APPENDIX

TABLE OF APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATIE GARDING, *Petitioner-Appellee / Cross-Appellant*, v. MONTANA DEPARTMENT OF CORRECTIONS, *Respondent-Appellant / Cross-Appellee*.	Nos. 23-35272 23-35327 D.C. No. 9:20-cv-00105-DLC-KLD OPINION

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted September 15, 2023
Seattle, Washington

Filed June 28, 2024

Before: William A. Fletcher, Ryan D. Nelson, and Daniel P. Collins, Circuit Judges.

Opinion by Judge R. Nelson;
Dissent by Judge W. Fletcher

SUMMARY*

Habeas Corpus

On cross-appeals from the district court's partial denial and partial grant of Katie Garding's habeas petition, the panel affirmed the district court's order denying Garding's claims under *Brady v. Maryland* and reversed the district court's grant of Garding's ineffective-assistance-of-counsel claim.

A Montana jury convicted Garding of vehicular homicide while under the influence, failure to stop immediately at the scene of an accident involving an injured person, and driving without a valid driver's license.

The panel rejected Garding's jurisdictional arguments. The panel explained that the state court's vacatur of her conviction pursuant to the district court's habeas decision, and her release from custody, did not moot this case. As the new trial against Garding has not yet begun, this court can provide Montana with relief by reversing the district court's order. Because Garding was "in custody" under the underlying state conviction when she filed her habeas petition, jurisdiction attached at that time; binding precedent forecloses her argument that AEDPA does not give this court power to hear the case because she is no longer in "custody."

The panel held that the Montana Supreme Court's determination that Garding's counsel's performance was not

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

deficient was reasonable. The Montana Supreme Court reasonably held that Garding's counsel's decision not to hire an accident reconstruction expert was within the wide range of professionally competent assistance and reasonably concluded that Garding's claim would require the court to engage in second-guessing with 20/20 hindsight her counsel's choices, which *Strickland v. Washington* forbids. The Montana Supreme Court's determination of the facts supporting its holding was also reasonable.

The panel held that the Montana Supreme Court reasonably rejected Garding's *Brady* claims, and thus deferred to the Montana Supreme Court as 28 U.S.C. § 2254(d) requires. The Montana Supreme Court reasonably held that the state had not in any way suppressed evidence concerning x-rays of the victim, reasonably held that Garding did not show that the non-disclosure of photos from a different car crash was material, and reasonably concluded that the photos did not establish that Garding was not involved in the accident.

Dissenting, Judge W. Fletcher wrote that it is clear from the trial and postconviction record that Garding is innocent, but her innocence is not the legal basis for his agreement with the district court, which held that trial counsel provided ineffective assistance in failing to present evidence from an accident reconstruction expert. Judge Fletcher agreed with the district court because Garding established both deficient performance and prejudice under *Strickland* and is entitled to relief under AEDPA.

COUNSEL

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Roy Brown (argued), Assistant Attorney General; Austin Knudsen, Montana Attorney General; Office of the Montana Attorney General, Helena, Montana; Brad Fjeldheim, Assistant Attorney General, Montana Department of Justice, Agency Legal Services, Helena, Montana; for Respondent-Appellant.

OPINION

R. NELSON, Circuit Judge:

We review on cross-appeals the district court's partial denial and partial grant of Katie Garding's habeas petition. We hold that the Montana Supreme Court reasonably determined that Garding's trial counsel was not constitutionally deficient and that her *Brady* claims lacked merit. We thus affirm the district court's order denying the *Brady* claims and reverse its grant of the ineffective assistance claim.

I

A

Early New Year's Day 2008, a vehicle hit and killed Bronson Parsons. Parsons and his friend, Daniel Barry, were walking westbound on the righthand side of Highway 200 in East Missoula. The two planned to stop by Ole's Convenience Store and then go to last call at The Reno, a casino and bar across the street.

At around 1:40 am, a vehicle struck Parsons from behind. Barry stated that he "felt . . . a rush of wind," and then Parsons was gone. Parsons "stuck to the front of the car," and then "came to rest off [of it.]" The vehicle, described as a dark-colored SUV or truck, fled.

Trooper Novak of the Montana Highway Patrol (MHP) responded. He found Parsons "lying . . . sideways on his back." He investigated, including by collecting evidence and interviewing Barry. He did not find any of the striking vehicle's debris.

Later that day, two other MHP officers—Troopers Hader and Wolfe—stopped Garding's vehicle, a dark Chevrolet S-10 Blazer. At the time, they were looking for a car with heavy front-end damage. Trooper Hader testified that Garding's windshield was visibly cracked. After stopping Garding, the officers saw that her car did not have full-front-end damage, so the officers let her go. Later that week, however, while examining Parsons's body, Trooper Hader realized Parsons's injuries did not suggest a "full-frontal impact." The State then changed its investigation to look for a minimally damaged car.

Around that time, MHP received a tip about Garding. A man reported a dark Blazer with front-end damage. MHP ran a registration check, identifying it as Garding's car. Trooper Novak contacted Garding's father, whom he knew personally, but did not speak with Garding.

The case went cold for about a year. Then an inmate in Missoula, Teuray Cornell, claimed to have information about the crash. Trooper Hader met with Cornell, who thought Garding was involved. He divulged that he had "taped up" Garding's bumper's turn indicator light right after the crash, suggesting that it had recently been damaged.

Trooper Hader then interviewed Garding. Based on further investigation, Garding was charged with Vehicular Homicide While Under the Influence or Negligent Homicide, Failure to Stop Immediately at Accident Scene, Tampering With or Fabricating Physical Evidence, and Driving Without a Valid Drivers License based on a "totality of the evidence."

B

Garding's criminal trial was in June 2011. A public defender represented Garding. Garding maintained her innocence.

What matters for this appeal is the State's crash theory, or how Garding's car caused Parsons's injuries. Garding claims that her counsel was not able to effectively push back against the State's theory because her counsel did not use an accident reconstruction expert and that the State kept evidence from her. Several State witnesses testified about the crash, including the three investigating MHP Troopers—Strauch, Hader, and Novak—and expert witness Dr. Gary Dale, who medically examined Parsons's body. We discuss the salient parts of the trial.

1

Each of the three Troopers testified about the crash, including how Garding's vehicle was involved.

Trooper Strauch testified about how the crash might have happened. He used a method called "total station," relying on "an electronic distance measuring instrument," to help him gauge how far Parsons might have traveled from impact. He estimated this to be about ninety feet. That said, he could not identify the location where Parsons had been hit and could not estimate the vehicle's speed. He said that tire

marks might have helped him estimate, but didn't recall if any were found.

Trooper Hader testified about how the scene pointed to Garding's vehicle. He thought Parsons's injuries, which differed from full-frontal impact injuries, fit the Blazer's minimal damage. He reasoned that, if Parsons's full body had struck the vehicle, there should have been some greater evidence of impact, such as broken ribs or more bruising, but that there was not. Trooper Hader thought that the crash was likely a "swerving-type impact," consistent with minimal damage. He also thought Garding's big, steel, aftermarket bumper could explain the minimal front-end damage.

Trooper Novak testified about his interview with Barry. He stated that Barry described seeing Parsons "on the hood . . . by the windshield" after he was struck. He stated that Barry also described Parsons being "carried" by the car and falling onto the road.

The Troopers did not provide a comprehensive theory of how the crash happened. None of them claimed to be an expert in accident reconstruction, nor were they offered as experts.

2

Dr. Dale's autopsy identified the cause of death as blunt force head injuries, resulting from when Parsons hit the asphalt. He testified that, in his opinion, Parsons' other upper body injuries resulted from impact with the asphalt as well. Parsons also suffered faint bruising and crushed calf muscles, which Dr. Dale thought Garding's bumper could have caused as well. That said, he admitted that any bumper of a similar height could have caused Parsons's injuries.

3

Garding's counsel pushed back against the State's crash testimony. She called Dr. Thomas Bennett, an expert witness in forensic pathology to rebut the State's theory. During voir dire, Dr. Bennett clarified that he did not "do accident reconstruction," but "usually work[ed] with other accident reconstructionists" in similar types of cases. In his opinion, the bruises on the back of Parsons's legs "would not [have been] caused by a bumper like" Garding's but were "more consistent with a more rounded bumper." He thus concluded that Garding's "bumper could not have caused [Parsons's] injuries."

Garding's counsel extensively critiqued the State's theory of the crash during closing argument. She noted the inconsistencies with the State's theory presented during Trooper Novak's testimony and argued that it was "not possible" that "Parsons [was] struck from behind going backwards," but "g[ot] forward 150 feet." She also mentioned that "[Garding's] vehicle d[id] not have heavy front-end damage."

The jury found Garding guilty on June 10, 2011. Garding was sentenced to forty years in prison. She was released on parole on February 3, 2022.

C

Garding moved for habeas relief in state court. She alleged ineffective assistance, *Brady* violations, and newly discovered evidence. We discuss the evidence supporting those claims still on appeal—the ineffective assistance and *Brady* claims. As for the ineffective assistance claim, Garding's counsel represented that she had been "ineffective." On her *Brady* claims, Garding argued that the

State did not disclose exculpatory evidence: (1) photographs of a 2005 hit-and-run collision and (2) x-rays of Parsons's lower legs.

In 2018, the state court granted the State's motion for partial summary judgment on Garding's *Brady* claim related to the x-rays and her newly discovered evidence claim. The court scheduled a hearing for the ineffective assistance claim.

1

The hearing lasted two days. The court listened to evidence on whether Garding's counsel was ineffective for not securing an accident reconstruction expert or conducting a reasonable investigation. Several witnesses testified, including Garding's counsel, two concurring attorney witnesses, and accident reconstruction experts.

Garding's counsel claimed that she was ineffective because she did not take "necessary steps" to consult and secure an accident reconstruction expert. She claimed to be isolated, overwhelmed, and without adequate help. That said, she admitted that she had used such an expert in a similar case and knew they could offer "valuable insight." She also admitted that she had help, including co-counsel and investigators.

Two expert attorney witnesses concurred that she was ineffective. That said, both acknowledged that defense counsel can prefer cross-examination over expert testimony, and that this can be an effective strategy.

Accident reconstruction experts also testified. One claimed that he could "[a]bsolutely" "refute the . . . theories presented at trial." But he admitted that other data, which was unavailable, would be needed for a "precise

reconstruction." Another admitted that the state usually provides a "counter expert" who typically reaches different conclusions.

The State offered a rebuttal accident reconstruction expert, Trooper Smart. He explained that there usually is not enough data to do a "full accident reconstruction" when the car flees the scene or the speed or impact point are unknown. He said that Garding's experts used "[g]arbage data," including an illogical assumed speed.

2

In 2019, the state court denied all Garding's habeas claims. The state court held that Garding's counsel's trial performance was not constitutionally deficient because, among other things, she "effectively cross examined the State's witnesses." The court rejected her contradictory testimony, characterizing it as "self-serving" and "not credible." Instead, the court thought Garding's counsel's choice was strategy, not error.

The state court found that Garding's counsel made a strategic decision to not use an accident reconstructionist and that this decision was "reasonable." The court based this conclusion on several considerations. For example, the state court found a lack of evidence to precisely determine the speed of the vehicle. So, according to the state court, Garding's experts relied on faulty assumptions. Concluding that not enough data justified use of an accident reconstruction expert, the court found that Garding's counsel made a "calculated decision" to rely instead on cross-examination.

The court also rejected the *Brady* claim. It held that there was not enough information about the crash photos to assess

their "relevancy" or "exculpatory value" and that they were "not material."

3

The Montana Supreme Court affirmed. *Garding v. State*, 466 P.3d 501 (Mont. 2020). It first analyzed Garding's ineffective assistance of counsel claims under the first part of the two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984)—whether counsel's performance was deficient. *Garding*, 466 P.3d at 506–09.

The court found that Garding's counsel's performance was adequate. First, it rejected Garding's counsel's "self-proclaimed inadequacies," as those "do not hold great persuasive value with this Court." *Id.* at 507. It then determined that Garding's counsel provided an "extensive and strong defense." *Id.* She "countered or sought to undermine virtually every evidentiary contention introduced by the State, and the jury was left with the unenviable task of making numerous credibility determinations in order to resolve evidentiary conflicts necessary to reach a verdict." *Id.*

The court identified several ways Garding's counsel performed adequately. For example, Garding's counsel retained a forensic pathologist, Dr. Bennett, to counter the State's only expert testimony. He testified extensively that Garding's bumper could not have caused Parsons' injuries. *Id.* Garding's counsel also "elicited multiple concessions" from the State's expert, Dr. Dale, that "any other vehicle with a bumper the same height as Garding's could have caused Parsons' injuries." *Id.*

The court also squarely rejected Garding's argument that failure to hire an accident reconstruction expert was

deficient. *Id.* at 508. "Notably," it pointed out, "the State did not pursue [one] either." *Id.* The court also stated that Garding's counsel "presented a strong defense." *Id.* To otherwise find for Garding, the court concluded, it "would [be] require[d] . . . to engage in second guessing with '20/20 hindsight' of the choices made by her counsel," even though *Strickland* does not allow this analysis. *Id.* The court thus affirmed the denial of habeas relief without reaching *Strickland*'s second prong. *Id.*

The court also affirmed the denial of Garding's *Brady* claims. As to the x-rays, their existence was disclosed, the state's expert referenced them, and Garding's expert noted that reference. Given that Garding's "expert referenced" the x-ray result and her counsel "examined witnesses based on it," the state court held that "Garding was not only aware of the evidence . . . she . . . actively used it." *Id.* at 510. Thus, no *Brady* violation could be found. *Id.* As to the crash photos, the court disagreed that the prosecution suppressed them, given that they were independently obtained by the expert after his testimony and "placed within his own file." *Id.* at 510–11. Thus, "it is unlikely Garding could have used the photos to directly impeach Dr. Dale at all." *Id.* at 511. Moreover, even if he had, "the many distinctives between the photographs and this case" would have likely made them inadmissible. *Id.* As a result, they were neither "suppressed, material nor exculpatory." *Id.*

Garding unsuccessfully sought review in the United States Supreme Court. *Garding v. Montana*, 141 S. Ct. 1076 (2021).

D

Garding next sought federal habeas relief. She argued that the Montana Supreme Court unreasonably applied

Strickland and that habeas relief was therefore available under 28 U.S.C. § 2254(d)(1). The district court partially granted the habeas petition and partially denied it. *Garding v. Montana Dep't of Corr.*, No. CV 20-105-M-DLC, 2023 WL 3086883 (D. Mont. Mar. 27, 2023).

On the *Strickland* claim, the district court held that there was ineffective assistance. *Id.* at *10. It claimed that "there [was] no scenario under which" Garding's counsel could have thought an accident reconstruction expert "could have inculpated her client." *Id.* at *9. Thus, her failure to use such an expert was constitutionally deficient, failing to satisfy *Strickland*'s objectively reasonable requirement. *Id.* at *10.

The district court denied the *Brady* claims. *Id.* at *17–19. It determined that "[t]he Montana Supreme Court reasonably rejected [them]," and so the court "must afford deference under . . . § 2254(d)." *Id.* at *17.

Garding filed an appeal in 2023. Montana timely cross-appealed.

II

Garding raises two jurisdictional issues, which we address from the start. *See, e.g.*, *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction."). First, Garding argues that this appeal is moot because we cannot reinstate her criminal conviction, and so cannot give relief to the State. Second, she argues we do not have statutory jurisdiction under AEDPA. We reject both arguments.

A

We assess mootness by whether there is "a present controversy" for which we can grant relief. *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 485–86 (9th Cir. 2023) (citation omitted). The party claiming mootness has a heavy burden of proof. *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). And the remedy need not be "fully satisfactory." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam). If some relief can be granted, the case is not moot. *Forest Guardians*, 450 F.3d at 461.

Garding argues that the state trial court's release of her from custody and the vacatur of her conviction deprives this court of jurisdiction over her habeas appeal. This is because, Garding claims, this court "has [no] power to alter [the] state court order." Thus, Garding claims we can grant no effective relief, and the case is moot.

Garding relies on *Brown v. Vanihel*, 7 F.4th 666 (7th Cir. 2021)—an out of circuit case. There, a federal district court granted Brown habeas relief. *Brown*, 7 F.4th at 668. The State then asked to vacate Brown's conviction and retry him. *Id.* The state court vacated the conviction. *Id.* at 668–69. Brown asked to dismiss the appeal, arguing that the vacatur order mooted the State's appeal. *Id.* at 669. The Seventh Circuit agreed, holding that the vacatur of the conviction took away its power to hear the case because the State's appeal concerned a nonexistent judgment. *Id.* Thus, it dismissed the case as moot. *Id.*

The problem is that *Brown* is contrary to the Supreme Court's decision in *Moore*, and thus wrong. In *Moore*, the Court held that a factually similar habeas appeal was not moot. 518 U.S. at 149–50. The petitioner challenged his conviction, and the district court granted relief, directing that

he be released, or that the State have a new trial. *Id.* at 149. "The State . . . set Moore for retrial." *Id.* at 150. We held this mooted the case. *Id*. The Supreme Court reversed, holding that the new trial order did not amount to a situation in which, "by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever.'" *Id*. Although "the administrative machinery necessary for a new trial ha[d] been set in motion, that trial ha[d] not yet even begun, let alone reached a point where the court could no longer award any relief in the State's favor." *Id.* At a minimum, "a decision in the State's favor would release it from the burden of [a] new trial." *Id.* Thus, at least some relief was available. *Id.* (citing *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Here, just as in *Moore*, the state court judgment was set aside only because of the district court's habeas decision. This started a process for a new trial in state court. True, the district court below did not set aside the judgment directly. But that does not justify ignoring *Moore*. The State here moved for a new trial in state court only under compulsion of the habeas order, which otherwise barred retrial. That was when the state court vacated the conviction and set a new trial. Indeed, the state court order vacated conviction "*[p]ursuant to the Order in the United States District Court* for the District of Montana, Missoula Division, cause number CV-20-105-M-DLC and based upon the State's Motion to Renew Proceedings filed in compliance with that order." (emphasis added). Reversal of the district court's order would remove the current federal court impediment to any state court reinstatement of the judgment and cancellation of the new trial. Reversal would, as in *Moore*, "release [the state of] the burden of the new trial itself." 518 U.S. at 150.

Brown conflicts with *Moore* and did not consider *Moore*. In both *Brown* and *Moore*, the underlying conviction was vacated. *Moore*, 518 U.S. at 149; *Brown*, 7 F.4th at 668–69. *Brown* suggests that this was enough to take away our power to hear the case, because "[i]f the state court vacates the underlying judgment, there is usually nothing more for the federal courts to do." *Id.* at 669. But *Moore* held the opposite; federal courts can relieve the state of the burden of a new trial. 518 U.S. at 150.

Brown also conflicts with the Supreme Court's holding in *Eagles v. U.S. ex rel. Samuels*, 329 U.S. 304, 307–08 (1946). There, the Court held that even where "the writ has been granted and the prisoner released," an appellate court can still "affect the litigants in the case before it" because "[r]eversal undoes what the habeas corpus court did and makes lawful a resumption of the custody." *Eagles*, 329 U.S. at 307–08. *Brown* sought to distinguish *Eagles* because the latter did not involve a vacatur of an underlying conviction. 7 F.4th at 672. But that is a difference without a distinction. Garding was formerly "in custody" as a state parolee before the district court's grant of habeas relief. *See Thornton v. Brown*, 757 F.3d 834, 841 (9th Cir. 2013) ("A state parolee is 'in custody' for purposes of the federal habeas statute."). Thus, just as in *Eagles*, a reversal would allow a "resumption of the custody" that had been challenged in habeas corpus.

The state court's vacatur of Garding's conviction did not moot this case. The new trial against Garding has not yet begun, and by reversing the district court's order, we can provide Montana with relief.

B

Garding also argues that AEDPA does not give us power to hear this case because she is no longer in "custody."

Binding precedent, however, forecloses this statutory interpretation. The statute asks whether the petitioner was "in custody" under the "judgment of a State court" when the petition was filed. *Stow v. Murashige*, 389 F.3d 880, 885 (9th Cir. 2004) (quotations omitted); *see Maleng v. Cook*, 490 U.S. 488, 490–91 (1989) ("We have interpreted the statutory language as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed."); *Carafas v. LaVallee*, 391 U.S. at 234, 238 (1968) ("The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed."). All agree that Garding was "in custody" under the underlying state conviction when she filed her habeas petition. Jurisdiction attached at that time.

III

We turn to the merits. We review a district court's grant or denial of a habeas petition de novo. *Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018); *Wilkinson v. Gingrich*, 806 F.3d 511, 515 (9th Cir. 2015). We apply "AEDPA's standard of review to the 'last reasoned state-court decision.'" *Noguera v. Davis*, 5 F.4th 1020, 1034 (9th Cir. 2021) (quoting *Martinez v. Cate*, 903 F.3d 982, 991 (9th Cir. 2018)). That standard is "highly deferential." *Davis v. Ayala*, 576 U.S. 257, 269 (2015). As relevant here, by AEDPA's terms, we can reverse a state court decision only if the "decision . . . was contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Guided by these principles, we defer to the Montana Supreme Court's application of *Strickland* and *Brady*.

A

In reviewing an ineffective assistance claim, we ask "whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Id.*

We first evaluate whether the Montana Supreme Court reasonably applied *Strickland* when it held that Garding's counsel's performance was not deficient. *Strickland*, 466 U.S. at 687. Because we hold that it did, we do not reach the second part of the *Strickland* test. *Id.* at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

The Montana Supreme Court's determination that Garding's counsel's performance was not deficient was reasonable. First, the state court reasonably held that Garding's counsel's decision not to hire an expert was within the "wide range of professionally competent assistance." *Garding*, 466 P.3d at 508 (citing *Whitlow v. State*, 183 P.3d 861, 866 (Mont. 2008) (quoting *Strickland*, 466 U.S. at 690)). It also reasonably held that Garding's counsel's defense was strong, and that she effectively countered the State's case. *Id.* at 507. It further reasonably concluded that Garding's claim would require "the Court to engage in second guessing with '20/20 hindsight'" her counsel's choices, which *Strickland* forbids. *Id.* at 508.

