for sentencing based on a mistaken belief sentencing would not go forward, resulting in a sentence of 20 years imprisonment, and did not consult with Oliphant about an appeal or post-conviction relief except to tell Oliphant he had no grounds for appeal. The Montana Supreme Court held that trial counsel was not ineffective. Did the Court incorrectly apply *Strickland*?

LIST OF PARTIES

The petitioner is Aaron Joel Oliphant, an inmate at the Montana State Prison.

The respondent is the State of Montana.

LIST OF RELATED PROCEEDINGS

1. *State v. Oliphant*, Cause No. DC 16-270 (Mont. First Jud. D. Ct.) (original case).

2. *Oliphant v. State*, Cause No. DV-20-874 (Mont. First Jud. D. Ct.) (postconviction proceeding).

3. *Oliphant v. State*, 525 P.3d 1214 (Mont. 2023) (postconviction appeal).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Aaron Joel Oliphant petitions this Court for a writ of certiorari to review the judgment of the Montana Supreme Court in this case.

OPINIONS AND ORDERS BELOW

The Montana First Judicial District Court's order denying Aaron's petition for postconviction relief, App.27, is not published. The opinion of the Montana Supreme Court affirming the district court, App.1, is published at 525 P.3d 1214 (Mont. 2023).

JURISDICTION

The judgment of the Montana Supreme Court was entered March 14, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment to the United States Constitution states, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

Aaron Oliphant ("Oliphant") was charged with assaulting his four-month-old son, R.O., solely on the basis of an AHT diagnosis. Yet, Oliphant's trial counsel failed to consult with any medical experts prior to trial. *App. B* at 16-17.[1]

On September 27, 2017, Oliphant was convicted of aggravated assault on R.O. *App. B* at 26. The State's theory at trial was that R.O. exhibited symptoms consistent with a combination of shaking and blunt force trauma, and that the timing of the injuries could be pinpointed to a timeframe in which R.O. was exclusively in Oliphant's care. *App. B* at 17.

By the time of Oliphant's trial, trial counsel, Mayo Ashley, was being treated for esophageal cancer, was having significant difficulty hearing, speaking, and eating; he also had very little energy. *Id.* As his secretary of 18 years, Julie Johnson, explained in a declaration attached to Oliphant's post-conviction petition, "Mr. Ashley was unable to hear his clients, the Court, or witness testimony at the end of his career." *App.* D at ¶ 12. Further, Johnson explained that "during Mr. Ashley's representation of Mr. Oliphant, Mr. Ashley's health had declined to a point that he was unable to effectively represent Mr. Oliphant." *Id.* at ¶ 31. Ashley died from related complications shortly after Oliphant's trial. *Id.* at ¶¶ 28–30.

Before Oliphant's trial, Ashley told Johnson that he intended to hire a private investigator to interview witnesses and a medical expert; in addition, Ashley told Johnson that there were funds available for a private investigator or a medical

[1] Record references to the Appendix filed in the Montana Supreme Court.

expert. *Id*. at ¶ 17, 21. He never did so. Importantly, Johnson stated that "[a]fter trial, Mr. Ashley told [her] he regretted not obtaining a medical expert to rebut the State's evidence." *Id*. at ¶ 26. In addition to his failure to hire a private investigator or a medical expert, Ashley submitted no jury instructions and did not object to any of the State's jury instructions. *App*. B at 16. He filed no pretrial motions. *Id*. Further, both Oliphant and Johnson recall Ashley telling Oliphant that the case was a "slam dunk" because the State had no evidence against him. App. D ¶ 25.

At trial, Ashley made minimal opening and closing statements. *App*. B at 18-20. He did not cross-examine two of the State's medical experts, and he conceded in closing—contrary to his opening and cross-examination strategies of questioning whether any assault occurred—that R.O. was assaulted. *Id*. He failed to raise a single objection during trial. *Id*. at 16.

After the trial, Ashley wrongly advised Oliphant that Probation and Parole would contact him about the presentence questionnaire and interview when, in fact, Oliphant was supposed to initiate contact. *Id*. at 26. Shortly before sentencing, Ashley finally advised Oliphant that he needed to contact Probation and Parole. *Id*. Oliphant turned in the questionnaire for Probation and Parole but was never interviewed. *Id*. Ashley assured Oliphant that, because there was no interview, sentencing would be continued and, thus, no need for any witnesses to show up and testify on Oliphant's behalf or for Oliphant to prepare a statement. *Id*. Ashley also assured Oliphant that Ashley's close relationship with the prosecutor meant he

would not serve any prison time. *App*. C ¶ 25. Sentencing was not continued, no witnesses spoke on behalf of Oliphant, he made no personal statement to the District Court regarding culpability, and Oliphant was sentenced to 20 years in prison with 5 suspended. *Id*.