The district court held that because no reasonable defense attorney would have failed to use an accident reconstruction expert here, the Montana Supreme Court unreasonably held that Garding's counsel acted within the

range of professional competence. *See Garding*, 2023 WL 3086883, at *8–10. We disagree. The Montana Supreme Court reasonably applied *Strickland* to the facts as found by the Montana Supreme Court. These facts included that at trial, the State elected not to present any expert. *Garding*, 466 P.3d at 508 ("Notably, the State did not pursue an accident reconstruction [expert] either.") And, the state high court concluded, Garding's counsel "countered or sought to undermine virtually every evidentiary contention introduced by the State." *Id.* at 507.

The state trial court also rejected Garding's counsel's representations as "self-serving statements" contradicted by other testimony. And then, holding that counsel's testimony was not credible, the state trial court reviewed the total record, and concluded that counsel made a "strategic decision" not to use an accident reconstruction expert. The state trial court's analysis is reasonable under our highly deferential review.

The dissent faults the Montana Supreme Court for relying too much on Garding's counsel's representations while not discussing Garding's post-conviction accident reconstruction evidence. Dissent at 41. But the dissent's analysis is flawed. The postconviction accident reconstruction experts' evidence was considered by the trial court but only related to the prejudice issue, not the deficiency issue. The Montana Supreme Court's decision to deny Garding's claims because her counsel's performance was not deficient was reasonable. Thus, the Montana Supreme Court did not separately address the prejudice issue. *See Strickland*, 466 U.S. at 697. The dissent collapses these two inquiries by concluding that Garding's counsel's performance was deficient because an accident reconstruction expert's "testimony would have been

devastating to the State's case." Dissent at 40. Put differently, the dissent argues that Garding's counsel was necessarily deficient because Garding was prejudiced. The dissent's argument violates *Strickland*'s very dictates that "[a] fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight." *See Strickland*, 466 U.S. at 689.

Moreover, the Montana Supreme Court reasonably concluded that Garding's counsel mounted a strong defense. And, as part of this defense, Garding's counsel relied on the State's disjointed presentation to cast doubt on the State's case. The Montana Supreme Court's conclusion that this was a strategic decision over using an accident reconstruction expert was reasonable, especially given that Garding's counsel had used an accident reconstruction expert before.

This conclusion follows *Richter*. There, the petitioner claimed his counsel was constitutionally deficient because he failed to secure expert testimony on blood evidence. *Richter*, 562 U.S. at 96. The Supreme Court disagreed, holding that "[i]t was at least arguable that a reasonable attorney could decide to forgo [the] inquiry." *Id.* at 106. This is because "making a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on the blood pool's origins and compositions," and "there was a serious risk that expert evidence could destroy Richter's case." *Id.* at 108.

The state courts reasonably concluded that a similar risk was present here. As the state trial court noted, there was "a counter-analysis" presented at the post-conviction hearing that argued for a conclusion consistent with Garding's guilt.

The State's expert presented a crash theory that tracked the minimal injuries to Parsons, minimal damage to Garding's vehicle, and reflected the eyewitness testimony.

The dissent objects to the State's use of the Troopers' testimony about their investigation of the accident, claiming that the Montana Supreme Court was wrong in stating that the State did not pursue an accident reconstruction. Dissent at 41. But the Troopers were never offered or formally qualified as experts, and the Montana Supreme Court reasonably concluded that whatever limited opinions they offered did not amount to the sort of "accident reconstruction" that Garding now contends that her counsel should have done. *See Garding*, 466 P.2d at 504. This reasonable finding is one that we may not second-guess on AEDPA review. *See* 28 U.S.C. § 2254(d). The dissent's citation to *Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008), Dissent at 41–42, does not change this. There, we simply said it was possible that when the prosecution puts up an expert witness, a defense counsel's failure to put up their own rebuttal expert may constitute deficient performance. *Ornoski*, 528 F.3d at 1235. But the State did not offer expert testimony. The dissent's reinterpretation of the facts to suggest they did is inappropriate under AEDPA review and undermines *Richter*'s holding that it is sometimes strategic for defense counsel not to pursue expert testimony. *See* 562 U.S. at 106.

The district court wrongly held that the Montana Supreme Court unreasonably applied *Strickland*. *Garding*, 2023 WL 3086883, at *8. The Montana Supreme Court's decision was a reasonable application of *Strickland*. *See* § 2254(d). Likewise, its determination of the facts supporting this holding was also reasonable. *See id.* The

district court misapplied the law and misconstrued the record in holding otherwise.[1]

B

Garding claims that her constitutional rights were violated because the prosecution failed to disclose evidence. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). She has two theories. First, the prosecution did not disclose x-rays of Parsons's leg. Second, they did not disclose unrelated crash scene pictures. Garding claims that if she had had either, she might have been found not guilty.

"A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. W. Virginia*, 547 U.S. 867, 869 (2006). Evidence is "material only if there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is [one] sufficient to undermine confidence in the outcome." *Amado v. Gonzalez*, 758 F.3d 1119, 1139 (9th Cir. 2014) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

[1] The dissent concludes that, in light of the new evidence developed in the state habeas proceedings, Garding's showing of prejudice is strong enough to conclude that she is "innocent." Dissent at 43. But we cannot reach the issue of prejudice unless we are able first to conclude, applying the deference required by AEDPA, that the state court unreasonably applied the "highly deferential" *Strickland* standard for assessing "counsel's performance." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). The dissent fails to apply this "doubly deferential" standard of review. *Id*. It also relies extensively on "the distorting effects of hindsight," rather than assessing counsel's performance "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. We thus reiterate that we cannot and do not reach the issue of prejudice.

We agree with the district court that the Montana Supreme Court reasonably rejected Garding's *Brady* claims. We thus defer to the Montana Supreme Court's conclusions as § 2254(d) requires.

1

Garding alleged that the State violated *Brady* by failing to turn over x-rays of the victim. Dr. Dale, the State's expert and the medical examiner who performed the autopsy, created an x-ray of Parsons's injuries. The x-ray was never provided to Garding's counsel. That said, Garding's counsel received a summary of the x-ray, which she used effectively at trial.

Garding relies on her expert, Dr. Bennett, to show that the x-rays were "impeaching and exculpatory." Dr. Bennett explained that the x-rays showed a "slight hairline fracture," which would have "cast[] doubt upon and undermine[d] the State's case." Dr. Bennett concluded that the x-ray confirms that Garding's Blazer was not involved because its custom bumper would have caused more damage to Parsons's leg. Similarly, Garding argues that the x-ray would have undermined Dr. Dale's testimony that the injuries pointed to the Blazer.

The Montana Supreme Court reasonably concluded that Garding's theory does not show a *Brady* violation. *Brady* requires the disclosure of exculpatory or impeaching evidence that, "if disclosed and used effectively, . . . may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. As the Montana Supreme Court noted, the existence of the x-rays was disclosed, a summary of what was shown by the x-rays was discussed by both experts, and defense counsel "examined witnesses based on it." *Garding*, 466 P.3d at 510. The Montana Supreme Court

reasonably held that the state had not "in any way suppressed the evidence." *Id.*

2

Garding also argues that the State violated *Brady* by not disclosing exculpatory pictures from a different car crash. Three days after he testified, Dr. Dale discovered photos of a victim and vehicle connected to a different crash. *Garding*, 466 P.3d at 510. These showed similar injuries to the victim, but different damage to the vehicle. Dr. Dale explained that he thought they might be helpful if he was called as a rebuttal witness. But he never was. *Id.* He did not use the photos to form his testimony. And after reviewing them, he did not change his mind. *Id.*

The Montana Supreme Court reasonably held that Garding did not show that the non-disclosure of these photos was material. The photos were from a crash with "many distinctives" from this case—differences that made the Montana Supreme Court question the likelihood of the photos' admissibility. *Id.* at 511. More importantly, the Montana Supreme Court reasonably concluded that the photos did "not establish that Garding was not involved in the accident." *Id.*

IV

The Montana Supreme Court was objectively reasonable in determining that Garding failed to establish an ineffective assistance of counsel claim under *Strickland* or any *Brady* violations.

AFFIRMED IN PART AND REVERSED IN PART.

W. Fletcher, J., dissenting.

The district court granted petitioner Katie Garding's federal habeas petition, holding that her trial counsel provided ineffective assistance in failing to present evidence from an accident reconstruction expert. The majority concludes that the district court erred. I disagree and would affirm the district court.

This case is a miscarriage of justice. It is clear from the trial and postconviction record that Garding is innocent.

I. Background

On January 1, 2008, at about 1:40 a.m., Bronson Parsons was walking beside his friend Daniel Barry on the side of Highway 200 in East Missoula, Montana. A vehicle struck Parsons from behind. Barry told state troopers who arrived on the scene that the vehicle had been a rounded, dark colored SUV or truck. He testified at trial that the vehicle had been traveling "extremely fast," "too fast" for someone to survive. Barry recounted, "[A]ll of a sudden [Parsons] was gone. I felt like a rush of wind." He told a trooper who arrived at the scene that the vehicle had been traveling at about 60 miles per hour, and that Parsons had been "on the hood and up by the windshield." He testified that when the vehicle slowed down, Parsons slid off the hood onto the ground.

Another eyewitness, Deborah Baylor, was driving in the opposite direction on Highway 200 when Parsons was hit. Baylor testified that she saw a dark colored vehicle hit Parsons. "I think they were going regular speed." The vehicle, a "little bit smaller" than a Cadillac Escalade, had "rounded edges." "[I]t was so fast. . . . I saw something get

hit and—and then I hear a—it's like a pop, like a quick bang."

When State Trooper Andrew Novak arrived at the scene, Parsons was on the ground and "agonally breathing." Parsons had blood coming "from his stomach area" and "from his head, the back of his head, and his mouth." Based on Barry's description of what had happened, Novak believed that the striking vehicle would have sustained "heavy, front-end damage." Parsons was taken to the hospital and was later pronounced dead. Windshield glass was recovered from Parsons' clothing.

Later that morning, Montana Highway Patrol troopers were on the lookout for vehicles with broken windshields. About twelve hours after Parsons was hit, Trooper Richard Hader stopped Garding in East Missoula because she had a cracked windshield. She was quickly released because the crack in her windshield was old and there was no observable damage to her vehicle.

About a year later, after the case had gone cold, a jail inmate named Teuray Cornell contacted Trooper Hader, saying he had information about who had hit Parsons. Cornell made it clear that in exchange for his testimony he wanted to get out of jail. Cornell's call rekindled interest in Garding. Garding was ultimately charged with having killed Parsons.

According to the Montana Innocence Project, Garding was offered an extremely favorable deal under which, in return for a guilty plea, she would receive a suspended sentence and no prison time. Montana Innocence Project, *Katie Garding*, https://mtinnocenceproject.org/katie-garding-2/ [https://perma.cc/NY4Y-BG5P]. Garding, who has consistently said she was innocent, rejected the deal.

The case was tried to a jury in June 2011. Garding was represented by Jennifer Streano, a Montana Public Defender. Streano had four-and-half years of criminal defense experience and had previously been lead counsel in only one homicide case.

The jury found Garding guilty of vehicular homicide, failure to stop, and driving without a license. She was sentenced to a term of 30 years for the homicide, a consecutive term of 10 years for failure to stop, and a concurrent term of 6 months for driving without a license. The Montana Supreme Court affirmed. *State v. Garding*, 315 P.3d 912 (Mont. 2013). Montana trial court denied Garding's petition for postconviction relief, and the Montana Supreme Court again affirmed. *Garding v. State*, 466 P.3d 501 (Mont. 2020).

Garding timely filed a federal habeas petition under 28 U.S.C. § 2254. After giving the deference required by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the district court granted habeas relief, holding that in denying Garding's ineffective assistance of counsel claim, the Montana Supreme Court had unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Trial Court Evidence

The State's case against Garding relied heavily on testimony from James Bordeaux, Garding's ex-boyfriend. Bordeaux had been one of two passengers in Garding's vehicle on the night Parsons was killed. In exchange for his testimony, Bordeaux obtained a favorable plea deal on an unrelated burglary charge. The State had indicated that it intended to pursue a persistent felony offender designation against Bordeaux, exposing him to a potential sentence of up

to 100 years. In exchange for Bordeaux's testimony, the State agreed to recommend a five-year suspended sentence.

Bordeaux testified at trial that on the night of the accident, Garding had been driving and that he had been in the front passenger seat. He testified that after he turned to argue with Paul McFarling, who was in the back seat, about McFarling's handgun, he felt an impact and saw "[a] person flying through the air." Bordeaux was asked, "How do you know it's a person?" He answered, "I mean you can tell. Two feet. Two arms."

Before he testified at trial, Bordeaux's story had changed several times. After he agreed to a plea deal, Bordeaux was unable to locate where the fatal accident had occurred. Trooper Hader asked Bordeaux about the sequence of events and the location of the accident six different times. Bordeaux consistently denied traveling east from The Reno, the bar where he, McFarling, and Garding had been drinking before getting into Garding's vehicle. Parsons was east of The Reno when he was killed.

After Trooper Hader told Bordeaux where the accident occurred, Bordeaux changed his story to match that location. Bordeaux also changed his narrative of the evening several times. For example, Bordeaux originally claimed that Garding's vehicle had "rolled over" something, and that "Garding would have stopped if she knew she hit something." At trial, Trooper Novak was asked whether it was his opinion that Bordeaux had made inconsistent statements. Novak responded, "That would not be my opinion. That would be fact."

Bordeaux's testimony conflicted with the testimony of Barry, who had been walking beside Parsons. According to Barry, Parsons had not flown through the air, with his arms

and legs visible. Rather, Barry testified that after Parsons was struck, he was carried by the vehicle across its hood and windshield and that he slid off the hood when the vehicle stopped.

Bordeaux's testimony also conflicted with the testimony of Paul McFarling, Garding's back-seat passenger. McFarling testified that he had spent the evening drinking at The Reno with Garding and Bordeaux, and that the three of them had left The Reno in Garding's vehicle in search of cocaine. He testified that when they were driving near the I-90 underpass he had argued with Bordeaux about a handgun. The underpass is a considerable distance from where Parsons was killed. When Trooper Novak told McFarling that Bordeaux had said that Garding had hit Parsons, McFarling told Novak that Bordeaux's story was "ridiculous" and "pure fiction." He told Novak that "there was not one cell or molecule in his body that believed Katie Garding hit anything that night." The county attorney offered McFarling an immunity deal on an unrelated charge if he testified against Garding, but McFarling refused the deal. When McFarling testified at trial, he was asked, "And without a doubt, while you were in the vehicle with them, she hit nothing that night[?]" He answered, "She hit nothing."

Cornell, the jailhouse inmate who had rekindled interest in Garding, was not called to testify by the State because his story was replete with inconsistencies and contradictions. Instead, Cornell was called by Garding to underline the weakness of the State's case.

Cornell had initially told Trooper Hader that he had taped a light back onto the front of Garding's vehicle the day after Parsons was killed. Cornell's statement conflicted with Hader's own observations. Hader had stopped Garding's

vehicle in the late morning the day of the accident because of the crack in her windshield. Damage to the light, as described by Cornell, would have been easily and immediately visible. Yet Hader testified at trial that he had observed no damage to the front of Garding's vehicle.

Cornell had originally told the authorities that Bordeaux was the driver and that Garding was performing a sexual act on him when Parsons was hit. Later, after Bordeaux was placed in a pod with Cornell at the Missoula County Detention Center, Cornell changed his story to say that Garding had been driving. Michael Crawford, Cornell's cellmate at the time, testified that Cornell had told him that he was going to lie and say that Garding had been driving.

The prosecution called the state medical examiner, Dr. Gary Dale, to testify about Parsons' injuries. Dr. Dale testified that the cause of death was a skull fracture caused by contact with asphalt. He testified that the location of injuries to both of Parson's calves and a fracture of his left fibula was consistent with the height of the bumper on Garding's vehicle. The prosecutor asked only about the height of the bumper. He did not ask whether Garding's bumper, which was an unusual square-edged after-market front bumper, could have caused the injuries to Parsons' calves.

Garding called Dr. Thomas Bennett, a forensic pathologist, who testified that the unusual bumper on Garding's vehicle could not have caused the injuries to Parsons' calves. Dr. Bennett testified, "This is not the mark a square bumper like this would leave." Rather, "these bruises are more consistent with a rounded bumper."

The State relied on Troopers Strauch, Hader, and Novak to reconstruct the accident. Trooper Strauch testified that he

had received over 160 hours of crash investigation training, 16 hours of training on forensic mapping software, and another 80 hours of training in "reconstruction school." Strauch had drawn a map of the scene of the crash that was introduced into evidence.

Trooper Hader testified that he had training as a "technical crash investigator," had completed over 240 hours of "crash reconstruction" course work, and had responded to 1,600 crashes over sixteen years. Hader testified that he had initially searched for a vehicle with heavy front-end damage caused by a "full-frontal impact," based on Barry's description of the crash. He testified that he changed his mind about the nature of the impact after he personally inspected Parsons' body at the funeral home two days after crash: "Upon examining the body, it was evident to me that we didn't have a full-frontal impact with the injuries that the body showed to us. . . . Basically all I saw on Mr. Parsons was a bruise on his left calf [in addition to] his head injury that happened when he hit the pavement." Based on what he perceived as a minor injury only to Parsons' left calf, Hader concluded that the vehicle had not hit Parsons with "full-frontal impact." Rather, in Hader's opinion, the vehicle had swerved and merely clipped Parsons on his left side. Hader discounted Barry's eyewitness testimony that Parsons had been on the vehicle's hood as "pretty much . . . impossible." "I feel what he saw was Mr. Parsons being flipped by the vehicle."

Trooper Novak testified that he had worked for the Montana Highway Patrol for about five years and that he had been trained at the Advanced Traffic Enforcement Academy and had received additional field training. Novak had been the first trooper to arrive at the scene. He estimated the distance between the point of impact and where Parsons was

found as somewhere between 90 and 150 feet. He testified that he had originally believed that the striking vehicle would have sustained "heavy, front-end damage." Novak testified that he accompanied Trooper Hader to the funeral home to examine Parsons' body. After that visit and after gathering "more information," he concluded that he "should be looking for a vehicle with minor front-end damage on the right side." Novak said that he described the impact to Dr. Dale as "more of a clip."

Streano was not prepared to refute the troopers' accident reconstruction testimony. She did not object to any of their testimony on the ground that they had not been qualified as experts. She had not consulted an accident reconstruction expert and offered no expert testimony of her own.

B. Postconviction Evidence

In 2015, Garding sought postconviction relief in state court. She was represented by the Montana Innocence Project. Garding presented evidence from three accident-reconstruction experts: Keith Friedman, an expert in pedestrian impact crash reconstruction with over thirty-five years of experience; David Rochford, an expert in a crash reconstruction with over forty years of experience; and Dr. Harry W. Townes, an expert in crash reconstruction with over fifty years of experience. All three experts concluded that the State's theory of the accident was impossible. In Friedman's words, the State's theory "violates the laws of physics."

The experts identified critical flaws with the State's theory. Most important was the fact that there was no damage to Garding's vehicle. Given the nature and extent of Parsons' injuries, the experts each concluded that the impact would have caused significant damage to the bumper

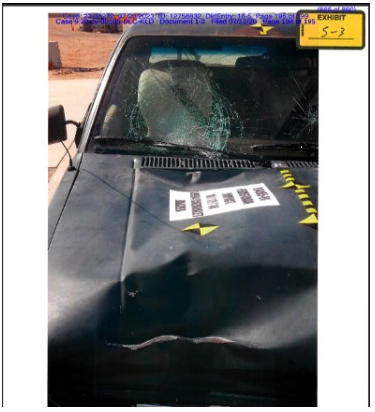
and the windshield. In addition to the injury to Parsons' legs, they pointed to an abrasion on his left shoulder consistent with the size and shape of a windshield wiper and shards of windshield glass on Parsons' clothing. Further, if the accident had occurred in the manner posited by the State, Parsons would have struck a radio antenna at the base of the windshield on the passenger side of Garding's vehicle. The antenna was undamaged.

The experts also all concluded that Parsons' leg injuries could not have been caused by Garding's square-edged bumper. Her bumper had no shock absorbing capacity. Friedman concluded that Parsons' leg injuries were instead consistent with a modern rounded bumper with shock-absorbing technology. Friedman's simulations showed there would have been "catastrophic fractures" to both of Parsons' legs if Garding's bumper had hit him, even if her vehicle had only been going 15 mph. Rochford similarly concluded that Garding's bumper would have caused far more damage to Parsons' legs. Dr. Townes concluded that, given the nature of the front bumper, if Garding's vehicle had struck Parsons, the tibias and fibulas in both of his legs would have been broken.

KARCO Engineering LLC, an automotive and safety testing firm, conducted a physical crash test using a nearly exact replica of Garding's vehicle, including her customized bumper. The test vehicle traveled at 35 miles per hour (the speed limit on Highway 200) and hit a stationary 198-pound dummy. The dummy victim was hit in the legs by the front of the test vehicle. The dummy's head then struck the hood and windshield. The vehicle's grille and trim around the passenger side headlight were broken in several places; the hood was badly dented; and the windshield was broken and dented by several inches. Two photographs were put into

evidence, illustrating the difference between Garding's undamaged vehicle and the damaged test vehicle:

Garding's Vehicle



KARCO Test Vehicle: Post-Crash

The three experts unanimously concluded that Garding's undamaged vehicle could not have possibly struck Parsons. According to Friedman, the State's theory of the case was a "physical impossibility." He concluded categorically, "Systems analysis proves that Ms. Garding's vehicle was not involved in the death of Mr. Parsons." Dr. Townes wrote that it was "beyond a reasonable doubt" that Garding's vehicle did not strike Parsons. Rochford wrote that Garding's "Blazer was obviously not the vehicle that struck Mr. Parsons."

The State changed its theory in response to Garding's expert evidence. The State's theory at trial had been that the vehicle had been traveling somewhere between a high and normal rate of speed, as Barry and Baylor had testified, and that the right side of the vehicle had "clipped" Parsons, as Troopers Hader and Novak had testified. Now, on

postconviction review, in an unsigned and undated report by Trooper Philip Smart, the State advanced an entirely new theory.

Trooper Smart recounted in his report that he had received "over 300 hours of instruction in crash investigation" and was "an instructor a[t] the Montana Law Enforcement Academy on the subject." His report concluded, contrary to the evidence the State had presented and relied upon at trial, that Garding's vehicle had been traveling "below 20 mph," perhaps as low as 12–16 mph. Smart speculated, "If driven by a distracted and/or impaired driver who may have intended to pull over, it might have been going slowly and sneaked up behind Mr. Parsons and Mr. Barry."