After sentencing, Oliphant's family contacted Ashley to let him know Oliphant wanted to appeal. Ashley responded with a letter to Oliphant's family, acting as appellate counsel to advise that there were no appealable issues, mentioning nothing about postconviction relief, and telling them the only available avenue for relief was sentence review—a state-law procedure in which a sentence review board decides whether a sentence should be increased, decreased, or left as is. App. E. Oliphant could not afford to hire another attorney for a second opinion, nor did he have any reason to believe doing so was necessary as he retained Ashley as private counsel expecting competent counsel and advice. App. C ¶ 35. Further, Oliphant did not know there was a difference between an appeal and a petition for postconviction relief.

Ashley died on March 29, 2018, days after the deadline to file a notice of direct appeal, but still within the timeline to file a petition for post conviction relief. At that point, all Oliphant knew was that his attorney believed his only avenue of relief was sentence review.

Oliphant then reached out to the Montana Innocence Project ("MTIP") who began assessing his application and gathering documentation, including his case file to process his application. *App. B* at 55. Once MTIP received and reviewed the

trial transcripts, it corroborated that no experts were consulted in preparation for or during trial. *Id.* at 19. MTIP recognized that the diagnosis and testimony needed to be assessed by a medical professional and reached out to experts in the field. Many responded that the set of medical records in trial counsel's records and introduced at trial were incomplete, and they could not provide a medical opinion based on incomplete records. *App. B* at 55. However, Dr. John Galaznik, a pediatrician with extensive experience with suspected child abuse cases, reviewed what document MTIP had, and agreed to provide a limited preliminary report, leaving open the possibility to change his opinion when MTIP received complete medical records. *App. B* at 32. Dr. Galaznik wrote that report on December 10, 2019.

MTIP filed a petition for postconviction relief on June 3, 2020, alleging ineffective assistance of counsel and newly discovered evidence in the form of Dr. Galaznik's preliminary expert opinion, which was obtained less than one year before the petition was filed[2]. *App. B* at 3. Oliphant's petition did not ask the Court to immediately overturn his conviction, only to allow discovery and stay the petition until discovery could be completed and an amended petition filed. *App. B* at 57.

A motion for discovery was filed with the petition explaining: (1) the medical records were incomplete, (2) only one expert, Dr. Galaznik, could opine based on the available medical records, and his opinion would be strictly preliminary, and (3)

[2] The District Court's order incorrectly provides a filing date of June 30, 2020. App. A, 2. The case register shows it was actually filed June 3, 2020

other experts could opine on the matter once the petitioner obtained all relevant medical records. *App. G.*

The State argued only that Oliphant's petition was untimely.

Oliphant filed a reply brief noting the untimeliness itself was due to ineffective assistance of counsel. *App. J.* To demonstrate this, Oliphant attached the above-mentioned letter from his appellate counsel advising him there were no appealable issues in his case and that his only avenue for relief was sentence review. *App. E.* Oliphant additionally noted the issues with the lack of scientific evidence for the AHT/SBS diagnosis discussed above. *App. J* at 2-5.

On January 20, 2022, the District Court denied Oliphant's petition as untimely on the basis that Dr. Galaznik's opinion was an interpretation of existing evidence rather than newly discovered evidence. *App. A.* The District Court did not address appellate counsel's letter telling Oliphant he had no appealable issues and his only avenue of relief was sentence review, nor did the District Court address the fact that a number of the records Galaznik's opinion relies upon were not in trial counsel's file, and thus were not available to Oliphant at trial. *Id.*

The District Court did not address Oliphant's request that the merits be stayed pending discovery and never ruled on the motion for discovery. *Id.*

On appeal, Oliphant argued that the District Court abused its discretion by failing to rule on the discovery motion, erroneously held that an expert opinion can never be newly discovered evidence, and should have applied a "miscarriage of

justice" exception to the time bar available in Montana because his appellate counsel's ineffective assistance caused his procedural default.

The Montana Supreme Court affirmed the District Court, holding: (1) the District Court correctly denied Oliphant's petition as untimely; and (2) the "miscarriage of justice" exception to the time bar was inapplicable because it was premised on an ineffective assistance of counsel claim that failed to meet *Strickland*'s two-prong test. Although neither party asked the Montana Supreme Court to decide Oliphant's ineffective assistance of counsel claims—because the District Court had not decided the issue—the Court nonetheless decided the issue on the basis of an incomplete record.

Like the District Court, the Montana Supreme Court did not address counsel's incapacity, did not address appellate counsel's erroneous legal opinions that Petitioner had no appealable issues and sentence review was the only remedy available to him, and did not address trial counsel's erroneous assumption that sentencing would be continued because Probation and Parole had not interviewed Oliphant.

REASONS FOR GRANTING THE PETITION

I. The Montana Supreme Court applied *Strickland* incorrectly

At the beginning of its analysis, the Montana Supreme Court held: "In assessing ineffective assistance of counsel claims, Montana courts apply the United States Supreme Court's two-prong test as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984)." *Oliphant v. State*, 525 P.3d 1214, 1222 (Mont. 2023). The

Court then failed to address two separate deficiencies of counsel raised by Oliphant and misapplied the *Strickland* test to the two deficiencies in counsel's performance it did address.

A. Trial counsel errors the Montana Supreme Court failed to address

A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation "fell below an objective standard of reasonableness," and (2) that counsel's deficient performance prejudiced the defendant. *Roe v. Flores-Ortega*, 528 U.S. 470, 476–77 (2000) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

1. Appellate counsel did not file a notice of appeal and did not consult with Petitioner regarding an appeal, despite Petitioner indicating he wished to file an appeal.

This Court holds that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Specifically, the *Flores-Ortega* Court held that, in addition to filing a notice of appeal when a defendant requests an appeal, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480.

In this case, Oliphant maintained his innocence and proceeded to trial. *See Id. at* 480 ("a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea"). Oliphant also expressed a clear desire to appeal. Immediately following sentencing, Oliphant's family told trial counsel Oliphant wished to appeal. *See Id*. at 485 ("[E]vidence that… the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination.").

Counsel responded only with a letter saying there were no appealable issues and the only procedure for relief available to Oliphant was sentence review. He then died just days after the notice of appeal was due, but still within the window to file a petition for post conviction relief.

Appellate counsel did not consult with Oliphant about the "advantages and disadvantages" of filing an appeal. *See Flores-Ortega* 528 U.S. at 478 ("We employ the term 'consult' to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.").

Nor did counsel file a notice of appeal. Even though he expressed a belief that there were no appealable issues, that does not absolve him of the obligation to assist the client with the appeal. As this Court has long noted, the procedure specified in *Anders* is the appropriate method for filing an appeal when the client wants to appeal a criminal conviction and trial counsel believes there are no appealable issues:

> After an appeal has been preserved and counsel has reviewed the case, counsel may always, in keeping with longstanding precedent, "advise the court and request permission to withdraw," while filing "a brief referring to anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The existence of this procedure reinforces that a defendant's appellate rights should not hinge "on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson v. Ohio*, 488 U.S. 75, 80, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

Garza v. Idaho, 139 S. Ct. 738, 746 n.9, 203 L. Ed. 2d 77 (2019).

At a minimum, counsel needed to consult with Oliphant to determine whether he wished to appeal. He failed to do so despite having a client he knew professed actual innocence and was intent on pursuing all avenues of relief. The Montana Supreme Court failed to address this deficiency in deciding that no violation of *Strickland* occurred, yet this alone is grounds for allowing an appeal. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985) (holding *Strickland* applies to appellate counsel where defendant is entitled to counsel.)

2. Trial counsel's decision not to prepare for sentencing was based on a mistake of law.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Here, trial counsel told Oliphant that there was no need to prepare for sentencing because Oliphant had not been interviewed by Probation and Parole, and thus sentencing would be continued. Trial counsel further opined that

Oliphant would not get jail time because trial counsel knew the prosecutor. Both were untrue. The sentencing was not continued, and Oliphant was sentenced to 20 years in prison with five suspended.

Failing to prepare for sentencing is not a strategic decision, it is a failure to do the bare minimum necessary to represent a convicted defendant. It is thus objectively unreasonable.