Trooper Smart wrote, "Mr. Barry never said the vehicle was going fast." "[T]he collision was a low-speed carry. This matches Barry's description of the collision[.]" Trooper Smart's description of Barry's evidence was flat wrong. Barry had described the vehicle as traveling "extremely fast." He estimated its speed as 60 mph. Smart's description was also inconsistent with Baylor's testimony. Baylor, who had been on Highway 200 driving the other direction, estimated the vehicle's speed as "regular speed."

Garding's three experts disagreed vehemently with Trooper Smart. Dr. Townes wrote that Smart had misapplied scientific methods. Friedman wrote that Smart provided "a deeply flawed analysis." "His whole premise relied on his misunderstanding of the injuries received and then misusing a table in a paper with the erroneous injury information." Rochford criticized Smart for failing to observe the appropriate professional standards of crash reconstruction procedure, and accused Smart of failing to

read or understand the articles cited in his report. Rochford concluded, "It is astonishing that the state proceeded on a vehicular manslaughter case, without first having an analysis and reconstruction performed by an expert qualified in the field of auto [v.] pedestrian crashes."

Streano, Garding's trial lawyer, testified during postconviction proceedings that she had failed "to take necessary steps to consult with an accident reconstruction expert and secure appropriate testing," "failed to request funding to secure testing," "failed to request more time to secure testing," and failed to make an investigation into the use of accident reconstruction in support of Garding's defense. She testified that her "failure to take these steps had nothing to do with strategy." Defense investigator Mori Woods also testified that she and Streano never discussed the possibility of consulting with or procuring an accident reconstructionist during the investigation leading up to Garding's trial.

Two experienced criminal defense attorneys testified that Streano had provided ineffective assistance. David Ness, who had been a criminal defense attorney for over 30 years, and Wendy Holton, who had practiced law in Montana since 1989, testified that an accident reconstruction was the most critical aspect of the case, and that Streano's failure to consider employing an expert in the field fell below an objective standard of reasonableness under prevailing professional norms.

II. Discussion

The Sixth Amendment guarantees a criminal defendant's right to effective assistance of counsel. This right is "beyond question a fundamental right." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). "[I]t assures the fairness, and thus

the legitimacy, of our adversary process." *Id.* at 378. "[A]ccess to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685. To prevail under *Strickland*, a defendant must demonstrate, first, that counsel's performance fell below an objective standard of reasonableness and, second, that the defendant was prejudiced by reason of counsel's actions. *Kimmelman*, 477 U.S. at 375.

The Montana Supreme Court denied Garding's ineffective assistance claim under *Strickland*'s first prong, holding that Streano's performance was professionally competent. *Garding*, 466 P.3d at 507. The Court wrote, "Our examination of the trial record 'in light of all the circumstances,' leads us to the conclusion that Garding's trial counsel presented an extensive and strong defense." *Id.* (internal citation omitted). "Against the entirety of the trial record, Garding claims ineffective assistance because her counsel did not pursue another possible defense tactic—the hiring of an accident reconstructionist. Notably, the State did not pursue an accident reconstruction either. . . . [T]he trial record here proves convincingly that Garding's counsel provided a strong defense." *Id.* at 508. The Court did not reach *Strickland*'s second prong.

Justice Gustafson dissented. She wrote, "[E]ffective cross-examination did not and could not counter officer testimony about the mechanics of the collision. Expert testimony to explain why the scenario offered by the officers violated the laws of physics and could not have occurred was required." *Id.* at 517 n. 4 (Gustafson, J., dissenting). "[I]t was constitutionally deficient to allow the State to put on non-expert opinions about the mechanics of the impact without any counter. The officer[s'] testimony likely carried

much weight with the jury and trial counsel failed to provide expert evidence to support an alternative scenario or to explain that the State's theory violated the laws of physics and was not physically possible." *Id.* at 517.

Garding sought federal habeas under 28 U.S.C. § 2254. Applying the deferential standard of AEDPA, the district court granted relief, holding that Garding had received ineffective assistance of counsel. Applying *Strickland*, the court found, first, that Garding's attorney performed deficiently, and, second, that Garding was prejudiced. I agree with the district court.

Garding is innocent, but her innocence is not the legal basis for my agreement with the district court. Rather, I agree with the district court because Garding has satisfied both steps of the *Strickland* analysis and is entitled to relief under AEDPA. In reaching both steps, I consider not only evidence showing deficient performance but also evidence showing prejudice.

A. Deficient Performance

To establish deficient performance under *Strickland*, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Counsel are constitutionally deficient when their "unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

It is well established that *Strickland* imposes a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691; *Kimmelman*, 477 U.S. at 384; *Hinton v.*

Alabama, 571 U.S. 263, 274 (2014). An attorney's "performance at trial, while generally creditable enough," cannot justify the "apparent and pervasive failure to" uphold this duty. *Kimmelman*, 477 U.S. at 386; *see also United States v. Cronic*, 466 U.S. 648, 657, n. 20 (1984). The Supreme Court has consistently held that a single, serious error is sufficient to support a claim of ineffective assistance of counsel. *Kimmelman*, 477 U.S. at 383; *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Cronic*, 466 U.S. at 657 n.20. "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011); *see also* ABA Criminal Justice Standards for the Defense Function 4-4.1(d) (2017) ("Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts.").

Under AEDPA, a federal court may not grant habeas relief to a state prisoner unless the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The Montana Supreme Court failed to recognize that Streano's failure to investigate accident reconstruction constituted a single, serious error rising to the level of ineffective assistance. The Court described the ways in which Streano had performed at a professionally competent level, and it is true that Streano provided effective assistance

in some respects. *Garding*, 466 P.3d at 507–08. But the Court failed to recognize the critical importance of the accident reconstruction evidence that Streano could have introduced but did not.

We know from Garding's postconviction proceedings that expert accident reconstruction testimony would have been easy to obtain, and that such testimony would have been devastating to the State's case. Garding's postconviction counsel put on three experts who unanimously concluded that the accident that killed Parsons could not have occurred in the manner described by the troopers. The State effectively conceded as much. Instead of defending the accident reconstruction theory of Troopers Strauch, Hader and Novak, the State advanced an entirely different theory. With no supporting evidence, Trooper Smart concluded that Garding's vehicle had been traveling at a speed of less than 20 mph, perhaps even as low as 12–16 mph, and might have "sneaked up" on Parsons. Garding's three experts unanimously concluded that the accident could not have happened in the way posited by Smart.

The Montana Supreme Court said nothing about any of this. The Court wrote only, "Garding argues, based *primarily* on an affidavit provided by her trial counsel, that the [Montana] District Court erred by concluding her trial counsel did not render ineffective assistance by failing to hire an accident reconstructionist." *Garding*, 466 P.3d at 506 (emphasis added). And it wrote, "Notably, the State did not pursue an accident reconstruction either." *Id.* at 508. Neither of the Court's statements is true.

First, while Garding did rely on Streano's affidavit, that was not the primary basis for her argument in the

postconviction proceedings. Rather, Garding's argument relied heavily on the failure of her counsel to present accident reconstruction evidence at trial, and on the utterly convincing accident reconstruction evidence introduced at postconviction. The Montana Supreme Court failed to acknowledge the ease with which accident reconstruction evidence had been obtained from three unanimous experts for postconviction proceedings, and the ease with which that evidence could have been obtained for trial. It also failed to acknowledge the devastating effect that this evidence would have had on the State's case against Garding. *See Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (noting that this court has consistently held that a lawyer who fails to investigate evidence that could demonstrate her client's factual innocence renders deficient performance); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence."); *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). Indeed, the Court failed even to acknowledge the *existence* of the three experts' accident reconstruction evidence.

Second, contrary to the Montana Supreme Court's statement, the State did "pursue accident reconstruction" at trial. It did so through Troopers Strauch, Hader and Novak. The troopers were not qualified as experts, but they provided accident reconstruction testimony as if they were experts. Streano mounted no defense against the troopers' testimony. She did not challenge their qualifications and allowed them to provide what was, in effect, expert testimony. Because she had not investigated the possibility of expert accident reconstruction testimony, she could not counter their testimony with expert testimony of her own. *See Duncan v. Ornoski,* 528 F.3d 1222, 1235 (9th Cir. 2008) (holding that

the duty to consult with an expert is particularly important "when the prosecutor's expert witness testifies about pivotal evidence" and when counsel "has no knowledge or expertise about the field").

I agree with the district court and conclude under AEDPA that the decision of the Montana Supreme Court majority that Streano provided professionally competent assistance was error. The result was "a decision that . . . involved an unreasonable application of" *Strickland*, and "a decision . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

B. Prejudice

For counsel's inadequate performance to constitute a Sixth Amendment violation, the petitioner must also show that counsel's failures prejudiced her defense. *Strickland*, 466 U.S. at 692. A petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Because the Montana Supreme Court did not reach the question of prejudice, AEDPA deference is not required. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005). However, even if AEDPA were to apply, I would reach the same result. The prejudice to Garding's case is beyond obvious.

The three accident reconstruction experts—with over a century of combined experience—uniformly concluded that Garding's vehicle could not possibly have struck Parsons. The experts disproved the state troopers' theory at trial and made a laughingstock of Trooper Smart's theory at postconviction. The weakness of the State's case at trial

makes prejudice all the more evident. *See Strickland*, 466 U.S. at 695–96. The only purported eyewitnesses connecting Garding to the crime were Bordeaux and Cornell. Bordeaux testified in return for a spectacularly good plea deal. He provided a number of different stories before he settled on the story he told on the stand. He could testify accurately as to the location of the crash only because Trooper Hader told him where it occurred. Cornell was so unreliable that the State was unwilling to put him on the stand.

The evidence now before us tells one story: Garding is factually innocent. From the moment Garding was first questioned by Trooper Hader until today, she has consistently maintained her innocence. Had the reconstruction evidence been presented at trial, the "likelihood of a different result" is more than "substantial." *Richter*, 562 U.S. 86 at 112. It is a virtual certainty.

Conclusion

Garding has spent many years in prison for a crime she did not commit.

In Garding's own words, "When Bronson was hit that night, not just one innocent life was taken but two." Garding has suffered a great injustice at the hands of the State of Montana. Today, she suffers another injustice at the hands of this court.

I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

KATIE IRENE GARDING, Petitioner, vs. MONTANA DEPARTMENT OF CORRECTIONS, Respondent.	Cause No. CV 20-105-M-DLC ORDER

Petitioner Katie Irene Garding (Garding) has been released on parole during the pendency of these proceedings and is now under the supervision of the Montana Department of Corrections. Accordingly, Garding's unopposed Motion for Substitution of Party (Doc. 22) will be granted. The caption is amended to reflect Garding's proper custodian as the Montana Department of Corrections. *See Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963).

Pending before this Court is Garding's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254(d). Garding challenges her convictions for: Vehicular Homicide while Under the Influence, Failure to Stop Immediately at the

Scene of an Accident Involving Injury, and Driving Without a Valid Driver's license, handed down in Montana's Fourth Judicial District, Missoula County. Having considered the parties' submissions, the record in the case, and the applicable law, the Court GRANTS the petition, in part.

I. Background

The following facts, presumed to be correct under 28 U.S.C. §2254(e)(1), are taken from the Montana Supreme Court's decision affirming the denial of Garding's postconviction petition. Additional facts will be supplied herein where necessary.

> Garding's conviction of vehicular homicide arises out of a tragic incident leading to the death of Bronson Parsons (Parsons) from injuries he sustained after being hit by a vehicle while walking along Highway 200 in East Missoula, in the early morning hours of January 1, 2008. Parsons had been walking with a friend, Daniel Barry (Barry), who testified Parsons was hit by a bigger, dark-colored SUV or truck, possibly with a deer guard or other front-end attachment. Another eyewitness, Deborah Baylor (Baylor), also reported that a dark-colored vehicle had hit Parsons with its passenger side. After the impact, the vehicle drove off. After a lengthy period of investigation, the State charged Garding with vehicular homicide, leaving the scene of a fatal crash, tampering with evidence, and driving a motor vehicle without a valid license.
>
> The case proceeded to a jury trial in 2011. In addition to the testimony of Barry and Baylor, the State provided testimony from the two Montana Highway Patrol officers who had conducted the investigation. The State did not retain an expert to conduct an accident reconstruction, and the officers did not conduct one. However, the State did provide the expert testimony of Dr. Gary Dale, the medical examiner who had examined Parsons. Dr. Dale testified the location and size of Garding's bumper was consistent with the injuries sustained in Parsons' calves.

In response to cross examination by Garding's counsel, Dr. Dale acknowledged that any vehicle with a bumper of the same height could have caused Parsons' injuries. Further, Garding's counsel presented the testimony of an expert forensic pathologist, Dr. Thomas Bennett (Dr. Bennett), that the irregular bruising on Parsons' calves could not have been caused by a bumper like the one on Garding's vehicle.

The jury heard testimony from Gabrielle Weiss (Wiess), who law enforcement initially suspected of hitting Parsons. Weiss had made an unusual 911 call around the time of the accident, during which she identified herself as being in East Missoula. However, Weiss later explained she was reacting to an emergency when she called 911, and that she was actually in the Blue Mountain area at the time. Law enforcement agreed with Weiss after reviewing her cell phone records, and believed she was not driving the vehicle involved in the accident. Garding's counsel questioned Weiss, the investigating officers, and a Verizon representative who testified about Weiss' cell phone records, about Weiss' story. Garding's counsel emphasized that Weiss' vehicle contained a fabric impression from a pair of jeans, and that Verizon was unable to analyze several of Weiss' phone records. Garding's counsel pointed out inconsistencies in Weiss' story regarding her location, and secured an admission from Weiss on cross examination that she could not remember much about the night because she had been drinking heavily.

Highway Patrol Trooper Richard Hader (Trooper Hader) testified that the case went cold after police ruled out Weiss as a suspect, until he received a lead from Teuray Cornell (Cornell) almost one year after the accident. Cornell, at the time detained at the Missoula County Detention Center, contacted Trooper Hader to report that he had information about the accident. Cornell related to Trooper Hader that Garding had driven to his house later in the day on January 1, 2008, told him that she had hit a deer, and asked him to fix a broken light on the front of her vehicle, which Cornell did by affixing it with tape. On cross examination at trial, Garding's counsel got Cornell to acknowledge that he could not say with certainty whether Garding actually told him she hit a deer on the day he fixed her light. Garding's counsel also highlighted several different versions of the story Cornell had provided to police, and also elicited testimony from Cornell and Trooper Hader that Cornell was seeking to get out of jail when he contacted

police regarding the accident. Garding's counsel also elicited testimony from Cornell's cellmate at the time that Cornell had told the cellmate he was going to lie to police about the accident.

Other primary witnesses in the case were James Bordeaux (Bordeaux) and Paul McFarling (McFarling), both of whom were passengers in Garding's vehicle on the night in question. Bordeaux, Garding's boyfriend at the time, testified that he and Garding had started drinking around 11:00 a.m. on December 31st, and met up with McFarling that afternoon. He reported the three of them continued to drink throughout the afternoon and evening, including at Red's Bar in Missoula and the Reno Bar in East Missoula. After midnight, they went to a friend's house to purchase cocaine and, after they were unsuccessful, returned to Red's Bar. Garding hit the curb as she parked, and an officer observing this instructed her not to drive for the rest of the night. About 1:30 a.m., they left Red's Bar, with Garding driving, to again attempt to purchase cocaine in East Missoula. During this drive, Bordeaux testified that McFarling, who was sitting in the back seat, pulled out a gun and attempted to show it to Bordeaux. Bordeaux, who was sitting in the front passenger's seat while Garding was driving, turned around and started arguing with McFarling about the gun, causing a commotion in the vehicle. Bordeaux testified that, upon an impact, he spun around in his seat just in time to see a person flying through the air, and that Garding had stated, "I hit somebody." Bordeaux testified they were "in a panic about what to do," Garding did not stop the vehicle, and instead, she drove back to Red's Bar, where she attempted to park close to the same spot where they had been parked when the officer told Garding not to drive that evening. Then, the three got into McFarling's vehicle and drove to Missoula, where the three stayed the night at McFarling's house.

In exchange for his testimony, Bordeaux obtained a plea deal regarding a burglary charge arising out of the theft of McFarling's gun, which occurred the morning following the accident. Garding's counsel attacked Bordeaux's credibility at trial by focusing on his plea deal and highlighting inconsistencies in the stories Bordeaux had given to police. Garding's counsel also emphasized the testimony of McFarling, who consistently stated he did not remember Garding hitting anything with the vehicle that night. Further, Garding's counsel had McFarling explain that he had no reason to lie to protect Garding, as he believed Garding aided Bordeaux in stealing his gun.

(*Garding v. State*, 2020 MT 163, ¶¶ 2-8, 400 Mont. 296, 466 P.3d 501 (Mont. 2020)(internal citations omitted).

As set forth above, Garding was convicted of Vehicular Homicide while Under the Influence, Failure to Stop, and Driving without a Valid License. She was acquitted of one count of Tampering with Physical Evidence. On October 11, 2011, the district court sentenced Garding to a 30-year prison term for Vehicular Homicide, a consecutive 10-year sentence for Failure to Stop, and a concurrent 6-month sentence for Driving without a License.[1]

> Garding appealed, challenging evidentiary rulings made by the District Court regarding witnesses, cross examination, and Garding's expert witness. [The Montana Supreme Court] affirmed, and the United States Supreme Court subsequently denied Garding's petition for writ of certiorari. *Garding v. Montana*, 574 U.S. 863, 135 S. Ct. 162, 190 L.Ed.2d 118 (2014).
>
> On September 15, 2015, Garding, represented by the Montana Innocence Project, filed a petition for postconviction relief (Petition), raising three claims: ineffective assistance of counsel (IAC), discovery violations under *Brady v. Maryland*, 373 U.S. 83 (1963), and newly discovered evidence of her innocence. Specifically, Garding claimed her trial counsel had been ineffective for failing to hire an accident reconstructionist; that the State had failed to produce x-rays of Parson's legs and photographs of an unrelated 2005 vehicle-pedestrian accident, both of which she claimed were exculpatory; and that post-trial accident reconstructions produced by new experts constituted new evidence that proved Garding's innocence.
>
> The State filed motions for summary judgment on Garding's newly discovered evidence claims and her *Brady* claim regarding Parsons' x-rays, which the District Court granted after a hearing. The District Court then

[1] (*See* Sent. Trans.)(Doc. 1-25 at 712-13.)

> conducted a hearing on the remainder of Garding's claims, after which it denied the Petition in March of 2019.

Garding, 2020 MT 163, ¶¶ 10-11.

On appeal, the Montana Supreme Court found that the district court did not err in denying Garding's ineffective assistance of counsel claim. Specifically, the Court found trial counsel, Jennifer Streano (Streano), did not perform deficiently by failing to retain an expert in accident reconstruction. *Id*. at ¶¶ 17-23. The Court also held the district court properly concluded the State did not fail to disclose exculpatory evidence in violation of *Brady*. *Id*. at ¶¶ 29-36.[2]

II. Legal Standards

A federal court may entertain a habeas petition from a state prisoner "only on the ground that [she] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a district court may not grant habeas relief unless the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2)

[2] In a strongly worded dissent, two justices of the Montana Supreme Court would have reversed the lower court, granted Garding relief on all of her claims, and ordered a new trial. *Garding*, 2020 MT 163, ¶¶ 44-61. (Gustafson dissenting, joined by McKinnon).

resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Id*. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 412 (2000). Additionally, a federal habeas court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The U.S. Supreme Court further instructs that § 2254(d)(1) consists of two separate clauses. "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached [by the U.S. Supreme Court] on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the U.S. Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 413. A federal court may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id*. at 411. The question is whether the state court's application of clearly established federal law was "objectively unreasonable." *Id*. at 409.

Thus, AEDPA sets forth a highly deferential standard for evaluating state court decisions. A state prisoner is required to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Bearing these principles in mind and the limited scope of review outlined by AEDPA, the Court turns to Garding's claims.

III. Discussion

Garding raises the following claims for relief:

1. The State violated *Brady v. Maryland*[3] by failing to produce the x-rays of Parsons' leg taken by Dr. Dale, despite a court order;

2. The State violated *Brady v. Maryland* by failing to produce the 2005 accident photographs; and,

3. Trial counsel provided ineffective assistance by failing to consult with and call an accident reconstruction expert.

The Court will address Garding's ineffective assistance of counsel claim first, followed by the *Brady* claims.

//

[3] In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court held that "suppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution."

1. Ineffective Assistance of Counsel: Accident Reconstruction Expert

Garding contends she was deprived of her Sixth Amendment right to effective assistance of counsel at trial because her counsel failed to consult with and present testimony from an accident reconstruction expert that would have testified that the State's theory of the case violated the laws of physics.

i. Clearly Established Federal Law

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

To obtain relief on a claim of ineffective assistance of counsel, a defendant must show both that her attorney provided deficient performance, and that prejudice ensued as a result. *Strickland*, 466 U.S. at 687-96. To establish deficient performance, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation fell within the "wide range" of reasonable professional assistance. *Id*. at 689. Thus, in evaluating allegations of deficient performance the reviewing

court's scrutiny of counsel's actions or omissions is highly deferential. *Id*. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. The defendant's burden is to show that counsel made errors so serious that she was not functioning as counsel guaranteed by the Sixth Amendment. *Id*. at 687.

The second prong of the *Strickland* test requires a showing of actual prejudice related to counsel's performance. In order to establish prejudice, a petitioner "must show 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.

In addition, under AEDPA, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard…A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington*, 562 U.S. at 101. Accordingly, the federal court must engage in "a 'doubly deferential' standard of review that gives both the state court and the

defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013).

ii. Garding's IAC claim on postconviction

In support of her IAC claim, Garding presented the opinion report of mechanical engineer Dr. Harry W. Townes, an expert in accident reconstruction, as well as the opinion of Keith Friedman, an accident reconstructionist with over 35 years of experience. (*See* Townes Report, Ex. G)(Doc. 1-2 at 31-45); *see also* (Friedman Report, Ex. H)(Doc. 1-2 at 46-89.) Mr. Friedman conducted virtual testing via computer simulations to replicate the hit-and-run accident. (*Id*. at 58-63.)

On October 17, 2014, KARCO Engineering, LLC, an automotive and safety testing facility conducted a physical crash reconstruction using a 1994 Chevrolet Blazer with a modified bumper, like Garding's. (*See* KARCO Test Report, Ex. I) (Doc. 1-2 at 90-114). A 198-pound dummy was positioned on the test track and the test vehicle was outfitted with weighted dummies, consistent with the individuals present in Garding's vehicle. The crash was reconstructed at a speed of 35.31 miles per hour. The crash test report summarized: "[u]pon impact the vehicle engaged the lower half of the dummy's body. The dummy rotated backward until its back impacted the hood of the vehicle, forcing its legs up in the air until it flipped over and dismounted to the passenger side of the vehicle. The dummy's head contacted the hood and windshield. The upper and lower torso

contacted the vehicle's hood. The test vehicle experienced damage to its front end and the windshield was broken on impact." (*Id*. 94.) The crash reconstruction was documented via photos contained within the report. (*Id*. at 101-14.) The test vehicle was significantly damaged. (*Id*. at 193-95) (Ex. S, Photos of test vehicle following crash reconstruction.)

Based, in part, upon the KARCO testing data, both Dr. Townes and Mr. Friedman provided opinions that Garding's vehicle did not strike Mr. Parsons. Central to both opinions was the fact that Garding's vehicle sustained no damage. (*Id*. at 39, 40-42)(Townes Report); (*Id*. at 64-66, 72)(Friedman Report). Mr. Friedman concluded, within a reasonable degree of engineering certainty that Garding's vehicle was not the vehicle that struck Parsons. (*Id*. at 72.) Further, Mr. Friedman opined that the trial testimony offered by Trooper Hader and Trooper Novak, regarding the pedestrian kinematics that they believed to have occurred during impact, was incorrect and "violate[d] the laws of physics given the front-end design of [Garding's] vehicle and Mr. Parsons' body characteristics." (*Id*.) Specifically, Trooper Novak's trial testimony regarding Parsons being hit from behind in both legs by the bumper but never contacting the body of the vehicle and then flying forward 90 feet, allowing the vehicle to swerve around the body and not run it over, was a "physical impossibility," violating both the laws of physics and impact mechanics." (*Id*. at 67.)

Similarly, Trooper Hader's theory that Parsons was struck only in the left leg and projected forward approximately 90 feet also presented an impossibility. (*Id*.) Under this scenario "the leg, if not separated from the rest of [the] body, would move out of the way and rotate about Mr. Parsons' center of mass, leaving Mr. Parsons in a location very close to the point of impact." *Id*. Mr. Friedman noted that eyewitness Daniel Barry's description of the impact, in which Parsons was carried along by the vehicle with his head and upper shoulders on the hood/windshield and his body sliding off the side of the vehicle and landing on the ground, was "consistent with the results of the crash test and virtual testing" in which the dummy ended up approximately 120 feet from the point of impact. (*Id*. at 67-8.)

Dr. Townes opined "it is beyond a reasonable doubt" that Garding's vehicle did not strike Parsons. (*Id*. at 31.) He also explained the flawed reasoning, testified to by both Trooper Hader and Trooper Novak, that the lack of front-end damage to the Garding vehicle was due to turning or swerving. Dr. Townes noted that neither trooper presented any quantitative information to support their turning theory and further explained how the geometrics involved in the turning theory would not be sufficient to eliminate vehicle damage. (*Id*. at 36-38, 45.)[4]

[4] Garding also provided additional expert support, including a report from Peter J. Stephen, M.D. and report from Rocky Mountain Investigations, which offered similar findings: Garding's vehicle was not involved in the hit-and-run. *See* (Stephens Report, Ex. F)(Doc. 1-2 at 21-

Streano also provided an affidavit acknowledging she failed to consult with accident reconstruction experts and secure appropriate testing. (Aff. Streano II, Ex. N) (Doc. 1-2 at 163, ¶ 10.) Streano explicitly stated this decision was not strategic, but rather was illogical and a "terrible oversight" on her part. (*Id*.) She explained that she failed to appreciate that accident reconstruction was critical to Garding's case and that without such expert testimony, the opinions offered at trial by Troopers Hader and Novak were left unchallenged. *Id*. at ¶ 11. Defense investigator Mori Woods confirmed that she and Streano never discussed the possibility of procuring or consulting with an accident reconstructionist during the investigation leading up to Garding's trial. (*See* Hrg. Trans.)(Doc. 1-16 at 153:1-16.)[5]

In response to Garding's claim, the State provided a report prepared by Trooper Smart. In this document Trooper Smart posited that the collision occurred at a speed range between 12-18 miles per hour and that the collision was of the "wrap and carry" variety. Under this scenario, Mr. Parsons would be "wrapped" onto the hood of the striking vehicle and carried for some distance before falling

30)(Parsons' injuries consistent with a steep sloping hooded vehicle such as a sports car or sedan, not Garding's Blazer); *see also* (Rocky Mountain Investigations Report, Ex. J)(Doc. 1-2 at 115-128)(no indication of pedestrian contact on Garding's vehicle; improbable that it was involved in the accident and sustained no damage).

[5] (*See also* Doc. 1-4 at 60) (Ex. E, 6/22/16 "To Whom it may concern" letter written by Woods.)

off. (Smart Report, Ex. 8)(Doc. 1-3 at 112-122.) Trooper Smart, drawing from Dr. Dale's report, stated that "lacerations to the left, right, top front and back of head…and the stellate laceration on the right occipital bone was caused by contact with the ground and was the cause of death." (*Id*. at 115.) Trooper Smart went on to observe that "no broken bones were noted on Parson's head, although other experts referred to a broken anterior fossa." (*Id*.) Trooper Smart then went on to focus on the minimal injury to Parsons' legs and lack of damage to Garding's vehicle. (*Id*. at 115, 118) Trooper Smart concluded that a low-speed collision explains the lack of damage to the Garding vehicle and that this same vehicle, traveling at a low speed, was "a good candidate to break a pedestrian's leg" and that her bumper matched Parsons' injuries. (*Id*. at 118.)

Trooper Smart's findings were disputed by Garding's experts.[6] In particular, David Rochford an independent accident reconstructionist refuted the allegations of Trooper Smart. Rochford found that the Garding vehicle could not have been involved in the crash and detailed various inconsistencies throughout both the state's case and Smart's report. (*See* Rochford Rpt., Ex. H)(Doc. 1-4 at 187-217.) Further, Mr. Friedman found that Trooper Smart's conclusions were fundamentally

[6] *See e.g.*, (Doc. 1-4 at 61-66)(Townes Rebuttal Report, Ex. F); *see also*, (*Id*. at 76-186)(Supplemental Friedman Report, Ex. G)(finding Trooper Smart's report and analysis: (1) is based on an incorrect understanding of Parson's injuries; (2) ignored much of the evidence while attempting to justify the results; and, (3) either misinterpreted or misunderstood evidence).

flawed because he based his calculations on the relatively minor leg injuries Parsons received. But Friedman noted Trooper Smart misunderstood the injuries. He pointed out that Parsons received major injuries, including fractures to at least five bones in his head, and bilateral shearing of his carotid arteries, which were severe and life-threatening injuries. (*Id*. at 80-82.) Trooper Smart based his calculations on a belief that Parsons received relatively minor injuries. Friedman explained that a low-speed pedestrian impact where the pedestrian slowly slides off the hood, as posited by Trooper Smart, would not have resulted in the devastating injuries Parsons exhibited. (*Id*. at 83.) "The more likely explanation is that this massive set of injuries of the head/neck area are a result of a higher speed impact with a vehicle that was probably of a recent design." (*Id*.)

iii. PCR Decision

The PCR court found that Streano made a strategic decision not to retain an accident reconstructionist and that this decision was reasonable. The court further held Streano exercised sound trial strategy in relying heavily upon the cross-examination of witnesses to prove her defense. (Doc. 1-19 at 32, ¶ 59.) The court noted Streano effectively cross-examined the State's witnesses on matters which called into question what vehicle was involved in the crash, called witnesses that countered the State's witnesses, and provided alternate suspects and theories for the crash. (*Id*. at ¶ 57.) The PCR court also found Streano effectively cross-

examined Dr. Dale regarding the fibula fracture and that it "did nothing" to identify Garding's vehicle as the striking vehicle. Streano obtained several concessions from Dr. Dale, including that there was nothing about Parson's injuries that identified Garding's vehicle and that any vehicle with a bumper at the same height could have been involved. *Id*. at ¶ 58.

The PCR court further found Trooper Smart's testimony to be more credible than any of Garding's expert witnesses. (*Id*. at 33, ¶ 64.) The court determined the injuries to Parsons matched the trial testimony and Trooper Smart's analysis. Namely that "[a] low-speed collision would cause minimal injury to [Parson's] leg. The lack of injury to his torso shows that his body did not contact the striking vehicle and thus no damage would be caused to the vehicle." (*Id*. at 33-34, ¶ 65.) Further the Court noted that Garding's experts used an assumed speed of 35 miles per hour and a presumed impact point, which did not account for the relatively minor leg injuries and lack of a torso injury. Instead, these facts pointed to Trooper Smart's finding that it was a low-speed collision. (*Id*. at ¶ 66.)

For these reasons, the PCR court concluded that Streano's performance was not so deficient as to deprive Garding of a fair trial, (*id*. at 35, ¶ 67)(citing *Strickland*), and additionally found there was no prejudice to Garding. That is, there was no reasonable probability sufficient to undermine confidence in the outcome of the proceedings, the "[l]ikelihood of a different result is merely

conceivable, but isn't substantial." (*Id*. at ¶ 68.)

iv. Montana Supreme Court Decision

The Montana Supreme Court echoed the lower court's findings and that the examination of the trial court record led to the conclusion that Streano presented and "extensive and strong defense." *Garding*, 2020 MT 163, ¶ 17. Specifically, she countered or sought to undermine "virtually every" evidentiary contention introduced by the state and the jury was left to make credibility determinations in order to resolve evidentiary conflicts and reach a verdict. *Id.*

The Court did not get into the mechanics of the accident reconstruction or opposing expert testimony. Instead, it noted Streano presented the testimony of Dr. Bennett to counter Dr. Dale's testimony and he provided his expert opinion that Garding's vehicle, specifically her bumper, did not cause Parson's injuries. *Id*. at ¶ 18. Similarly, Streano highlighted potential flaws in the investigation and the work of the forensic analysts. The Court reiterated the cross-examination concessions Garding obtained from Dr. Dale that he could not definitely identify Garding's vehicle as the one that caused Parson's injuries and any vehicle with the same bumper height could have done so. *Id*.

The Court also discussed Streano's attack on Bordeaux's testimony and challenge to his credibility based upon his own self-interested motivation. *Id*. at ¶ 19. Streano was able to "highlight several inconsistent statements [Bordeaux]

provided during his police interviews." *Id*. Further, she directly contradicted his testimony with that of McFarling who repeatedly stated Garding did not hit anything that night and that he had no reason to lie for Garding. *Id*. Streano "examined the inconsistencies" in Cornell's statements regarding who was driving- Bordeaux or Garding- and also prompted him to admit he was uncertain whether Garding had told him she hit a deer at the time he taped her light. *Id*.

Streano provided multiple alternative theories about what happened, including challenging Weiss' shifting account of the night in question and getting her to admit she had changed her story and did not recall the night's events due to her heavy intoxication. *Id*. at ¶ 20. Streano also highlighted that a jean fabric impression was found on Weiss' bumper and attacked the State's handling of the evidence. *Id*. Streano pointed to the potential involvement of another individual, Josh Harrison, who had bragged at a party that he had hit someone with his car on the night Parsons was struck. *Id*. Finally, the Court noted Streano elicited testimony that raised unanswered questions regarding the State's timeline of events and overall theory of the case, including: a phone call Garding made at approximately the same time Parsons was hit, the origin of glass in Parsons' clothing, and incomplete cell phone data that could have supported Garding's timeline of events and location. *Id*. at ¶ 21.

In light of this record, the Court found Garding presented a strong defense

and to determine otherwise would require the Court to engage in impermissible "second guessing. *Id*. at ¶ 22. Or put another way, the Court could not consider a "Modified Plan A defense" or "Plan B defense" just because Streano's "Plan A defense" failed. *Id*. Due to trial counsel's efforts, the Court held Garding failed to establish that Streano's failure to hire an accident reconstructionist fell "outside the wide range of professionally competent assistance" and, thus, could not meet the first *Strickland* prong. *Id*. at ¶ 23. Based upon its finding that Streano performed proficiently, the Court declined to consider the prejudice *Strickland* prong.

v. Analysis

The Montana Supreme Court's determination that Streano performed proficiently resulted from an objectively unreasonable application of *Strickland*, pursuant to 28 U.S.C. § 2254(d). Garding is entitled to relief on this claim.

a. Deficient Performance

As set forth above, the PCR Court described Streano's decision not to hire an accident reconstruction expert a "strategic" one. (Doc. 1-19 at 32, ¶ 59.) The Montana Supreme Court seems to have tacitly adopted this finding. But Streano's own affidavit and hearing testimony, coupled with that of Investigator Woods, belies this finding. The Circuit has observed that "[c]ounsel cannot justify a failure to investigate simply by invoking strategy… Under *Strickland,* counsel's investigation must determine strategy, not the other way around." *Weeden v.*

Johnson, 854 F. 3d 1063, 1070 (9th Cir. 2017). In the same vein, a court should not seek to justify a failure to investigate by invoking trial strategy, particularly when the record suggests a contrary finding.

The Montana Supreme Court did not focus on the strategy inquiry and instead found that Streano's representation fell within the wide range of professionally competent assistance. Both the PCR court and the Montana Supreme Court referenced *Harrington v. Richter*. The PCR court noted *Harrington's* observation that "[i]t is sometimes better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." (Doc. 1-19 at 27, ¶ 33)(citing *Harrington*, 562 U.S. at 109). The Montana Supreme Court observed this principle to be true in Garding's case and also noted there can be more than one way to provide reasonable professional assistance. *Garding*, 2020 MT 163, f.n. 2.

In *Harrington v. Richter*, the Supreme Court rejected an IAC claim. There, the Court reversed an en banc Ninth Circuit decision and upheld a state court ruling that defense counsel's failure to test blood evidence was a reasonable trial strategy. *Richter*, 562 U.S. at 107-08. If defense counsel had tested the blood, he would have discovered the mixture supported his client's version of events- a fact that was revealed during PCR proceedings. *Id*. But without the benefit of hindsight trial counsel faced two potential outcomes: a result that might have

supported the defense theory of the case or one that defeated it. Faced with this "serious risk" of an adverse result, the Court held defense counsel was not obligated to "pursue an investigation that…might be harmful to the defense." *Id*.

But in the present case, to reach a conclusion that the trial strategy employed was reasonable, Streano was first obligated "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. While attorneys are afforded considerable discretion to make strategic decisions about what to investigate, this discretion is afforded only *after* the lawyer has "gathered sufficient evidence upon which to base their tactical choices." *Duncan v. Ornoski*, 528 F. 3d 1222, 1235 (9th Cir. 2008)(citing *Jennings v. Woodford*, 290 F. 3d 1006, 1014 (9th Cir. 2002). The Circuit has repeatedly held that "[a] lawyer who fails to adequately investigate and introduce…[evidence] that demonstrate[s] [her] client's factual innocence, or that raises[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Duncan*, 528 F. 3d at 1234, *citing Hart v. Gomez*, 174 F. 3d 1067, 1070 (9th Cir. 1999)(collecting cases). "The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Duncan*, 528 F. 3d at 1234-35, *citing Rios Rocha*, 299 F. 3d 796, 805 (9th Cir. 2002).

It is impossible to analyze the reasonableness of Streano's decision to forego

an investigation into accident reconstruction because she made no strategic considerations. Furthermore, there is no reason to think that pursuing such an investigation could have potentially undermined the defense. To be sure, Streano did a competent job of challenging the State's evidentiary contentions and witnesses. To nearly every point made by the State, Streano presented a counterpoint. But Streano also was presented with her client's vehicle, supposedly involved in a hit-and-run accident, that had sustained no damage. Thus, there is no scenario under which Streano could have believed crash reconstruction investigation, and the corresponding expert testimony, could have inculpated her client. Further, Garding had adamantly maintained her innocence throughout the proceedings.

Accordingly, this was not a situation, as the Montana Supreme Court claimed, where with the benefit of hindsight, once Streano's "Plan A" failed, it is convenient to suppose about the merits of a "Potential Plan B" or "Modified Plan A." *See Garding*, 2020 MT 163 at ¶ 22; *see also Bashor v. Risley*, 730 F. 2d 1228, 1241 (9th Cir. 1984)(tactical decisions do not constitute IAC simply because, in retrospect, better tactics were known to have been available.) In Garding's case, two things were true at the same time: the questionable investigation and witness credibility issues existed while the lack of damage to the vehicle also existed. Mounting challenges to both would not have resulted in Streano "riding two

horses" and, thus, presenting an inconsistent defense theory. *Cf. Correll v. Steer*, 137 F. 3d 1404, 1411 (9th Cir. 1998)(*Strickland* provides wide discretion to counsel who failed to develop an inconsistent defense). Nor would pursuing both lines of defense have been pointless or harmful to Garding. *See Browning v. Baker*, 875 F. 3d 444, 473 (9th Cir. 2017)(recognizing that "the obligation to investigate, recognized by *Strickland*, exists when there is no reason to believe that doing so would be fruitless or harmful.") In fact, by failing to pursue this investigation and present expert testimony in support, the two investigating officers were allowed to provide their conclusions about the kinematics of the crash and the lack of vehicle damage. Without countervailing testimony, the conclusions of Troopers Hader and Novak were given the imprimatur of expert testimony.

Thus, no matter the skill with which Streano challenged the State's case, the jury was left with the somewhat confusing, yet unrefuted, testimony of the officers. That is, that Parsons was either hit only in his left leg while the striking vehicle was turning, as testified to by Trooper Hader, or was struck in both legs and propelled forward, as testified to by Trooper Novak. Under either scenario, according to the troopers' respective conclusions, there would be little damage to the Garding vehicle. As set forth above, however, each of Garding's experts detailed how both scenarios presented impossibilities, violated the laws of physics, and were wholly inconsistent with the lack of damage to Garding's vehicle.

And while it is the case that in many situations, defense cross-examination will be sufficient and support a strategy that too much doubt exists regarding the State's theory to allow a jury to convict, *see Harrington*, 562 U.S. at 111, it is also the true that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Id.* at 106. Further, while Streano did perform proficiently in challenging the State's theory of the case, "even an isolated error" can support an ineffective assistance claim if it is "sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Her failure to investigate accident reconstruction constituted such an isolated, and serious, error.

Streano had a duty to perform an investigation and consult with experts. Her failure to pursue an accident reconstruction/crash investigation, and procure the corresponding expert testimony, was deficient and fell below an objective standard of reasonableness under *Strickland*. The state court's determination to the contrary resulted from an unreasonable application of the *Strickland* performance standard to the facts of this case. 28 U.S.C. § 2254(d)(1). Even under the deferential standards of AEDPA and *Strickland* applying in tandem, a reasonable jurist could not determine that the failure to investigate and introduce the accident reconstruction evidence did not amount to deficient performance. The Court has considered reasonable arguments against deficient performance and concludes

there to be none; Garding has established Streano performed deficiently.

b. Prejudice

As set forth above, the Montana Supreme Court did not consider the *Strickland* prejudice prong. The PCR court gave passing reference to second prong, but did not provide meaningful analysis. It simply determined that "[t]here [was] not a reasonable probability sufficient to undermine confidence in the outcome of the proceedings." (Doc. 1-19 at 35, ¶ 68.) This Court disagrees.

Once a petitioner demonstrates counsel's performance was deficient, the Court next engages in the prejudice analysis. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To satisfy the prejudice standard, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

The *Strickland* court further instructed:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with

> overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-96. To constitute *Strickland* prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable. *Richter*, 562 U.S. 86 at 112.

The evidence presented at trial against Garding was not overwhelming. The testimony of Garding's ex-boyfriend, Bordeaux, was fraught with issues. The same can be said of jailhouse informant Teuray Cornell. The investigation into the hit-and-run had gone cold for months once Weiss was eliminated as a suspect. In December of 2008, Cornell contacted law enforcement from the Missoula County Detention Center. From the outset, it was clear that he wanted a deal in exchange for his information. (*See* Hader test.)(Doc. 1-24 at 531:531; 581)(noting Cornell wouldn't cooperate until he was "home on his couch"); *see also*, (Crawford test.)(Doc. 1-25 at 429)(Cornell's cellmate testified Cornell was always trying to get out of jail using information he had.)

Cornell initially told Trooper Hader the day following the hit-and-run that he taped a light back onto Garding's vehicle after she or Bordeaux had allegedly struck a deer with the Blazer. The problem with this information is that Trooper Hader actually stopped Garding's vehicle 10 hours after the hit-and run. Trooper Hader observed no front-end damage to the vehicle, which would include a broken

or freshly-taped light. Also, on the stand Trooper Hader reviewed a photo Detective Blood took of Garding's vehicle two weeks after the hit-and-run. It does not show a freshly duct-taped light, but instead has "some kind of tape hanging on it." (*Id*. at 600-01.)[7]

Cornell initially told law enforcement that Bordeaux was driving the vehicle. (*See* Novak test.)(Doc. 1-25 at 216.) He subsequently changed his story to claim that Garding was the driver of the vehicle. This change in story occurred after Cornell was placed in a pod with Bordeaux at the Missoula County Detention Center. (*Id*. at 290-91); *see also* (Cornell Testimony)(Doc. 1-15 at 405-06). Michael Crawford, Cornell's cellmate, confirmed that while Cornell and Bordeaux were in the cell together, they were sitting down talking the entire time. (*Id*. at 430). Crawford also testified that after Bordeaux was moved out of their pod, Cornell stated that he liked Bordeaux and would hate to see him released from prison out of state and then thrown back into prison in Montana. Cornell informed Crawford he was going to change his story and tell the County Attorney that Garding was the driver and not Bordeaux. (*Id*. at 430-31.) On the stand Cornell admitted to providing untruthful information to law enforcement and he was unable to recall exactly where he had obtained the information he did provide.