With regard to *Strickland*'s prejudice prong, Montana has a highly permissive sentencing scheme in which trial courts may issue any sentence ranging from probation to the maximum term of imprisonment. Mont. Code Ann. § 46–18–201. The District Court sentenced Oliphant to the maximum sentence for aggravated assault. *See* Mont. Code Ann. § 45–5–202. Because the Montana Supreme Court decided Oliphant's ineffective assistance of counsel claim on the basis of an incomplete record, Oliphant did not have the opportunity to present testimony or evidence that would have proven prejudice. Based on what is in the record, Oliphant received the maximum sentence of 20 years, with five years suspended, with no prior convictions of any kind, and with a trial that was dominated by the State's evidence, a sentencing that was similarly dominated by the State's evidence, and with no witnesses and no statement from Oliphant, and no pre-sentence interview of Aaron by Probation and Parole presented to the District Court. The District Court thus had nothing presented on which to base a more lenient sentence.

3. Trial counsel erroneously advised Petitioner his only remedy was sentence review.

Trial counsel necessarily knew he was having a hard time hearing and was in exceedingly poor health, knew he failed to consult with any expert prior to trial, knew he failed to hire an investigator, knew he made no presentation at sentencing based on an erroneous belief it would be continued, and yet did not advise Oliphant that there is a procedure for addressing ineffective assistance of counsel if Oliphant believed his counsel's assistance was defective.

Montana provides for a post-conviction relief process similar to federal habeas proceedings under 28 U.S.C. § 2255. *See* Mont. Code Ann. § 46–21–101, et seq. Such proceedings are where most ineffective assistance of counsel claims necessarily must be heard because they present the first opportunity to present evidence beyond the record on appeal of ineffective assistance of counsel. *See Hagen v. State*, 973 P.2d 233, 237 (Mont. 1999) ("[W]here allegations of ineffective assistance cannot be documented from the record in the underlying case, such claims can only be raised in a post-conviction proceeding."); *see also Soraich v. State*, 53 P.3d 878, 883 (Mont. 2002) (evidentiary hearing necessary to determine *why* trial counsel made certain pretrial decisions in order to determine their reasonableness).

Trial counsel's letter stating that there were no appealable issues and sentence review—a rarely successful process in which a review board may decrease, increase, or maintain an existing sentence under Mont. Code Ann. § 46–18–901, et seq.—was the only avenue for relief available to Oliphant was objectively false. The post-conviction process under Mont. Code Ann. § 46–21–101 was available to

Oliphant, and counsel had an obligation to inform Oliphant of that process as an alternative means for Oliphant to vindicate his rights and seek relief from his conviction. Counsel's failure to do so was objectively unreasonable and substantially prejudiced Oliphant.

But for trial counsel's erroneous omission of the post-conviction relief process available to Oliphant to vindicate his Sixth Amendment right to effective assistance of counsel, Oliphant could have timely sought relief from counsel's deficient performance.

B. Trial counsel errors the Montana Supreme Court addressed incorrectly

1. Trial counsel's failure to consult any expert was neither a decision, nor "reasonable strategy," but a failure to act on his prior decision that he should hire an expert.

The Montana Supreme Court held that trial counsel "considered offering expert testimony but ultimately decided against it." *Oliphant v. State*, 525 P.3d 1214, 1222 (Mont. 2023). There is nothing in the record to support this. Instead, the record showed only that trial counsel had an advertisement for an expert in abusive head trauma in his file and told his secretary that he intended to hire an expert and an investigator but ultimately *failed* to do so.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must

> be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 691 (1984).

"In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). There is no basis in the record here that would make a decision to not investigate the validity of the State's expert's opinions reasonable. The State's witnesses were the only evidence that any crime occurred, and the only evidence that Oliphant committed it.

Contrary to the limited record in front of it, the Montana Supreme Court erroneously *assumed* that trial counsel made a decision not to consult with an expert. Instead, the record reflects that trial counsel failed to follow through on his decisions to consult with and hire an expert. Trial counsel had very low energy and was on death's doorstep. Nothing in the record suggests he "decided against" presenting an expert. The record reflects only that he decided to hire one, but then failed to even consult one, and expressed regret at this failure after trial.

Even if the Montana Supreme Court's assumption were correct, and trial counsel made a "strategic" decision not to consult with an expert, the Court failed to determine that such a decision was "reasonable" under the circumstances.

As this Court has recognized:

> Prosecution experts, of course, can sometimes make mistakes. Indeed, **we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts**, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials.... One study of cases in

> which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." Melendez–Diaz v. Massachusetts, 557 U.S. 305, 319, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L.Rev. 1, 14 (2009)). **This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses**[.]

Hinton v. Alabama, 571 U.S. 263, 276 (2014) (emphasis added).