[7] This tape, as shown on the 1/15/08 photo, is described elsewhere as being "old and tattered" an indication that it had been there for a substantial amount of time, certainly more than 2 weeks. (See Rochford Report)(Doc. 1-4 at 190).

(Cornell test.)(Doc. 1-25 at 415-16.) Of note, the State elected not to call Cornell as a witness; the defense called him.[8]

The testimony of Bordeaux, like Cornell's, was also problematic. In the statement he gave to Detective Blood in January of 2008, during the stolen gun investigation, Bordeaux stated that the group left the Reno Bar in East Missoula around 12:30 and headed back to Missoula and that Bordeaux, Garding, and McFarling were at Red's Bar until closing. After closing, they went to McFarling's house and spent the night. (Bordeaux test.)(Doc. 1-25 at 86-88.) There is no mention of any return trip to East Missoula.

Bordeaux was then extradited out-of-state on warrants. Upon his return to Montana in March of 2009, Bordeaux initially refused to speak to law enforcement. Subsequently, his attorney reached out to law enforcement and Bordeaux provided a statement. He was informed that this initial statement "wasn't going to cut it." (Hader test.)(Doc. 1-24 at 591).

On May 27, 2009, Bordeaux provided another interview in which he claimed they hit something around 1:40 in East Missoula. (*Id*. at 592.) Bordeaux then claimed the group was at the Reno until approximately 1:30 a.m. and, while driving west back into Missoula, they hit something near the interstate underpass.

[8] Additionally, at some point prior to sentencing, Cornell apparently advised Streano that "he made the whole thing up from the very git-go." (Sent. trans.)(Doc. 1-25 at 708:14-16.)

(Bordeaux test.)(Doc. 1-25 at 99-100.) During the interview, Bordeaux was asked about this sequence of events and the location of the collision six times; Bordeaux stated they never drove east of the Reno. He also denied going anywhere except from the Reno to Red's Bar. (*Id*. at 101-02.) Trooper Hader then informed Bordeaux that Parsons was hit 300 yards east of The Reno- the opposite direction of where Bordeaux had claimed the collision occurred. (*Id*. at 104-05; 107.) Bordeaux's story then changed and he stated that they had gone on a drug run that took them east of the Reno. (*Id*. at 107-08.) Bordeaux claimed that they ran over something but he didn't see what it was. (*Id*. at 114-15.) Notably, two days after providing this information, Bordeaux received a probationary sentence on the burglary charge stemming from the theft of McFarling's gun. (*Id*. at 117.)

Bordeaux then left Montana and did not know Garding had been charged. (*Id*. at 119.) The defense team went to Missouri to interview him. The story that he told Garding's team placed the group driving into Missoula at approximately 1:00 a.m., 40 minutes before the hit and run occurred. (*Id*. at 124.) Bordeaux stated it felt like they "rolled over" something- the collision was not high impact- and that Garding would have stopped if she knew she hit something. (*Id*. at 124-25.)

In March of 2011, Bordeaux was transported back to Montana facing revocation of his underlying burglary sentence. He then gave a new statement in

which he stated he, Garding, and McFarling all knew they'd hit a person on the night in question; he also changed the sequence of the night's events. (*Id*. at 132-38.) Bordeaux claimed, for the first time that he, Garding, and McFarling had a pact to cover up the hit-and-run. Despite this pact, he still decided to steal McFarling's gun the following morning. (*Id*. at 143.) Two months before trial Bordeaux provided a new statement. (Hader test.)(Doc. 1-24. at 594.) Bordeaux claimed that a body flew up onto the hood of Garding's vehicle. Trooper Novak acknowledged Bordeaux had provided inconsistent statements. (Novak test.)(Doc. 1-25 at 311.) Suffice to say, the only two witnesses who placed Garding behind the wheel of the Blazer in East Missoula at 1:40 a.m. had credibility issues and were both concerned with their own interests.

As discussed at length above, the physical condition of the Garding vehicle was not consistent with having been involved in a collision. While the vehicle was generally in rather poor condition, there was no recent damage that would indicate it had struck a pedestrian. Trooper Hader stopped Garding's vehicle at 1:00 p.m. on January 1, 2008. He observed a crack in her windshield, but that noted the crack was old. (Hader test.)(Doc. 1-24 at 560). Trooper Hader did not note any front-end damage, including a broken or taped light. (*Id*.) Similarly, there was no impact damage to the Blazer's hood or windshield, the radio antenna located on the right fender was not bent, and there was no observable damage to the right roof support,

the right-side door, the passenger side window, or the right side mirror.[9] Similarly, while Dr. Dale opined Parsons' head injury resulted from contact with the ground, Alice Ammen from the State Crime Lab provided counter testimony that supported a finding that Parsons actually contacted the striking vehicle's windshield. Ammen opined, given the large amount of glass she recovered from Parsons's clothing, she believed him to have struck a windshield and that the windshield glass was then transferred into his clothing. (Ammen test.)(Doc. 1-24 at 633). Ammen explained the glass she recovered was clean, distinct from glass that had been deposited or run over on the highway. (*Id*. at 635.) Also, McFarling was adamant that Garding never hit anyone on the night in question and that he never entered into an agreement with Garding or Bordeaux to conceal the hit and run. (McFarling test.)(Doc. 1-25 at 33-36.)

Dr. Dale testified that there was nothing about the Garding vehicle that was consistent with Parsons' fibula fracture, which was located 11 inches above his heel, and there was nothing about the Garding vehicle that was consistent with Parsons' head injury. (Dale test.)(Doc. 1-24 at 661; 668.) Dr. Dale also conceded that any vehicle with a bumper 15 to 18 inches high would have caused similar injuries. (*Id*. at 672, 675.)

[9] (*See also* Rochford Report)(Doc. 1-4 at 190.)

In support of the defense theory that Garding's vehicle was not involved in the hit-and-run, Dr. Bennett testified that the bruising on Parsons calves was inconsistent with Garding's square after-market bumper and was more consistent with a rounded bumper. (Bennett test.)(Doc. 1-25 at 456-57.) Dr. Bennett opined that Garding's bumper did not cause the injuries. But Dr. Bennett was offered as an expert in forensic pathology; he was not offered as a crash scene expert and was not an accident reconstructionist. Dr. Bennett noted crash biomechanics and occupant kinematics are not his field of expertise. (*Id*. at 438.)

Trooper Hader was not an expert in crash scene and/or accident reconstruction. He testified that his training in crash scene investigation, in addition to the law enforcement academy, consisted of two reconstruction courses. (Hader test.)(Doc. 1-24 at 512.) Trooper Hader explained his analysis of the crash. He believed it to be a "swerving type" collision. He based this conclusion upon the bruise he saw on Parsons' left calf, road rash on his flank, and Parsons' head injury. Hader testified, "if you strike a- a square vehicle, even a round front-end vehicle, you're going to have some form of impact whether it's broken ribs or more bruising and that, and there was nothing that indicated that his body struck anything in that way." (*Id*. at 521.) According to Hader this "swerving type" impact explained the lack of damage to Garding's vehicle. (*Id*. at 522.) Thus, the limited injury to Parsons body and swerving tire marks caused Hader to change the

scope of his investigation from looking for a vehicle that would have sustained major front-end damage to a vehicle with relatively minor damage. *(Id*. at 514-15; 522-23.)

Likewise, Trooper Novak was not an expert in crash scene reconstruction. At the time of the hit-and-run he had been with the Montana Highway Patrol for a year and a half. (Novak test.)(Doc. 1-25 at 163.) Like Trooper Hader, Trooper Novak changed his focus as to the type of vehicle damage they would be looking for, that is from a vehicle with major damage to a vehicle with minor front-end damage. (*Id*. at 211.) Novak testified that initially Dr. Dale believed the striking vehicle to be a "small car." *Id*. After Novak told Dr. Dale they were looking for an SUV and that he believed the striking vehicle to be steering back towards the road or slightly turning and that the collision was "more of a clip," Dr. Dale felt the scenario could be consistent with the injuries observed on Parsons. (*Id*.)

But Novak's understanding of the crash mechanics was less than clear: "My opinion was that [Parsons] was hit while the vehicle was steering back into the lane. My opinion is that he- the initial impact served to accelerate his body forward, and his acceleration was such that he stayed on or near the hood of the car as it continued to travel west." (*Id*. at 285). When Novak was asked if he believed Parsons was carried on the hood of the vehicle, he testified, "I can't really form an opinion as to that. I think – there's – there's a likelihood he was. There's also a

likelihood that he was actually flying through the air. I- I can't say if he was on the hood on the vehicle of if he was actually simply flying through the air. I don't know. (*Id*.). When questioned later by the State about the distance Parsons body traveled, Novak stated he couldn't say for certain, but believed it to be unlikely that Parsons traveled 150 feet from the point of impact. Novak agreed it was a possibility, but then qualified this statement by adding, "none of us really know." (*Id*. at 336.)

Had Streano engaged the services of an accident reconstruction expert, he or she would have been able to effectively counter the testimony offered by Troopers Hader and Novak, as detailed above. (*See* Section III(1)(ii)). Specifically a crash reconstruction expert and/or mechanical engineer would have established the following: (1) if involved in the collision, Garding's vehicle would have sustained readily observable damage, (2) the testimony offered by Trooper Hader and Trooper Novak regarding the pedestrian kinematics, when viewed against the design of the Garding vehicle and injuries to Parsons, violated the laws of physics, (3) Trooper Novak's trial testimony suggesting Parson flew forward but never contacted the body of the vehicle was an impossibility violating the laws of physics and impact mechanics, (4) Trooper Hader's theory of Parsons being struck only in the left leg and being projected forward 90 feet presented a physical impossibility, and (5) the troopers' theory that the lack of front-end damage to Garding's vehicle

was due to turning, finds no support in the applicable mathematics or geometrics.

Accordingly, such expert testimony would have established, within a reasonable degree of certainty, that Garding's vehicle could not have been the vehicle that struck Parsons. This information would have had a significant effect on Garding's defense. The troopers' testimony was the only evidence that was left virtually unchallenged; no counter to their testimony about the crash mechanics was presented. Without such expert testimony, the defense failed to present an alternate theory of the collision or to explain how the clipping/swerving theory violated the laws of physics. Such expert testimony would have convincingly bolstered Garding's claim that she was not the driver of the vehicle that struck Parsons. This evidence was necessary for the jury to fully understand the mechanics of the collision in relation to Parsons' injuries and would have exculpated Garding.

This weakness in the State's case is further underscored by virtue of the fact that the State entirely changed its theory of the crash in post-conviction proceedings. Via the Smart Report, the State contended, for the first time, that the crash was actually a low-speed side collision. This theory contradicts that of the two eye-witnesses that testified about the crash, Daniel Barry and Deborah Baylor. Barry testified he felt a rush of wind as the vehicle approached and that the striking vehicle hit Parsons struck Parsons "hard and fast." (Barry test.)(Doc. 1-24 at 455-

56). Barry reiterated the vehicle was coming "extremely fast." (*Id*. at 466.) Similarly, Baylor testified the vehicle was going "regular speed" at the time of impact and then sped up. (Baylor test.)(*Id*. at 479.) The posted speed limit for the area of East Missoula where the crash occurred is 35 miles per hour. Further, the reports of Rochford and Friedman convincingly refute the theories advanced in the Smart Report and affirm the findings advanced by Garding in the original expert reports and crash tests filed in support of her PCR petition. (*See* Rochford Report)(Doc. 1-4 at 187-217); *see also* (Friedman Report)(*Id*. at 77-129.)

Accordingly, the expert crash reconstruction testimony provides compelling support of Garding's innocence. Had Streano made a reasonable investigation and presented this information to the jury, it is reasonably likely that the decision reached would have been different. *See Strickland* at 695-96. That is, the Court finds it reasonable to infer that had this evidence been presented to the jury, there is a strong possibility that at least one member of the jury would have found reasonable doubt existed. Further, Garding has met her burden of establishing the requisite prejudice: the likelihood of a different result is not just conceivable, it is substantial. *See Richte*r, 562 U.S. at 112. It was objectively unreasonable for the state courts to conclude otherwise. Garding is entitled to habeas relief on this claim.

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2. *Brady* Claims: x-rays and 2005 Photos

Garding claims the State violated *Brady v Maryland* by failing to produce x-rays Dr. Dale took of Parsons' fibula fracture and 2005 photographs Dr. Dale reviewed following his trial testimony.

i. Clearly Established Federal Law

Under *Brady*, prosecutors are responsible for disclosing "evidence that is both favorable to the accused and material either to guilt or punishment." *United States v. Bagley*, 473 U.S. 667, 674 (1985)(internal quotation marks omitted). The failure to turn over such evidence violates due process. *Wearry v. Cain*, 577 U.S. 385, 392 (2016)(per curiam). The prosecutor's duty to disclose material evidence favorable to the defense "is applicable even though there has been no request by the accused, and encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

"There are three components to a true *Brady* violation: '[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Benson v. Chappell*, 958 F. 3d 801, 831 (9th Cir. 2020)(*quoting Strickler*, 527 U.S. at 281-82.) "The terms 'material' and 'prejudicial' are used interchangeably in *Brady* cases." *Benn v. Lambert*, 283 F. 3d 1040, 1053 n. 9 (9th Cir. 2002). Failure to disclose evidence

by the prosecution is prejudicial "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" of a different result exists when the failure to disclose "undermines confidence in the outcome of the trial." *Id*. at 678.

ii. Garding's Claims on PCR

Garding first argued that the State violated her right to due process, and an order of the trial court, by not disclosing x-rays that Dr. Dale had taken of Mr. Parson's lower leg during his post-mortem examination. (Doc. 1-1 at 18-19.)

The State contended that the x-rays were listed in Dr. Dale's post-mortem report and that Dr. Bennett referenced the x-rays in his expert report for the defense. The State further argued because the defense was on notice of the existence of the x-rays, it could have subpoenaed them from the Montana State Crime Lab and that the State was under no duty to obtain the x-rays, which were not in the State's possession, for the defense. The State also contended the evidence was not suppressed and was not favorable to Garding because it was not impeaching or exculpatory. (Doc. 1-3 at 4-8.) The State moved for summary judgment on this claim. (Doc. 1-11 at 3-7.)

Garding's next *Brady* claim surrounds photos that were not provided to the defense. Following his testimony, but prior to the end of trial, Dr. Dale reviewed

an autopsy report from an unrelated 2005 vehicular homicide case. On June 9, 2011, Dr. Dale created a CD of the photographs from the 2005 case and put them in his Garding/Parsons file in anticipation of potentially being recalled as a rebuttal witness. (*See* sealed trans.)(Doc. 12 at 15-16.) The photos detailed an automotive-pedestrian collision. The striking vehicle was a Nissan passenger car and the victim-pedestrian sustained injuries to his legs that were similar to Parsons' injuries. Because Dr. Dale was not recalled during the Garding trial, the photos stayed in his file and apparently remained unknown to either the State or the Defense until PCR proceedings in 2017.

In her Amended PCR Petition, Garding argued that these photos were exculpatory and that the State's failure to disclose at them, at trial or on appeal, constituted a *Brady* violation. (Doc. 1-5 at 6-10). Garding argued there was a reasonable probability the outcome of her trial would have been different if the photos were disclosed. This argument was premised upon the fact that the leg injuries sustained by the victim in the 2005 photos was substantially similar to Parsons and, therefore, refuted the State's contention that the unique nature of Garding's bumper was responsible for Parsons injuries. (*Id*. at 11-12, 14.) Further, the 2005 striking vehicle sustained extensive damage to its windshield, thereby highlighting the lack of damage to Garding's vehicle. (*Id*. at 12-13.) Garding argued these photos would have opened up new defense theories to trial

counsel and bolstered her expert reports that it was not her vehicle involved in the accident, but rather a vehicle with a softer front-end bumper system. (*Id*. at 15.)

The State countered by arguing that the 2005 photographs were not material for purposes of *Brady*, because they were not exculpatory, relevant, or independently admissible. (Doc. 1-6 at 6-9.) The State further argued that Garding received a fair trial and had the opportunity to advance the theories that she claimed the photos raised. (*Id*. at 9-12.)

iii. PCR Decision

The PCR court granted the State's motion for summary judgment as to the x-ray claim. There, the court found that the existence of the x-rays was disclosed via Dr. Dale's report and acknowledged by Dr. Bennett. (Doc. 1-15 at 5.) The x-rays were also discussed during the probable cause hearing held on March 2, 2011. (*Id*.) Under the facts of the case, the court found no due process violation occurred where Garding failed to obtain evidence of which she was aware. (*Id*. at 5-6.)

As to the 2005 photos, the PCR Court noted they contained insufficient information to determine relevancy and exculpatory value. (Doc. 1-19 at 20-21, ¶ 12.) The court found the theory advanced by Garding based upon the photos was actually presented at trial, thus, there was no prejudice. (*Id*. at 21, ¶ 15.) Further, the Court held the photos were not exculpatory, because they did not demonstrate Garding was not involved in the collision. (*Id*. at 21-22.) The Court determined

the photos were not material and Garding failed to demonstrate a reasonable probability of a different outcome had the photos been disclosed prior to trial. (*Id.* at 22.) Accordingly, no *Brady* violation occurred.

iv. Montana Supreme Court Decision

The Montana Supreme Court denied Garding's *Brady* claim relative to the x-rays. The Court first found that the x-rays were in possession of the State Crime Lab and both parties were "explicitly aware" of their existence, both Drs. Dale and Bennett referenced the x-rays in their reports submitted prior to trial. *Garding*, 2020 MT 163 at ¶ 30. In relation to Garding's argument that had the substance of the x-rays been disclosed she could have further impeached the credibility of Dr. Dale by pointing out that the bumper on Garding's vehicle would have caused more damage than only the fibular fracture shown on the x-rays, the Court found Garding's counsel questioned several witnesses about Parsons' injuries, including the fracture, in support of her contention that Garding's vehicle did not strike Parsons. *Id*. Further, the Court found that the prosecution did not suppress the evidence because Garding was not only aware of its existence, but actively used the x-rays at trial- during her direct examination of Dr. Bennett and to cross-examine other witnesses. *Id*. at ¶ 31. Citing the Ninth Circuit's decision in *Amado v. Gonzalez*, the court noted "defense counsel cannot ignore that which is given to [her] or of which [she] is otherwise aware." *Id*., *citing Amado*, 758 F. 3d 1119,

1137 (9th Cir. 2014). The Court affirmed the lower court's finding that no *Brady* violation occurred relative to the x-rays.

As to the photos, the Court first determined the prosecution cannot suppress evidence about which it is unaware- Dr. Dale independently obtained the photos for possible use in the future and placed them in his own file. *Id*. at ¶ 35. Further, given the timeline of when Dr. Dale obtained the photos, it is unlikely Garding could have used the photos to impeach Dr. Dale as he was not recalled as a rebuttal witness. *Id*. Had Garding been presented the opportunity to attempt to impeach Dr. Dale, the photos were subject to relevancy objections. Finally, even if the photos were admitted, the Court determined it was impossible to conclude they would have been material to the outcome as "the theory espoused by Garding was already thoroughly presented, including by examination and criticism of Dr. Dale's opinions about the impact." *Id*. Accordingly, the Curt concluded the photos were not suppressed, nor were they material or exculpatory, and the PCR court did not err by holding no *Brady* violation occurred. *Id*. at ¶ 36.

v. Analysis

The Montana Supreme Court reasonably rejected Garding's *Brady* claims. Accordingly, this Court must afford deference under 28 U.S.C. § 2254(d).

a. The leg X-rays

At the probable cause hearing held on March 2, 2011, Dr. Dale testified that

he took an x-ray of Parsons left leg during his postmortem exam and the fibula "had a very slightly displaced fracture 11 inches above the heel." (*See* Doc. 1-24 at 109-10.) Streano questioned Dr. Dale about the fracture. (*Id*. at 112; 117.) At trial Dr. Dale again testified that took his own x-rays of Parsons' lower extremities. (Doc. 1-24 at 641, 650, 661). Additionally, Dr. Bennett prepared a report which relied, in part, upon Dr. Dale's file and post-mortem exam. (Bennett test.)(Doc. 1-25 at 452; 461-62.) Dr. Bennett testified about and was, thus, aware of the fibula fracture. (*Id*. at 453.)

"Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." *Mike v. Ryan*, 711 F. 3d 998, 1012 (9th Cir. 2013). As a preliminary matter, the Court is not convinced that the physical x-ray was particularly favorable to Garding. The parties were all well aware of the fact that the fibula fracture existed, there was testimony about the fracture, and the significance of this fracture, throughout the trial. Exculpatory evidence includes any evidence that "if disclosed and used effectively, [ ] may make the difference between conviction and acquittal." *United States v. Bruce*, 984 F. 3d 884, 895 (9th Cir. 2021)(*quoting Bagley*, 473 U.S. at 676). In this same vein, the Court cannot say the defense having possession of the physical x-rays would have made the difference in the instant case, because the substance of the x-rays was well known and discussed.

Exculpatory information includes that which may be used to impeach prosecution witnesses. *Giglio v. United States*, 405 U.S. 150, 152-54 (1972). Similarly, the impeachment value of the x-rays is limited. As set forth above, Dr. Dale acknowledged there was nothing about the Garding vehicle that was consistent with the location of Parsons' fibula fracture. (*See* Doc. 1-24 at 661; 668.) Thus, for purposes of *Brady*, Garding has not shown the physical x-rays were favorable. That is, there is no indication that having the actual x-rays, rather than a medical summation of what the x-rays showed, would have provided exculpatory or impeaching evidence. *See Benson*, 958 F. 3d at 831

While the actual printed x-rays were not contained in Dr. Dale's file and were, instead, at the crime lab, there is no indication that the State suppressed these documents. "In order for a *Brady* violation to have occurred, the favorable evidence at issue must have been suppressed by the prosecution." *See United States v. Olsen*, 704 F. 3d 1172, 1182 (9th Cir. 2013). Garding argues that the Montana Supreme Court's finding that there was no suppression contravenes *Banks v. Dretke*, 540 U.S. 668, 695 (2004), which provides defense counsel is not required to "scavenge for hints of undisclosed *Brady* material." (See Doc. 1 at 20.)

But the instant situation was not one where the prosecution lied or concealed evidence and put the burden on the defense to discover the evidence, as in *Banks*, where the prosecution failed to disclose evidence that would have allowed the

defense to discredit two essential prosecution witnesses. *See Banks*, 540 U.S. at 675. "Under *Brady's* suppression prong, if 'the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence,' the government's failure to bring the evidence to the direct attention of the defense does not constitute 'suppression.'" *Cunningham v. Wong*, 704 F. 3d 1143, 1154 (9th Cir. 2013)(*quoting Raley v. Ylst*, 470 F. 3d 792, 804 (9th Cir. 2006). As set forth above, the Court does not find the physical x-rays to be exculpatory. Furthermore, Garding and her counsel "possessed the salient facts regarding the existence of the records [she] claims were withheld." *See Raley*, 470 F.3d at 804. In *Cunningham*, the Court applied *Raley* and found that Cunningham's attorneys possessed facts that would have allowed them to access medical records of an individual that they knew had been shot and was subsequently treated by medical personnel. Accordingly, there was no suppression of this easily attainable evidence. *Cunningham*, 704 F. 3d at 1154. The situation is similar in the present case.

Streano was made aware of the existence of the physical x-rays at the probable cause hearing, if not sooner. Dr. Bennett was made aware that Dr. Dale took his own x-rays during the postmortem exam when he obtained Dr. Dale's files to review in preparation of writing his own expert report. As in *Cunningham*, Garding could have easily obtained the x-rays from the State Crime Lab; there was

no suppression.

Garding has not shown that the x-rays were favorable to her defense or that they were suppressed for purposes of *Brady*. Accordingly, the Montana Supreme Court did not unreasonably deny this claim.

b. The 2005 Photographs

Garding claims that the state court erred in holding no *Brady* violation occurred when it found the State did not possess or suppress the 2005 photographs for purposes of *Brady*, and that its decision contravenes *Kyles v. Whitley*. (Doc. 1 at 29-36.) Respondent counters that the prosecutor's duty to disclose the information was not triggered because the photographs were neither favorable nor material, accordingly, the Montana Supreme Court reasonably denied the claims. (Doc. 11 at 63-75.)

The Court acknowledges that *Kyles v. Whitley*, 514 U.S. 419 (1995) imposes upon government a "duty to learn" of favorable evidence known to others acting on the government's behalf as part of their "responsibility to gauge the likely net effect of all such evidence" to the case before it. *Kyles*, 514 U.S. at 437. "Whether the Government has 'possession, custody or control' of a document turns 'on the extent to which the prosecutor has knowledge of and access to the documents sought by the defendant in each case." *United States v. Posey*, 225 F. 3d 665 (9th Cir. 2000)(*quoting United States v. Bryan*, 868 F. 2d 1032, 1036 (9th Cir. 1989)).

But the prosecution "has no obligation to produce information which it does not possess or of which it is unaware." *United States v. Cano*, 934 F. 3d 1002, 1023 (9th Cir. 2019)(*quoting Sanchez v. United States*, 50 F. 3d 1448, 1453 (9th Cir. 1985)); *see also United States v. Aichele*, 941 F. 2d 761, 764 (9th Cir. 1991)("The prosecution is under no obligation to turn over materials not under its control."). There is no requirement that a prosecutor "comb the files" of every agency which "might have documents regarding the defendant in order to fulfill his or her obligations…" *Cano*, 934 F. 3d at 1023.

In the present case, Dr. Dale independently obtained the photographs and put them in his own file mid-trial, after he had already testified. Because Dr. Dale was not recalled as a rebuttal witness, the photos were not referenced or used at trial. As set forth above, the existence of the photos did not come to light until Garding's PCR proceedings, years after her trial. While Garding asserts there was an affirmative duty upon the State to learn of these photos and disclose them to the defense, the Court finds such a requirement untenable. *See Cano*, 934 F. 3d at 1023. There is no indication in the record before this Court that the State ever possessed these photos, had knowledge of the photos, or even had access to the photos until 2017. Accordingly, it would be counterintuitive for this Court to find the State somehow suppressed the photos, of which it was not aware, for purposes of *Brady*. The photos were not suppressed.

Further, the Montana Supreme Court's finding that the photos were immaterial and not exculpatory was reasonable. The photos demonstrate that the 2005 crash involved a Nissan passenger car and a pedestrian. (Sealed Trans.)(Doc. 12 at 23.) As a result of the collision the windshield was broken and the victim's scalp and hair were embedded in the windshield. (*Id*. at 26.) Some of the injuries to the 2005 victim were similar to Parsons' injuries. (*Id*.) These similarities included the head injuries, (*id*. at 27-28), and the leg injuries. (*Id*. at 39.) There was also significant damage to the Nissan passenger car, including the crumpled hood and extensive windshield damage. *Id*. at 28-29.

Garding argues that these photos were favorable because they could have been used to impeach Dr. Dale's trial testimony. She further claims that the photographs provide evidence that Garding's Blazer did not cause Parsons injuries because, when viewing the 2005 photos, it is apparent that the injuries to Parsons' calves were not unique to the height or weight of Garding's after-market bumper. This, in turn, would have defeated the State's reliance upon Garding's bumper as the identifier of Parsons' injuries. (Doc. 1 at 33)(citing portion of State's closing argument that "[i]f vehicles had DNA, this one is its bumper."). Garding points out that the State relied upon Garding's unique bumper to bolster its theory of the case throughout trial and also in postconviction proceedings. (*Id*. at 34.) Garding also notes that when examined about the 2005 photos, Dr. Dale reiterated his belief

that Parsons' head injuries came from contact with the ground, but stated he could not "exclude the windshield as the origin of those injuries, which would be direct contact with the vehicle." (Sealed Trans.)(Doc. 12 at 43: 8-11.) Thus, according to Garding, the 2005 photographs could have been used to identify this weakness in Dr. Dale's testimony and further bolster Garding's defense.

This Court understands Garding believes the photos would have been helpful to further impeach Dr. Dale and support her case. But given the timing of when the photos were obtained by Dr. Dale and the fact that Dr. Dale was not recalled to testify as a rebuttal witness, it is unclear how Garding could have done so. Moreover, the photos were subject to relevancy objections. Assuming defense counsel had the photos and could obtain their admission, the photos may have been used to further question Dr. Dale. As set forth above, however, Garding was able to obtain concessions from Dr. Dale that any vehicle with a bumper of the same height as Garding's could have caused Parsons' injuries. Also, Dr. Bennett testified that he did not believe Garding's vehicle caused Parsons' injuries. Thus, in this context the impeachment value of the photos was cumulative. *See United States v. Marashi*, 913 F. 2d 724, 732 (9th Cir. 1990).

Moreover, the photos are not exculpatory, that is, they do not show that Garding was not guilty of vehicular homicide. They could have been used to further challenge Dr. Dale's belief that Parsons' head struck the pavement, rather

than the windshield, thus bolstering the defense theory of the case, but this still does not exculpate Garding. Moreover, if this line of questioning had occurred, Dr. Dale would have likely utilized the other photos he had of a known fall-onto-pavement, obtained at the same time as the 2005 photos, to compare to Parsons injuries in support of his belief that Parsons' head injuries were a result of ground contact. (*See* Sealed Trans.)(Doc. 12 at 32-3.) Or, put another way, Garding has not shown that these photos "[made] the difference between conviction and acquittal." *Bagley*, 473 U.S.

Moreover, Garding has not shown that she suffered prejudice based upon the failure to obtain these photographs. In relation to the materiality, Garding must show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. She fails to do so here. The Montana Supreme Court reasonably denied this *Brady* claim. Accordingly deference must be afforded.

If anything the photographs and the x-rays underscore how critical it was for Streano to fully investigate and engage the services of an accident reconstructionist. Had she done so, Garding would have been able to present evidence from her own witnesses that the injuries to Parsons were likely caused by a smaller passenger vehicle with a modern bumper. These experts would have affirmatively excluded Garding's vehicle as the striking vehicle. Further, defense

experts would have testified that Parsons' extensive head and neck injuries likely came from contact with the body of the striking vehicle or its windshield, rather than the ground. All of these conclusions are set out in the various defense expert reports outlined herein and contained within the record before this Court. Relying on photos of an unrelated crash obtained years after her trial to impeach government witnesses that had already formed opinions and been impeached, highlights the need for Garding to have presented such information, in the first instance, during trial. While the failure to do so constitutes ineffective assistance on the part of defense counsel, it does not demonstrate a corresponding *Brady* violation by the State.

IV. Certificate of Appealability

"The district court must issue of deny a certificate of appealability when it enter a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Proceedings. A COA should issue as to those claims on which the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Gonzales v. Thaler*, 565 U.S. 134, 140 (2012)(*quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

"[A] claim can be debatable even though every jurist of reason might agree, after a COA has been granted and the case has received full consideration, that the petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). The outcome of Garding's *Brady* claims is not reasonably debatable; thus a COA will not issue. As Garding prevails on her IAC claim, a COA is not warranted.

Accordingly, IT IS HEREBY ORDERED:

1. Garding's Unopposed Motion to Substitute Party is GRANTED. The Clerk of Court is directed to have the docket reflect that the Montana Department of Corrections is the proper Respondent.

2. Garding's Claim 3 regarding Ineffective Assistance of Counsel is GRANTED. Garding's *Brady* claims, Claims 1 & 2, are DENIED.

3. A COA is DENIED as to Claims 1 & 2.

4. The Clerk of Court is directed to enter judgment, by separate document, in favor of Garding and against Respondent on Claim 3 and in favor of Respondent and against Garding on Claims 1 & 2.

5. Within thirty (30) days of the date of this Order, the State may move to vacate the state criminal judgment and renew proceedings against Garding in the trial court. If the proceedings are renewed in state court, the State must promptly file notice in this action.

6. If the State does not file notice on or before **April 21, 2023**, at 12:00

p.m., Respondents shall immediately and unconditionally release Garding from all custody based on the Judgment entered in *State v. Garding*, Cause No. DC-2010-160 (Mont. Fourth Jud. Dist. Court, Oct. 25, 2011), and Garding may not be retried.

DATED this 27th day of March, 2023.

Dana L. Christensen, District Judge
United States District Court

APPENDIX C

DA 19-0226

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 163

KATIE IRENE GARDING,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-15-969
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Larry D. Mansch, Toby Cook, Caitlin Carpenter, Montana Innocence Project, Missoula, Montana

E. Lars Phillips, Tarlow Stonecipher Weamer & Kelly, PLLC, Bozeman, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Missoula, Montana

Submitted on Briefs: March 26, 2020

Decided: June 23, 2020

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Katie Irene Garding (Garding) appeals the denial of her petition for postconviction relief and an order granting partial summary judgment in favor of the State entered by the Fourth Judicial District Court, Missoula County. We affirm, and restate the issues as follows:

1. *Did the District Court err by denying Garding's petition for postconviction relief based on her claim of ineffective assistance of counsel?*

2. *Did the District Court err by concluding the State did not fail to disclose exculpatory evidence?*

3. *Did the District Court err by concluding Garding failed to present newly discovered evidence?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Garding's conviction of vehicular homicide arises out of a tragic incident leading to the death of Bronson Parsons (Parsons) from injuries he sustained after being hit by a vehicle while walking along Highway 200 in East Missoula, in the early morning hours of January 1, 2008. *State v. Garding*, 2013 MT 355, ¶ 5, 373 Mont. 16, 315 P.3d 912. Parsons had been walking with a friend, Daniel Barry (Barry), who testified Parsons was hit by a bigger, dark-colored SUV or truck, possibly with a deer guard or other front end attachment. Another eyewitness, Deborah Baylor (Baylor), also reported that a dark-colored vehicle had hit Parsons with its passenger side. After the impact, the vehicle drove off. *Garding*, ¶¶ 5-6. After a lengthy period of investigation, the State charged Garding with vehicular homicide, leaving the scene of a fatal crash, tampering with evidence, and driving a motor vehicle without a valid license.

¶3 The case proceeded to a jury trial in 2011. In addition to the testimony of Barry and Baylor, the State provided testimony from the two Montana Highway Patrol officers who had conducted the investigation. The State did not retain an expert to conduct an accident reconstruction, and the officers did not conduct one. However, the State did provide the expert testimony of Dr. Gary Dale, the medical examiner who had examined Parsons. Dr. Dale testified the location and size of Garding's bumper was consistent with the injuries sustained in Parsons' calves. *Garding*, ¶ 15.

¶4 In response to cross examination by Garding's counsel, Dr. Dale acknowledged that any vehicle with a bumper of the same height could have caused Parsons' injuries. Further, Garding's counsel presented the testimony of an expert forensic pathologist, Dr. Thomas Bennett (Dr. Bennett), that the irregular bruising on Parsons' calves could not have been caused by a bumper like the one on Garding's vehicle. *Garding*, ¶¶ 15, 32.

¶5 The jury heard testimony from Gabrielle Weiss (Wiess), who law enforcement initially suspected of hitting Parsons. *Garding*, ¶ 9. Weiss had made an unusual 911 call around the time of the accident, during which she identified herself as being in East Missoula. However, Weiss later explained she was reacting to an emergency when she called 911, and that she was actually in the Blue Mountain area at the time. Law enforcement agreed with Weiss after reviewing her cell phone records, and believed she was not driving the vehicle involved in the accident. Garding's counsel questioned Weiss, the investigating officers, and a Verizon representative who testified about Weiss' cell phone records, about Weiss' story. Garding's counsel emphasized that Weiss' vehicle contained a fabric impression from a pair of jeans, and that Verizon was unable to analyze

several of Weiss' phone records. Garding's counsel pointed out inconsistencies in Weiss' story regarding her location, and secured an admission from Weiss on cross examination that she could not remember much about the night because she had been drinking heavily.

¶6 Highway Patrol Trooper Richard Hader (Trooper Hader) testified that the case went cold after police ruled out Weiss as a suspect, until he received a lead from Teuray Cornell (Cornell) almost one year after the accident. Cornell, at the time detained at the Missoula County Detention Center, contacted Trooper Hader to report that he had information about the accident. Cornell related to Trooper Hader that Garding had driven to his house later in the day on January 1, 2008, told him that she had hit a deer, and asked him to fix a broken light on the front of her vehicle, which Cornell did by affixing it with tape. *Garding*, ¶ 10. On cross examination at trial, Garding's counsel got Cornell to acknowledge that he could not say with certainty whether Garding actually told him she hit a deer on the day he fixed her light. Garding's counsel also highlighted several different versions of the story Cornell had provided to police, and also elicited testimony from Cornell and Trooper Hader that Cornell was seeking to get out of jail when he contacted police regarding the accident. Garding's counsel also elicited testimony from Cornell's cellmate at the time that Cornell had told the cellmate he was going to lie to police about the accident.

¶7 Other primary witnesses in the case were James Bordeaux (Bordeaux) and Paul McFarling (McFarling), both of whom were passengers in Garding's vehicle on the night in question. Bordeaux, Garding's boyfriend at the time, testified that he and Garding had started drinking around 11:00 a.m. on December 31st, and met up with McFarling that afternoon. He reported the three of them continued to drink throughout the afternoon and

evening, including at Red's Bar in Missoula and the Reno Bar in East Missoula. *Garding*, ¶ 12. After midnight, they went to a friend's house to purchase cocaine and, after they were unsuccessful, returned to Red's Bar. Garding hit the curb as she parked, and an officer observing this instructed her not to drive for the rest of the night. About 1:30 a.m., they left Red's Bar, with Garding driving, to again attempt to purchase cocaine in East Missoula. During this drive, Bordeaux testified that McFarling, who was sitting in the back seat, pulled out a gun and attempted to show it to Bordeaux. Bordeaux, who was sitting in the front passenger's seat while Garding was driving, turned around and started arguing with McFarling about the gun, causing a commotion in the vehicle. Bordeaux testified that, upon an impact, he spun around in his seat just in time to see a person flying through the air, and that Garding had stated, "I hit somebody." *Garding*, ¶12. Bordeaux testified they were "in a panic about what to do," Garding did not stop the vehicle, and instead, she drove back to Red's Bar, where she attempted to park close to the same spot where they had been parked when the officer told Garding not to drive that evening. Then, the three got into McFarling's vehicle and drove to Missoula, where the three stayed the night at McFarling's house. *Garding*, ¶ 12.

¶8 In exchange for his testimony, Bordeaux obtained a plea deal regarding a burglary charge arising out of the theft of McFarling's gun, which occurred the morning following the accident. *Garding*, ¶ 13. Garding's counsel attacked Bordeaux's credibility at trial by focusing on his plea deal and highlighting inconsistencies in the stories Bordeaux had given to police. Garding's counsel also emphasized the testimony of McFarling, who consistently stated he did not remember Garding hitting anything with the vehicle that

night. Further, Garding's counsel had McFarling explain that he had no reason to lie to protect Garding, as he believed Garding aided Bordeaux in stealing his gun.

¶9 The jury found Garding guilty of vehicular homicide while under the influence, failure to stop immediately at the scene of an accident involving an injured person, and driving without a valid driver's license. *Garding*, ¶ 17. Garding appealed, challenging evidentiary rulings made by the District Court regarding witnesses, cross examination, and Garding's expert witness. *Garding*, ¶¶ 2-4. This Court affirmed, and the United States Supreme Court subsequently denied Garding's petition for writ of certiorari. *Garding v. Montana,* 574 U.S. 863, 135 S. Ct. 162 (2014).

¶10 On September 15, 2015, Garding, represented by the Montana Innocence Project, filed a petition for postconviction relief (Petition), raising three claims: ineffective assistance of counsel (IAC), discovery violations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and newly discovered evidence of her innocence. Specifically, Garding claimed her trial counsel had been ineffective for failing to hire an accident reconstructionist; that the State had failed to produce x-rays of Parson's legs and photographs of an unrelated 2005 vehicle-pedestrian accident, both of which she claimed were exculpatory; and that post-trial accident reconstructions produced by new experts constituted new evidence that proved Garding's innocence.

¶11 The State filed motions for summary judgment on Garding's newly discovered evidence claims and her Brady claim regarding Parsons' x-rays, which the District Court granted after a hearing. The District Court then conducted a hearing on the remainder of Garding's claims, after which it denied the Petition in March of 2019. Garding appeals.

STANDARD OF REVIEW

¶12 This Court reviews a district court's denial of a petition for postconviction relief to determine whether its factual findings are clearly erroneous and whether its legal conclusions are correct. *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387 (citing *Rukes v. State*, 2013 MT 56, ¶ 8, 369 Mont. 215, 297 P.3d 1195). Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo. *Rose*, ¶ 15 (citing *Miller v. State*, 2012 MT 131, ¶ 9, 365 Mont. 264, 280 P.3d 272).

DISCUSSION

¶13 *1. Did the District Court err by denying Garding's petition for postconviction relief based on her claim of ineffective assistance of counsel?*

¶14 Garding argues, based primarily on an affidavit provided by her trial counsel, that the District Court erred by concluding her trial counsel did not render ineffective assistance by failing to hire an accident reconstructionist. In response, the State argues Garding's counsel was effective and that this court should not be persuaded by counsel's affidavit.

¶15 This Court analyzes ineffectiveness claims pursuant to the two-prong test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Under *Strickland*, the defendant must prove "(1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *Whitlow*, ¶ 10 (citing *State v. Racz*, 2007 MT 244, ¶ 22, 339 Mont. 218, 168 P.3d 685). If the petitioner cannot satisfy both of these elements, the claim will be denied. *Whitlow*, ¶ 11. "Thus, if an

insufficient showing is made regarding one prong of the test, there is no need to address the other prong." *Whitlow*, ¶ 11 (citation omitted).

¶16 Under the first prong, the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Whitlow*, ¶ 16 (quoting *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066). This Court then determines "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Whitlow*, ¶ 16 (quoting *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066) (emphasis omitted). In determining whether counsel's performance was deficient, this Court applies "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Whitlow*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689 104 S. Ct. at 2065) (internal quotations omitted). Important in this consideration is the need "to eliminate the distorting of effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Whitlow*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065) (internal quotations omitted). Therefore, "self-proclaimed inadequacies on the part of trial counsel in aid of a client on appeal do not hold great persuasive value with this Court." *State v. Trull*, 2006 MT 119, ¶ 22, 332 Mont. 233, 136 P.3d 551.

¶17 Our examination of the trial record "in light of all the circumstances," *Whitlow*, ¶ 16, leads us to the conclusion that Garding's trial counsel presented an extensive and strong defense. She countered or sought to undermine virtually every evidentiary contention introduced by the State, and the jury was left with the unenviable task of making numerous

credibility determinations in order to resolve evidentiary conflicts necessary to reach a verdict.

¶18 To counter the State's expert medical testimony, trial counsel retained Dr. Bennett, a forensic pathologist. Dr. Bennett testified extensively regarding his expert opinion that Garding's bumper could not have caused Parsons' injuries. *See Garding*, ¶ 32 ("Dr. Bennett repeatedly testified that Garding's vehicle did not cause the injuries to Parsons' calves. Each time, Dr. Bennett supported his opinion with extensive analysis of the bruising, which he characterized to the jury as 'the best way to look for the nature of that instrument [Garding's bumper].'"). Consistent therewith, Garding's counsel highlighted possible flaws in the police's investigation and reports, as well as the forensic analyst's work. She elicited multiple concessions from Dr. Dale on cross examination that any other vehicle with a bumper the same height as Garding's could have caused Parsons' injuries, and that he could not definitely state that Garding's vehicle had caused the injuries.

¶19 Garding's counsel broadly attacked Bordeaux's critical eye witness testimony. She challenged his credibility by emphasizing his motivation to testify in exchange for receiving a plea deal on his own charges. *Garding*, ¶ 24 (the District Court gave Garding's counsel "wide latitude in cross-examining Bordeaux about his bias and motivation to testify falsely[.]"). She called into question the accuracy of his story by highlighting several inconsistent statements he provided during police interviews. She directly contradicted his version of the events by having McFarling state several times that Garding had not hit anything that night. She bolstered McFarling's credibility by emphasizing that he had no reason to lie for Garding. Likewise, with regard to Cornell, counsel effectively

examined the inconsistencies in his statements to police regarding whether Garding or Bordeaux was driving that day, and prompted him to admit uncertainty about whether Garding had actually told him she hit a deer the day he taped her light.