It is nearly unthinkable that trial counsel would have been able to determine which questions he should ask in cross-examination of the State's experts to expose the flaws in their reasoning without consulting an expert. For the same reason, the Montana Supreme Court cannot reasonably know that trial counsel's cross-examination was even minimally proficient in the absence of any input from an expert regarding a medical diagnosis as complex and contentious as abusive head trauma. Note, for example, that even in the Montana Supreme Court's discussion of the facts, it appears that seizures can both cause the symptoms diagnosed as AHT as well as result from them. *Oliphant*, 525 P.3d at 1218. To ascertain which direction the causal relationship flowed here (either seizures caused the symptoms diagnosed as abusive trauma, or the diagnosed abusive trauma caused seizures) would require insight from an expert.

2. The cumulative acts of trial counsel's failure to file any pre-trial motions, make any objections at trial, and failure to present any jury instructions were not strategic decisions, but failures based on limited capacity.

The Montana Supreme Court treated trial counsel's numerous omissions as simply an issue of how many objections trial counsel made, and held that was not

sufficient to overcome the presumption of competence under *Strickland*. *Oliphant*, 525 P.3d at 1223.

Again, in the case of healthy trial counsel, a presumption that failures to object might be reasonable, but the entire package of errors and omissions, coupled with the affidavit from trial counsel's secretary of 18 years opining that trial counsel was not competent at the time of Oliphant's trial, indicate that such presumptions are not objectively reasonable given all the circumstances.

For example, Oliphant specifically pointed out to the Montana Supreme Court that trial counsel did not object even to propensity evidence prohibited by Montana Rules of Evidence 404(b) (which follows Federal Rules of Evidence 404(b)). Trial counsel did not file any pretrial motions, for example, to exclude any of the State's expert opinions on the basis of unreliability, which has proven successful in other AHT cases. *See, e.g., New Jersey v. Nieves*, No. 17-06-00785, Decision of the Court and Order (Sup. Ct. N.J. Jan. 7, 2022) (finding the AHT diagnosis "akin to 'junk science'"). (That case is highly similar to Oliphant's both in the presentation of symptoms in the child and the defendant was charged and tried in the same timeframe as Oliphant's case.)

Limitations on introduction of AHT diagnoses have grown particularly since a panel of influential experts published the findings of a two year study, first in an initial report in 2016 ("The Report"),[3] and then in a peer-reviewed medical journal

[3] *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking*, SBU (October 2016), https://www.sbu.se/contentassets/09cc34e7666340a59137ba55d6c55bc9/traumatic_shaking_2016.pdf.

in July 2017[4], saying AHT diagnoses lack scientific underpinning and are based instead on circular reasoning.

The Montana Supreme Court ignored all of this, and decided only that "our case law does not support that the number of objections is a determinative factor in our analysis of the first prong of the *Strickland* test." *Oliphant*, 525 P.3d at 1223. This misses the point entirely.

Strickland stands for the propositions that the role of defense counsel is to meaningfully test the prosecution's case in order to minimize wrongful convictions. Where trial counsel is so weakened, his performance lacks any of the markers of basic competence—consultation with experts or research into the medical science underpinning the prosecution's case, pretrial motions, objections at trial, proposed jury instructions, cross-examination of all key witnesses, a consistent theory of the case, accurate opinions about when sentencing will occur and what sentence the defendant might receive—and the record at trial, plus the affidavit of his secretary of 18 years, reflect someone unable to hear witnesses or follow through on his own decisions, then the presumption must give way to the uncontested evidence that trial counsel was simply incapable of effective representation. The Montana Supreme Court's analysis thus comports neither with the record, nor with *Strickland* and related cases.

[4] Lynøe N, Elinder G, Hallberg B, Rosén M, Sundgren P, Eriksson A. *Insufficient Evidence for 'Shaken Baby Syndrome' - a Systematic Review*, Acta Paediatr. 2017 Jul;106(7):1021-1027.

C. This case presents a direct-appeal opportunity—without required reference to the Anti-Terrorism and Effective Death Penalty Act—to explicate this Court's statement in *Harrington* that "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence."

In *Harrington*, this Court noted that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). Post-Harrington, jurisdictions throughout the country that have recognized that trial counsel performs deficiently where he fails to investigate the use of expert testimony to challenge the critical pieces of the prosecution's case. *See, e.g., Ibar v. State*, 190 So.3d 1012, 1021 (Fla. 2016); *People v. Ackley*, 497 Mich. 381, 389–94, 870 N.W.2d 858, 863–65 (Mich. 2015); *Kendrick v. State*, 454 S.W.3d 450, 477 (Tenn. 2015); *Kigozi v. United States*, 55 A.3d 643, 651 (D.C. 2012).