¶20 Garding's counsel provided multiple alternative theories about what happened the night Parsons was hit, including the stories of two other suspects. She had the police's original suspect, Weiss, admit she had changed her story about her location that night from East Missoula to Blue Mountain, and that she did not well remember what happened because she was heavily intoxicated. She highlighted the jean fabric impression found on the bumper of Weiss' vehicle, and attacked the State's handling of that evidence. *See Garding*, ¶ 37 ("Garding thoroughly cross-examined [the forensic analyst] about the failure to compare the fabric impressions on Weiss' bumper to the clothing of the victim or any other relevant party."). Counsel raised the potential involvement of a suspect named Josh Harrison, who was reported to have bragged during a party that night that he had hit someone with his car.

¶21 Garding's counsel elicited testimony pointing to several unanswered questions regarding the State's timeline and overall theory of the case, including a phone call Garding made near the time Parsons was struck, the origin of glass and marking on Parsons' clothing, and potentially incomplete cellular phone tower data that could have mapped Garding's location on the night in question.

¶22 Against the entirety of the trial record, Garding claims ineffective assistance because her counsel did not pursue another possible defense tactic—the hiring of an accident reconstructionist. Notably, the State did not pursue an accident reconstruction

either. We must start with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Whitlow*, ¶ 15 (citing *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). However, we need not rely solely on the strong presumption, because, as discussed above, the trial record here proves convincingly that Garding's counsel presented a strong defense.[1] Garding's claim would require the Court 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. *See State v. Llamas*, 2017 MT 155, ¶ 26 388 Mont. 53, 402 P.3d 611 ("there are 'countless ways to provide reasonable assistance in any given case,'" (citing *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065)). 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. *Whitlow*, ¶ 15 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065).[2]

[1] A legal expert for Garding testified during the postconviction hearing that Garding's trial counsel "did a pretty good job."

[2] The District Court noted the observation made in *Harrington v. Richter*, 562 U.S. 86, 109, 131 S. Ct. 770, 790 (2011), that "[i]t sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." While that may be true in any particular case, including this one, we have held, as did *Strickland*, that there can be more than one way to provide reasonable professional assistance in defense of a criminal charge. *See Cheetham v. State*, 2019 MT 290, ¶ 14, 398 Mont. 131, 454 P.3d 673 ("While pursuing the Report further, using it at trial, and supporting it with available expert testimony may well have been a reasonable strategy, we cannot conclude that the strategy [defense counsel] elected to pursue was not also a reasonable approach.").

¶23 Given the efforts of her trial counsel, we conclude Garding's IAC claim based on the failure to hire an accident reconstructionist has not established that counsel's representation was "outside the wide range of professionally competent assistance," as required by the first prong of the *Strickland* test. *Whitlow*, ¶ 16 (quoting *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066) (emphasis omitted). Trial counsel's affidavit, drafted for her by Garding's PCR counsel, constitutes "self-proclaimed inadequacies" that "do not hold great persuasive value with this court," in light of the trial record. *Trull*, ¶ 22. Having so concluded, we need not reach the second prong of the *Strickland* test.

¶24 *2. Did the District Court err by concluding the State did not fail to disclose exculpatory evidence?*

¶25 Garding argues the State violated her due process rights by failing to provide two pieces of evidence: x-rays of Parsons' injuries, and photographs from an unrelated 2005 vehicle-pedestrian accident that Dr. Dale independently obtained following his testimony, and did not provide to the County Attorney. As to the victim's x-rays, the State argues they were separately possessed by the Crime Lab, were known to Garding and referenced by her expert, and could have been obtained by Garding. About the 2005 photographs, the State argues they were immaterial and would not have changed the outcome of the case.

¶26 Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, the State must provide to the defense any evidence material to the defendant's guilt or punishment. *See also State v. Jackson*, 2009 MT 427, ¶ 52, 354 Mont. 63, 221 P.3d 1213. A prosecutor also has a "continuing duty to promptly disclose any additional, discoverable evidence." *Jackson*, ¶ 52 (citing § 46-15-327, MCA). A failure to disclose exculpatory evidence violates the

defendant's Fourteenth Amendment guarantee of due process. *State v. Ilk*, 2018 MT 186, ¶ 29, 392 Mont. 201, 422 P.3d 1219. "Within the meaning of *Brady*, material evidence is that evidence which, had it been disclosed, the result of the proceeding would have been different." *State v. Reinert*, 2018 MT 111, ¶ 16, 391 Mont. 263, 419 P.3d 662 (citation omitted). Thus, to establish a *Brady* violation, the defendant must show: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *Reinert*, ¶ 17 (citing *Jackson*, ¶ 53).

The x-rays

¶27 The District Court determined the State was entitled to summary judgment on the *Brady* claim related to the x-rays because it found they were not in the prosecutor's possession and, even if they were considered to be, the prosecutor did not fail to disclose them.

¶28 Under the first *Brady* prong, the defendant must prove that the State possessed evidence, including impeachment evidence, favorable to the defense. *Reinert*, ¶ 17. The State notes *State v. Hudon*, 2019 MT 31, 394 Mont. 226, 434 P.3d 273, where the Defendant argued his blood test results were erroneously admitted at his DUI trial because the Crime Lab possessed additional information that had not been produced, in violation of the discovery statute and due process. The defense had been advised by the prosecutor of the process available to both parties to obtain the information, some of which required a court order, but had not requested it. *Hudon*, ¶ 6. We concluded the evidence was in the

possession and control of the State Crime Lab, and not the prosecutor, because "the Crime Lab is under control of a different government agency, separate from the county attorney's office, and is not located at or within a county attorney's office. The Crime Lab is not supervised by the county attorney's office, does not report to or take direction from the county attorney's office, is not funded by the county attorney's office, and is not administratively connected to any county attorney's office." *Hudon*, ¶ 19. We therefore concluded the Defendant's right to due process had not been violated where the defense had been advised of the procedure to obtain the evidence, but had failed to avail himself of it. *Hudon*, ¶ 21. Here, the parties do not dispute that the x-rays were in the possession of the Crime Lab, and not the prosecutor. Unlike *Hudon*, Garding had obtained a court order for production by the Crime Lab of "all notes, information, testing, recordings or materials with regards" to Parsons' injuries, and thus, she argues this was a Brady violation similar to that in *State v. Weisbarth*, 2016 MT 214, 384 Mont. 424, 378 P.3d 1195.

¶29 In *Weisbarth*, the defendant was charged with incest against his minor child. The defense called an expert witness child psychologist to testify about the victim's reactive attachment disorder, a disorder that often manifests in lying behaviors. The district court ordered the prosecutor to produce the child's medical records for the defense expert to review. *Weisbarth*, ¶ 4. The prosecutor reviewed the records and unilaterally determined that disclosing them completely would implicate the child's privacy rights, and therefore, produced a version of the records so heavily redacted that only a single sentence was left unredacted in the entire report written by the child's psychologist. *Weisbarth*, ¶¶ 5-6. After trial, the defense obtained the unredacted records, which revealed additional facts unrelated

to reactive attachment disorder, but discussing the child's propensity for lying. *Weisbarth*, ¶ 10. On appeal, the Defendant argued the State violated *Brady* by failing to disclose the entirety of the medical records. *Weisbarth*, ¶¶ 17-19. We agreed, and held "the State should have disclosed the substance of the records to [the Defendant]." *Weisbarth*, ¶ 25.

¶30 This case is different than *Weisbarth*, where evidence in the possession of the prosecutor was clearly withheld from the Defendant. Here, it is clear that evidence in possession of the Crime Lab about Parsons' medical condition was, unlike *Weisbarth*, disclosed to both parties, and both parties were explicitly aware of the x-rays. Both Dr. Dale and Dr. Bennett referenced them in their respective reports prior to trial, including Dr. Bennett's reference that "postmortem radiograph revealed a slightly displaced left fibular fracture 11 inches above the heel." Garding argues that, had the "substance" of the x-rays—copies or originals—been disclosed, she could have impeached the credibility of Dr. Dale by pointing out that the bumper on Garding's vehicle should have caused more damage to Parsons' legs than only a fibula fracture if he had been thrown as far as Dr. Dale had postulated. However, Garding's counsel questioned several witnesses about Parsons' injuries, including the fibula fracture, in support of her central contention that Garding's vehicle had not inflicted the injuries. It cannot be doubted that, had there been additional injuries to Parsons, they would also have been noted in the experts' reports from the x-rays and records, including the experts' respective conclusions about whether Garding's vehicle had caused them.

¶31 Garding is correct that this Court removed an additional requirement—reasonable diligence—from our *Brady* analysis, premised on the Ninth Circuit Court's holding in

Amando v. Gonzalez, 758 F.3d 1119 (9th Cir. 2014); *see Reinert*, ¶ 17, n.1. This eliminates from the analysis an obligation upon a defendant to have reasonably sought out the evidence. However, and nonetheless, the *Amando* court noted that "defense counsel cannot ignore that which is given to him or of which he is otherwise aware." *Amando*, 758 F.3d at 1137 (citations omitted). Here, Garding was not only aware of the evidence because of its disclosure, she had actively used it. Her expert referenced it and she examined witnesses based on it. We cannot conclude that the prosecution in any way suppressed the evidence. Consequently, the District Court did not err by denying this *Brady* claim.

The 2005 photos

¶32 Three days after his testimony and cross examination in this case, Dr. Dale located photographs of a victim and vehicle involved in a different vehicle-pedestrian accident in 2005. He had not used the photographs in forming his opinions in the Garding case, nor did they change his opinions in any way, but he believed they would be supportive of his opinions in the event he was called as a rebuttal witness in the trial. Dr. Dale placed the photographs in his file at that time, and did not notify the prosecutor about them. Dr. Dale was not called as a rebuttal witness.

¶33 The District Court concluded Garding's *Brady* claim based on the 2005 photographs failed because, "the photos [were] not material. They [were] not evidence in this particular case. When looking at the record as a whole, they provide[d] insufficient information needed for accurate comparison of the 2005 crash and the crash at issue here." The District Court concluded the photographs were not exculpatory and not material because they did

not create a reasonable probability that the outcome of the proceeding would have been different.

¶34 Garding asserts the photos are material because they would have allowed the defense to question Dr. Dale's conclusion that Parsons' injuries primarily stemmed from hitting the road. Garding had offered a theory that the vehicle that struck Parsons would have sustained damage to its hood and windshield.[3]

¶35 First, it cannot be said that the prosecution suppressed evidence about which it was unaware—evidence that an expert had independently obtained for possible use in future testimony and placed within his own file. Then, given the timeline of the appearance of the photographs, it is unlikely Garding could have used the photos to directly impeach Dr. Dale at all, as he was not thereafter recalled by the State to the trial. Assuming that opportunity would have occurred, then, as the District Court noted, the many distinctives between the photographs and this case may have subjected the photographs to a relevancy objection. Assuming their admission, we cannot conclude that the photographs would have been material to the outcome, as the theory espoused by Garding was already thoroughly presented, including by examination and criticism of Dr. Dale's opinions about the impact. Dr. Dale had already admitted that another car could have caused Parsons' injuries, and the photographs do not establish that Garding was not involved in the accident. Dr. Dale believed they supported, not undermined, his opinions regarding the impact in this case.

[3] Glass pieces found upon Parsons' body were tested by Garding, but the tests indicated the pieces were not windshield glass.

¶36 We conclude the photographs were not suppressed, material nor exculpatory, and that the District Court did not err by concluding the State did not violate Garding's due process rights by failing to disclose the 2005 photographs.

¶37 *3. Did the District Court err by concluding Garding failed to present newly discovered evidence?*

¶38 In its summary judgment order, the District Court concurred with the State's argument that the "new," or post-trial, accident reconstruction analysis offered by Garding in support of her petition did not qualify as "newly discovered" evidence, because it was based upon evidence available and known to the defense at the time of trial, and only the additional analysis of that evidence was new.[4] Garding argues that the District Court erred as a matter of law in so ruling because the "newly discovered" requirement under § 46-21-102, MCA, applies only to petitions filed *beyond* the general time limit of one year after the conviction becomes final, for purposes of establishing the exception to the time bar. Because her petition was timely filed, Garding contends the District Court erred in applying any "newly discovered" requirement whatsoever.

¶39 As the State notes, Garding's argument somewhat conflates the standards governing PCR petitions. Garding is correct that an *untimely* filed PCR petition must satisfy the exception to the general one-year time bar by demonstrating the existence of newly discovered evidence that the petitioner did not engage in the criminal conduct, which

[4] The District Court did not exclude the accident reconstruction evidence from the proceeding for purposes of Garding's IAC claim.

extends the time for filing a petition to within one year of discovery of the evidence.[5] *See Guillen v. State*, 2018 MT 71, ¶ 12, 391 Mont. 131, 415 P.3d 1. However, she is incorrect in arguing that a *timely* filed petition is not subject to any assessment of the evidence alleged to be newly discovered. As we explained in *Marble v. State*, 2015 MT 242, 380 Mont. 366, 355 P.3d 742, a timely filed PCR petition based upon newly discovered evidence must nonetheless undergo examination by the court to determine if the evidence is actually "newly discovered." *Marble*, ¶¶ 34, 36. While not subject to the more rigorous actual innocence thresholds applied to untimely petitions, district courts may examine timely filed petitions alleging newly discovered evidence with a broad array of tools. As we explained in *Marble* regarding timely filed petitions based upon new evidence:

> In making this determination, a district court may seek guidance from our case law addressing various forms of newly discovered evidence, such as our precedent with respect to recantations, whether set forth in a case involving a motion for new trial or one addressing a PCR petition. . . . [T]he first four factors of the *Clark* test also remain a viable resource *when determining whether the newly discovered evidence should be considered*.

Marble, ¶ 36 (emphasis added) (citations omitted).

[5] Section 46-21-102, MCA, provides, in pertinent part:

> (1) Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final.
>
> . . .
>
> (2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

¶40 Here, the District Court did not hold that Garding had failed to satisfy the exception to the time bar—that would have been the incorrect issue. Rather, the District Court held that the expert analysis of the accident submitted in support of Garding's timely filed petition was simply not newly discovered evidence, the same kind of determination we made in *Kenfield v. State*, 2016 MT 197, ¶ 15, 384 Mont. 322, 377 P.3d 1207, where we concluded that an expert report obtained by the defendant after trial regarding bullet trajectory analysis could not be considered new evidence because "the new report [was] simply an additional analysis of the same evidence used at trial[.]" As explained in *Marble*, quoted above, the first four factors of the *Clark* test, *see State v. Clark*, 2005 MT 330, ¶ 34, 330 Mont. 8, 125 P.3d 1099, remain a viable resource for a district court's assessment of the evidence. The first factor of the *Clark* test is that "the evidence must have been discovered since the defendant's trial." *Clark*, ¶ 34. Similar to our conclusion about the new evidence in *Kenfield*, the District Court here reasoned as follows:

> [T]he Court finds that there is no genuine issue of material fact that the purported new evidence . . . used by the Petitioner's experts was available at the time of the trial. During summary judgment hearing, the Court noted that the computer simulation evidence includes a mathematical formula that has been used by accident reconstructionist[s] for decades and was well-known technology in existence at the time of trial. Petitioner has not established that there was no way of conducting any of the new analysis in 2011, nor has she shown that the new evidence could not be obtained in 2011.

¶41 The analysis employed by the District Court distinguishes this case from *United States v. De Watson*, 792 F.3d 1174 (9th Cir. 2015), upon which Garding relies. In *De Watson*, the DNA testing at issue was unavailable at the time of the defendant's trial, and thus could be considered "newly discovered." *De Watson*, 794 F.3d at 1183.

¶42 The new expert analysis at issue here is governed by our decision in *Kenfield.* A decision to consider the analysis to be "newly discovered evidence" would significantly undermine the finality of convictions, as subsequent and perhaps seriatim scientific analyses of the same evidence could be employed to obtain new trials. We conclude the District Court did not err by dismissing Garding's newly discovered evidence claim.

¶43 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR

Justice Ingrid Gustafson, dissenting.

¶44 The State Crime Lab failed to provide Garding with documentation—including x-rays of the victim's legs—that the trial court ordered the lab to produce. Garding's trial expert has attested in the postconviction relief proceedings that the suppressed x-rays would have changed his written report, and her trial counsel attested the change in report would have changed the emphasis of the case. Further, the State failed to turn over photos from a prior fatal vehicle-pedestrian collision included in the Crime Lab file for this case that could have been used to challenge the opinion from the State's medical expert. In an effort to show that the evidence was not exculpatory, the State presents a theory of the case in these postconviction relief proceedings that it did not present to the jury—a low-speed,

side-only-impact collision. Given these facts, I would hold that the state violated Garding's due process rights under *Brady* and she is entitled to a new trial.

¶45 Second, although I agree with the District Court determination that the expert accident reconstruction reports presented with Garding's petition for postconviction relief are not newly discovered evidence because Garding could have sought those reports at the time of her trial, her trial counsel provided her ineffective assistance of counsel under the circumstances of this case in failing to seek those reports before trial to bolster Garding's trial defense. The accident reconstruction reports Garding presented with her petition for postconviction relief demonstrate that the theory of impact the State presented at trial violated the laws of physics. In response, the State produced an expert witness during these proceedings, who did not disagree with those experts, but rather propounded an alternative theory of the accident—a low-speed-impact theory the State did not present to the jury at trial. Importantly, unlike the theory the State presented at trial, the low-speed-impact theory contradicts testimony from key State witnesses. Garding's trial counsel provided ineffective assistance of counsel for failing to seek expert opinion to explain that the theories of the crash the State presented at trial could not possibly have occurred, especially in light of the fact that trial counsel attested that the decision was not strategic, Garding maintained her innocence, and the State's case lacked physical evidence connecting Garding to the crime, but rather relied heavily on testimony from Garding's ex-boyfriend—who was facing unrelated criminal charges and provided inconsistent accounts of the night—to connect Garding to the collision. I would reverse the District Court and remand

with instructions to grant Garding's petition for a new trial. I dissent from today's decision failing to do so.

***Brady* Claims**

¶46 Garding raises two *Brady* claims on appeal. First, the State suppressed medical information including x-rays of the victim's legs that Dr. Dale used in preparing his post-mortem report. Second, the State suppressed photographs from a prior fatal vehicle-pedestrian collision that Dr. Dale analyzed for comparison and put into the State Lab's file during trial.

¶47 Under *Brady*, a criminal defendant has a constitutional right to obtain exculpatory evidence, and the State violates the defendant's right to due process when it suppresses such evidence. *State v. Robertson*, 2019 MT 99, ¶ 32, 395 Mont. 370, 440 P.3d 17 (citing U.S. Const. amend. XIV; Mont. Const. art. II, § 17). To prove the State violated her due process rights under *Brady*, a defendant must establish that: (1) the State possessed evidence favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *Robertson*, ¶ 32 (citing *Ilk*, ¶ 29). The defendant bears the burden of proving all three prongs to demonstrate a *Brady* violation occurred. *Robertson*, ¶ 32. A *Brady* analysis is not a sufficiency of the evidence test. *Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 1566 (1995). A petitioner demonstrates a *Brady* violation "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S. Ct. at 1566. The "tendency and force" of the

individual items of undisclosed evidence are evaluated separately, but the court must consider their cumulative effect when determining prejudice. *See Kyles*, 514 U.S. at 436 n.10, 115 S. Ct. at 1567 n.10.

¶48 The District Court dismissed Garding's first *Brady* claim on summary judgment. The court concluded that Dr. Dale's post-mortem report and testimony during the pre-trial probable cause hearing put Garding on notice the Crime Lab had x-rays of the victim's legs and Garding had a duty to obtain evidence in her defense.

¶49 The District Court's determination overlooks the important fact that Garding's trial counsel did move for an order from the court, directing the State Crime Lab "to produce all notes, information, testing, recording or materials with regards to" the autopsy of Parsons. The State opposed the motion, arguing that such release was against the policy of the Crime Lab and that "it is the duty of the prosecutor to make available for examination and reproduction all written reports or statements of experts. The duty does not extend to their notes, testing, recordings, or other materials."[1] The District Court granted Garding's motion and ordered the Crime Lab to "provide a copy of all their notes, testing, information, recordings or materials" from their case file for Parsons. It is clear from its opposition to Garding's discovery motion the prosecution considered Dr. Dale to be their expert medical witness early in the investigation and recognized their duty to ensure discoverable material was released to the defense. And indeed Dr. Dale testified as the State's medical expert at

[1] Garding responded to the State's objection, arguing this was an inaccurate representation of the Crime Lab policy and further that the Crime Lab is a neutral state agency and the county attorney's office had no standing to object to or interfere with the discovery of materials from the Crime Lab.

trial. The Crime Lab did not act as a neutral state agency in this case but was working on the State's behalf.

¶50 The Crime Lab possessed evidence that was favorable to Garding's defense—x-rays that showed a relatively minor fracture to the victim's legs—that it failed to provide to the defense after the District Court ordered it to "provide a copy of all of their notes, testing, information, recordings or materials" from their case file for Parsons. Unlike the defendant in *Hudon*, Garding followed the accepted procedure for obtaining evidence from the Crime Lab by moving for and receiving a court order for the release of the information. Garding was not required to "scavenge for hints of undisclosed *Brady* material." *Banks v. Dretke*, 540 U.S. 668, 695, 124 S. Ct. 1256, 1274-75 (2004). Rather the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles*, 514 U.S at 437, 115 S. Ct. at 1567. This requirement means that a prosecutor has to put in place "procedures and regulations . . . to insure communication of all relevant information on each case to every lawyer who deals with it." *Kyles*, 514 U.S. at 438, 115 S. Ct. at 1568 (internal quotation omitted). The State is responsible for ensuring that the Crime Lab has procedures and regulations in place to ensure all relevant information is released to the defense—especially when the Crime Lab is serving as the State's expert in the case and after the court has explicitly ordered it to do so. The State was obligated to release the x-rays to Garding and did not do so.

¶51 Had this evidence been disclosed, Garding's medical expert attested that his report would have been different and trial counsel attested she would have focused on the medical

aspects of the case more.[2] In response, the State has changed its theory of the collision in these postconviction proceedings. The State argued at trial that the lack of damage to Garding's vehicle and Parson's relatively minor leg injuries were because Garding's "vehicle was correcting." Officers testified that Garding was either swerving or she only "clipped" Parsons. Barry, who was walking beside Parsons when Parsons was struck testified, "I didn't think someone could survive that just because it was – it was just too fast" and "the vehicle was coming extremely fast." Baylor, who was driving on the roadway and witnessed the collision testified that the vehicle was "going regular speed up until the point that they hit that person" in a thirty-five mile per hour zone. At trial, the State did not argue that the vehicle that struck Parsons was moving at a low speed in contravention of these eye-witness accounts. Now, however, the State argues that the impact occurred at a low speed and was side impact only. This change in theory in response to Garding's postconviction relief petition is strong evidence that had Garding had the x-rays, she could have successfully challenged the State's theory at trial and forced them to put on a different case than they did.