Specific examples are instructive. In *Thomas v. Clements*, 789 F.3d 760, 768–71 (7th Cir. 2015), the Seventh Circuit provides an additional example of a *Harrington*-style case. In reaching its conclusion that trial counsel was ineffective for failing to consult an expert witness, the Seventh Circuit focused not on whether the defendant had caused the death, but whether the death was intentional. *Thomas*, 789 F.3d at 771. The Seventh Circuit found that trial counsel's failure to consult an expert to challenge the cause of death was ineffective because the cause of death was directly related to the issue of whether the death was intentional. *Thomas*, 789 F.3d at 769.

In dicta, the Sixth Circuit found this Court's statement in *Harrington* to be implicated in *Stermer v. Warren*, 959 F.3d 704, 738 (6th Cir. 2020). The Sixth Circuit noted that "the only evidence supporting a finding [of the underlying crime] was the [state's expert" and that trial counsel had "already decided to argue that the fire could not have been an accident, but then rested on the prosecution's expert, who specifically opined that it was not an accident." *Stermer*, 959 F.3d at 739. The Sixth Circuit conclude "[w]here the defendant's guilt turns on a fire being arson, the state's evidence of arson is expert testimony, and the defense in fact argues (at least in part) that the fire was accidental, it is ineffective for counsel not to retain someone to help respond to the state's expert testimony." *Stermer*, 959 F.3d at 739.

Taken together, the decisions referenced above demonstrate that this Court's interpretation of *Strickland* in *Harrington* is being consistently applied where trial counsel fails to investigate the use of an expert witness whose opinion would cut directly to the central issue in the case. And yet, this case marks the second time the Montana Supreme Court has ignored this Court's rulings on this issue.

In a recent decision, the Federal District Court for the District of Montana held: "The Montana Supreme Court's determination that [trial counsel] performed proficiently resulted from an objectively unreasonable application of *Strickland*, pursuant to 28 U.S.C. § 2254(d). *Garding v. Montana Dept. of Corrections*, CV 20-105-M-DLC, 2023 WL 3086883, at *8 (D. Mont. Mar. 27, 2023). The issue in that case, as in this one, was trial counsel's failure to even consult with an expert who could address the expert testimony that formed the heart of the prosecution's case.

This case presents an opportunity to address this issue as it comes to this Court on direct review of the Montana Supreme Court's decision and without the need to engage in the Anti-Terrorism and Effective Death Penalty Act's heightened standard of review. *See* 28 U.S.C. § 2254. This Court should grant review to provide needed guidance to courts attempting to navigate this Court's recognition in *Harrington* and *Hinton* that certain cases require consultation with experts. *Harrington*, 562 U.S. at 106; *Hinton*, 571 U.S. at 273.

The Montana Supreme Court's decision guts *Strickland* and *Cronic*'s application in Montana's courts and ignores *Harrington*, and *Hinton*. Absent this Court's intervention, the errors of the Montana Supreme Court's misapplications of *Strickland* will continue to require correction by the Federal District Court conducting the substantially more arduous analysis required under 28 U.S.C. § 2254.

CONCLUSION

To take the entire body of omissions of trial counsel and dismiss it simply as a strategic decision not to call an expert and a decision not to make any objections ignores a large swath of the evidence in the record and does not comport with the evidence of trial counsel's severe health issues and incapacity. This is not simply a strategic decision not to call an expert and not to object. This was a failure to test the State's case in any meaningful fashion.

As this Court noted in the companion case to *Strickland*, "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there

has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *U.S. v. Cronic*, 466 U.S. 648, 659 (1984).

Oliphant's charges were based entirely on expert medical testimony diagnosing AHT. To not consult even one expert in those circumstances, to not seek to exclude the State's experts' testimony or to in any way let the jury know that the diagnosis of AHT has been heavily critiqued as lacking scientific validity, to not determine whether alternative diagnoses would also fit the symptoms, to not meaningfully probe the expert's opinion on the timing of the diagnosed injury, to make no objection to any of the prosecution's evidence or questions, to be unable to hear what the witnesses were even saying, taken all together, makes the adversary process here presumptively unreliable.

Respectfully submitted,

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