¶52 A similar conclusion must be drawn from the suppressed photographs from the 2005 fatal collision. The District Court dismissed Garding's second *Brady* claim after an

[2] The Opinion maintains that Garding was not only aware of the evidence, but her medical expert relied on Dr. Dale's assessment of the x-rays and she actively used Dr. Dale's assessment of the x-rays in cross-examining witnesses. Opinion, ¶¶ 30-31. This misses the point: Dr. Bennett relied on Dr. Dale's and the police report's description of the x-rays, rather than then assessing and interpreting the x-rays for himself when writing his expert report for trial. Dr. Bennett's affidavit makes clear that had he analyzed the x-rays himself in preparing his expert report for trial, he would have found the x-rays more significant than he did based on the mere descriptions of the x-rays provided to him in preparing his report for trial.

evidentiary hearing. The court determined that Garding did not show a reasonable probability of a different outcome if the photographs had been disclosed because there was not enough information for an accurate comparison of the collisions in the two different cases. The court concluded Garding was not prejudiced because she was still able to present the theory at trial that there should have been damage to the vehicle that struck Parsons.

¶53 The State does not dispute that Dr. Dale put the photographs in the file during trial. "[T]he government's duty to provide *Brady* material is ongoing" through trial and the photographs should have been turned over to the defense. *Ilk*, ¶ 34 (internal quotations omitted). The State instead argues the District Court correctly determined there was no reasonable probability the outcome would have been different, citing the other evidence the State presented at trial. But a *Brady* analysis is not a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434-35, 115 S. Ct. at 1566. Rather, a *Brady* violation occurs if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S. Ct. at 1566. Dr. Dale admitted at the evidentiary hearing that the injuries on the two victims were similar. Thus, the photographs supported Garding's theory of the collision that damage would be expected on the vehicle involved, even with relatively minor leg injuries. Although, Dr. Dale testified the photographs did not change his conclusion that Parsons' head injuries were caused by contact with pavement and not a windshield, the photographs would have given credence to the defense's theory that the type of injuries found on Parson were also consistent with striking a windshield and greater vehicle damage.

¶54 Taken together, I would conclude the suppression of the x-rays and photographs undermine confidence in the verdict. The x-rays support a theory that the leg injuries to Parsons would have been more catastrophic had her vehicle with its square steel bumper hit the victim. The photographs support Garding's theory of the case presented at trial that even with the relatively minor leg injuries observed, the vehicle that struck Parsons would have sustained damage. While the State's new theory of a fatal, low-speed, side-only-impact crash may prove convincing to a jury, a jury—not this or any other court—must still decide that in the first instance. The very fact the State changed its theory during postconviction relief proceedings proves the suppressed evidence puts "the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S. Ct. at 1566.

Ineffective assistance of counsel

¶55 In assessing ineffective assistance of counsel claims, this Court adopted the two-pronged test set forth in *Strickland*. *State v. Santoro*, 2019 MT 192, ¶ 15, 397 Mont. 19, 446 P.3d 1141. The defendant must (1) demonstrate that "counsel's performance fell below an objective standard of reasonableness" and (2) "establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Santoro*, ¶ 15 (quoting *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095). Courts determine deficient performance under the first prong based on "whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. "[W]hether counsel's conduct flowed from

ignorance or neglect . . . is certainly a relevant consideration in the analysis." *Whitlow*, ¶ 20. "[E]ven if an omission is inadvertent, [however,] relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Whitlow*, ¶ 32 (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 6 (2003). Rather, this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065); *see also Santoro*, ¶ 15.

¶56 The District Court held trial counsel's performance was not deficient, because Garding failed to overcome the presumption the decision not to utilize an expert may be considered sound trial strategy. The District Court held, further, that Garding did not suffer any prejudice by the failure to utilize an expert because there is no reasonable probability the result of the proceeding would have been different. Garding and the State both called experts on accident reconstruction at the evidentiary hearing. The court found the State's expert was more credible, explaining Garding's experts did not account for the relatively minor leg injuries to Parsons or the eye-witness testimony at trial.

¶57 The evidence from Garding's experts on postconviction relief is emphatic and persuasive: Harry W. Townes wrote a report considering the State's theory of the accident at the time of trial in comparison to a crash test with the same vehicle. Townes opined that there would be damage to a vehicle traveling more than thirty-five miles per hours that hit a pedestrian. He explained that swerving would not eliminate vehicle damage, as the officers theorized at Garding's trial. Keith Friedman of Friedman Research Corporation conducted systems analysis of the collision. In his report, Friedman reviewed the scientific

literature about pedestrian-vehicle collisions and explained: "General characteristics in virtually all crashes shown indicated clear vehicle damage when an adult serious or fatal pedestrian impact occurred. . . . The literature reviewed indicates that fatal adult pedestrian impacts are likely to show significant damage to the hood, windshield and/or roof structure." After reviewing the literature and conducting a systems analysis Friedman concluded: "Within a reasonable degree of engineering certainty, Ms. Garding's vehicle was not the vehicle that impacted Mr. Parsons. The damage present on Ms. Garding's vehicle is in no way consistent with a pedestrian impact sufficient to kill a walking adult person." Friedman explained the testimony of the officers at trial regarding pedestrian kinematics is incorrect and violates the laws of physics.

¶58 In response to this evidence, the State has abandoned the theory of the collision it relied on at trial. The United States Supreme Court explained in *Harrington*, 562 U.S. at 106, 131 S. Ct. at 788: "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." This is one of those cases. I would find Garding's counsel's performance fell below an objective standard of reasonableness, considering the surrounding circumstances. First, the key State witness to connect Garding to the crime was her ex-boyfriend, who repeatedly changed his story and had reason to curry favor with the State because he was facing unrelated criminal charges and potential persistent felony offender status. Second, Garding has steadily maintained she had nothing to do with the tragic death of Parsons and her vehicle was not in the area when the collision occurred. Third, Garding's vehicle lacked damage that even the officers initially investigating the

case expected to see. Fourth, to explain the lack of damage to the vehicle, the State relied on the opinions of two officers—neither of whom created an accident reconstruction of the incident or had any expertise in physics—to opine on the possible mechanics of the impact. Those officers opined the lack of damage was due to the vehicle swerving or because it merely "clipped" Parsons on one leg, in spite of muscle tearing to both legs.[3] Finally, Garding's trial counsel attested she did not make a strategic decision to forgo an accident reconstructionist, but rather was ineffective when she failed to hire one.

¶59 The District Court found trial counsel's "self-serving statements" about being overwhelmed not credible and she "made a calculated decision" to not hire an accident reconstructionist. Even if these findings are not in error, I would still find trial counsel's performance deficient.[4] In this case, it was constitutionally deficient to allow the State to

[3] The reports from Garding's experts on postconviction relief prove these scenarios are physically impossible. In fact, the State has changed its theory of the accident on postconviction relief. The State no longer relies on the theories propounded by the two officers at trial but relies on a new analysis of the accident completed by Trooper Philip Smart. Although the court found Trooper Smart to be more credible than Garding's experts, Trooper Smart's theory of a low-speed impact was not put before the jury at trial.

[4] I believe the District Court clearly erred in finding trial counsel made a calculated decision. The District Court emphasized that trial counsel discussed the case with three investigators, Dr. Bennett, and other attorneys in her office, and "[n]o one felt that an accident reconstruction was appropriate in the case." This finding is in clear error. Steven Scott, who was assigned as co-counsel in the case for a limited time, admitted that trial counsel did not discuss the case with him. Meetings with other attorneys in the office, as described by trial counsel, did not involve in-depth discussion of cases. It was not Dr. Bennett's role to suggest hiring an accident reconstructionist. And three investigators staffed the case, not because of thorough staffing, but because of chronic, high turn-over. None of the investigators staffed the case simultaneously. The court found further that trial counsel had worked with an accident reconstructionist in a prior case and was aware of the valuable insight an accident reconstructionist could provide. This highlights trial counsel's oversight in this case. She knew the value but did not consider hiring an accident reconstructionist under circumstances that demanded it. The court found that it was "sound trial strategy" to rely on cross-examination and trial counsel "effectively cross-examined the State's witnesses on matters that called into question the vehicle involved in the crash." But this effective

put on non-expert opinions about the mechanics of the impact without any counter. The officer's testimony likely carried much weight with the jury and trial counsel failed to provide expert evidence to support an alternative scenario or to explain that the State's theory violated the laws of physics and was not physically possible.

¶60 Further, Garding was prejudiced by trial counsel's failure. The State has changed its theory of impact during these postconviction proceedings. At trial, the State argued there was a lack of damage to Garding's vehicle because she was "correcting" back onto the road. Now the State argues the lack of damage is due to the low speed that her vehicle was travelling. In contrast to the District Court's findings that Trooper Smart's conclusion accounts for the eye-witness testimony at trial, Trooper Smart's conclusion this was a low-speed collision does not conform to the eye-witness trial testimony. As explained above, none of the eye witnesses testified to a low-speed impact, but rather testified the vehicle was moving "too fast," "extremely fast," "regular speed," and Parsons went "flying through the air" upon impact. The State's change in theory is sufficient to demonstrate that had trial counsel not failed to engage an accident reconstructionist, there is a reasonable probability the outcome of the trial would have been different.

¶61 I would reverse and grant Garding's petition for a new trial.

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cross-examination did not and could not counter officer testimony about the mechanics of the collision. Expert testimony to explain why the scenario's offered by the officers violated the laws of physics and could not have occurred was required. Relying on cross-examination alone was unreasonable because it allowed the jury to rely on a scenario that could not have physically happened and defied science.

/S/ INGRID GUSTAFSON

Justice Laurie McKinnon joins in the dissenting Opinion of Justice Gustafson.

/S/ LAURIE McKINNON

APPENDIX D

JOHN W. LARSON
District Court Judge
Fourth Judicial District
Missoula County Courthouse
Missoula, Montana 59802
406-258-4773

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

KATIE IRENE GARDING,
Petitioner,
vs.
STATE OF MONTANA,
Respondent.

Dept. 3
Cause No. DV-15-969

FINDINGS OF FACT, CONCLUSIONS OF LAW DISMISSING PETITIONER'S AMENDED PETITION FOR POST-CONVICTION RELIEF

Before the Court is Defendant's Amended Post-Conviction Relief. The Court held a hearing on June 25-26, 2018, allowed supplemental briefing, and the matter is ready for decision.

PROCEDURAL HISTORY

The Court finds the procedural history as the following. On June 11, 2011, Petitioner was found guilty of Negligent Vehicular Homicide and Leaving the Scene of an Accident by a jury. On October 11, 2011, she was sentenced.

On November 26, 2013, her conviction was affirmed by the Montana Supreme Court. On October 6, 2014, Certiorari to the United States Supreme Court was denied. On September 15, 2015, the Montana Innocence Project filed a Petition for Post-Conviction Relief on Petitioner's behalf, alleging a violation of *Brady v. Maryland*; ineffective Assistance of Counsel; and newly discovered evidence of innocence.

The case was set for hearing in March 2017, at which time Petitioner produced photos from Dr. Gary Dale's file regarding a 2005 crash, which photos were not plead under the original petition. The 2005 photos depict the striking vehicle and victim of the 2005 hit-and-run collision. Petitioner contends that the 2005 striking vehicle left injuries on the 2005 victim's legs similar in location and severity to Mr. Parson's leg injuries; however, the 2005 striking vehicle was different than Petitioner's Blazer and sustained notable impact damage. Petitioner contends that the photographs of the 2005 hit-and-run collision prove that Petitioner's Chevy Blazer did not hit Mr. Parsons because Petitioner's vehicle could not have struck Mr. Parsons and sustained no impact damage. Petitioner contends that the damage to the striking vehicle in the 2005 collision confirms there would be extensive damage to the windshield of the striking vehicle in Mr. Parsons' case. Petitioner also argues that the 2005 photos show a different striking vehicle caused similar injuries,

undermining the State's contention at trial that the height of the bumper on Petitioner's Blazer in relation to the location of Mr. Parsons' injuries linked Petitioner's bumper to Mr. Parsons' leg injuries. Petitioner contends that if defense counsel had had the 2005 collision photos, then there is a reasonable probability that the outcome of Petitioner's trial would have been different.

On January 29, 2018, Petitioner filed an Amended Petition, alleging that photos of a vehicle versus pedestrian crash from 2005 contained within Dr. Dale's file after the trial should have been disclosed. Petitioner also provided a video recreation from the Reno Bar and new expert reports.

On June 13, 2018, the State filed Motions for Parital Summary Judgment regarding the newly discovered evidence claims in the Petition, Amended Petition, and the *Brady* claim regarding x-rays in the Petition. The Court set hearing on the motions for June 22, 2018. Following the hearing, the Court dismissed the newly discovered evidence claims and further granted the State's motion regarding the *Brady* violation pertaining to the x-rays.

On June 25-26, 2018, a hearing was held on Petitioner's Amended Post-Conviction Petition, on the remaining claims: (1) whether the State violated *Brady* in relation to the 2005 photos in Dr. Dale's file; and (2) whether Jennifer Streano's reliance on cross examination at trial rather than calling an expert witness constituted ineffective assistance of counsel. The Court

ordered the parties to submit amended proposed Findings of Fact and Conclusions of Law and file supplemental briefing. The Court is in receipt of supplemental briefing and the matter is now ready for decision.

BACKGROUND FACTS

On January 1, 2008, Petitioner was driving a 1994 S-10 Blazer. In the early morning of the same day, Bronson Parsons was killed during a hit-and-run vehicle-pedestrian accident that involved a dark-colored SUV. Trooper Novak of the Montana Highway Patrol arrived at the scene and conducted an investigation, but was unable to identify the point of impact. The State of Montana charged Petitioner by Information on April 13, 2010, with Vehicular Homicide; Leaving the Scene of a Fatal Crash; Tampering with Evidence; and Driving a Motor Vehicle without a Valid License. The case against Petitioner went to trial in October 2011. Troopers Hader, Novak, and Strauch from the Montana Highway Patrol, Alice Ammen, Judith Hoffmann, and Debra Hewitt from the State Crime Lab, Dr. Dale testified for the State. Petitioner called Dr. Thomas Bennett, a forensic pathologist, to challenge Dr. Dale's testimony.

At trial, James Bordeaux testified that he was in the vehicle and that Petitioner struck a person. Trial Transcr. Vol. II, p. 1006, ll. 4-10. Teuray Cornell testified that Petitioner appeared at his house the day of the crash or

shortly after and stated she hit a deer and he fixed her broken fog lamp with duct tape. Trial Transcr., Vol. II, p. 1352, ll. 20-23; p. 1361, ll. 11-20. Petitioner admitted that her fog lamp was taped when Trooper Hader stopped her vehicle. Trial Transcr., Vol. II, p. 1434, ll.5-11.

Mr. Parsons had three inches of crushed muscles in his calves 14" to 17" above his heel. Trial Transcr., Vol. I, p. 617, ll. 4-9. He had an abrasion on his head where his skin was scraped away. Trial Transcr., Vol. 1, p. 619-621. The cause of death was blunt force injuries to the head. He had basal skull fractures, extensive skull fractures, bruising and bleeding around the brain. Trial Transcr., Vol. I, p. 621, ll. 15-19.

The State called the medical examiner, Dr. Gary Dale, who testified that the location and size of Petitioner's bumper was consistent with muscle tearing injuries in Mr. Parsons' calves. Dr. Dale testified that muscle tearing is an indication of direct force. Tr. Transcr. Vol I, 617:16-17. He testified that the primary force to Mr. Parsons' lower extremities was 14 to 17 inches above his heels. Tr. Transcr. at 618:9-11. He testified that the bruises did not show evidence of direct points of impact. Tr. Transcr. at 623:12-14. The bruising was from 9-16 inches from the heels. Tr. Transcr. at 638:14-15. Dr. Dale stated that bruising is a hemorrhage in soft tissue, Tr. Transcr. at 615:18-19, and that if someone is still alive, the blood continues to move

underneath the skin and in between muscles and one must be careful using bruises to interpret points of impact. Tr. Transcr. at 623:5-10. The measurements of Petitioner's bumper aligned with the injuries to Mr. Parsons' muscle tearing. Tr. Transcr. at 643:8-11. Dr. Dale agreed with Ms. Streano several times that any other bumper at the same height could have struck Mr. Parsons. Tr. Transcr. at 646:25; 647:1-11; 650:16-22. Dr. Dale testified that he was not identifying Ms. Garding's vehicle as the vehicle that struck Mr. Parsons. He testified there was nothing from Mr. Parsons' injuries that identified Ms. Garding's vehicle as the vehicle that struck him. Tr. Transcr. Vol. I, 636:18-24; 637:1.

The jury convicted Petitioner of Vehicular Homicide While Under the Influence, Failure to Stop Immediately at the Scene of an Accident Involving an Injured Person, and Driving Without a License. Petitioner received a 40 years sentence and appealed her conviction but was denied relief.

I. FINDINGS OF FACT

A. *BRADY* VIOLATION

1. On June 6, 2011, Dr. Gary Dale testified at trial. Three days after cross-examination by Ms. Streano and after being released from his subpoena that he received information relating to two unrelated fatalities to compare head injuries–one was a known head-to-windshield impact

from 2005 (hereinafter referred to 2005 crash or 2005 photos) and one was a known head-to-ground impact from 2009 where a pedestrian fell from a standing position. *State v. Garding*, P.C.R. Hrg. Transcr. (sealed) 18:12-13, 19:14-16, 20:7-8 (June 25, 2018); Petitioner's Exhibit 1. Dr. Dale surmised that he was comparing a head injury caused by asphalt and a head injury caused by a windshield to Mr. Parsons' head injury. P.C.R. Hrg. Transcr. (sealed) 19:17-18, 13:9-13 (June 25, 2018). Dr. Dale placed this information in his file after review. P.C.R. Hrg. Transcr. (sealed) 3:8 (June 25, 2018).

2. The information in Dr. Dale's file regarding the 2005 crash were photos of the deceased, photos of the suspect vehicle, and a police report. P.C.R. Hrg. Transcr. (sealed) 11:11-13 (June 25, 2018).

3. To the best of his recollection, when he reviewed them after his trial testimony in 2011, he didn't look at all the St. Patrick Hospital information regarding decedent's injuries. P.C.R. Hrg. Transcr. (sealed) 9:20-21 (June 25, 2018).

4. Dr. Dale did not review these cases prior to examining Mr. Parsons. He did not review them prior to testifying. He did not consult them as the basis for the opinion to which he testified at trial. P.C.R. Hrg. Transcr. (sealed) 21:7-15 (June 25, 2018).

5. Review of the 2005 case did not influence or cause Dr. Dale to reach a different conclusion or a more sure conclusion as to the origin of Mr. Parsons' injuries. P.C.R. Hrg. Transcr. 14:1-4.

6. Dr. Dale's review of these photographs affirmed his opinion that Mr. Parsons' head injury was caused by ground impact and not with a windshield. P.C.R. Hrg. Transcr. 22:14-16.

7. Dr. Dale did not conduct an internal examination of the 2005 crash decedent. P.C.R. Hrg. Transcr. 8:21-23. Mr. Parsons' exam did not reveal an impact involving his torso. He had a non-displaced fracture on his fibula that was barely appreciable on the x-ray. P.C.R. Hrg. Transcr. 30:19-24, 31:14-15.

8. The amount of force required to produce a fibular fracture is lower on the scale of force than what is needed to cause a tibular fracture. P.C.R. Hrg. Transcr. 31:7-10. Speed is a huge factor when looking at severity of injury and calf muscles are a good energy absorber. P.C.R. Hrg. Transcr. 34:13-25. Internal review of muscle tearing reflects direct point of force. P.C.R. Hrg. Transcr. 28:16-18.

9. Ms. Streano testified that the photos would have been helpful to her case. Ms. Streano testified about similarities of the crashes based on

information she received from MTIP. P.C.R. Hrg. Transcr. 52:2-4 (June 25, 2018). Nothing in Dr. Dale's file contained this information.

10. Montana Innocence Project sent the glass particles recovered from the scene and from Mr. Parsons to McCrone Associates, Inc., for testing. McCrone's testing concluded the particles were not windshield glass. McCrone and Associates Letter to Mr. Tobias Cook, Sept. 20, 2017, Ex. 1, *State's Response to Petition and Amended Petition for Post-Conviction Relief*, (May 31, 2018).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

11. Ms. Streano was a member of a specialized criminal defense division, Major Crimes Unit. P.C.R. Hrg. Transcr. 34:8-10 (June 25, 2018). The Major Crimes Unit is a division of attorneys capable of independently trying complex cases up to and including death penalty cases. The purpose of the Unit is to handle difficult cases. P.C.R. Hrg. Transcr. 35:22-25 (June 25, 2018). Ms. Streano was hired based on her background, experience, and because she was competent to try complex cases. P.C.R. Hrg. Transcr. 39:3-5 (June 25, 2018).

12. Ms. Streano provided an affidavit dated August 13, 2015. Aff. of Jennifer Streano, Ex. N, *Petition for Post-Conviction Relief* (Sept. 14, 2015). The Montana Innocence Project prepared the affidavit. P.C.R.

Hrg. Transcr. 32:22-23 (June 25, 2018). Ms. Streano reviewed it, made changes, and swore to the accuracy of the information contained within the affidavit. P.C.R. Hrg. Transcr. 32:24-25, 33:1-6 (June 25, 2018); Aff. of Jennifer Streano, Ex. N, *Petition for Post-Conviction Relief* (Sept. 14, 2015).

13. Ms. Streano testified that she questioned witnesses at trial regarding the lack of damage to Petitioner's Blazer. Hrg. Transcr. 49:13-50:16, June 25, 2018.

14. Ms. Streano stated in both her affidavit and testimony at hearing that this was her second homicide trial, she had no co-counsel to assist her and she was overwhelmed with the complexities of the case. P.C.R. Hrg. Transcr. 9:9-18 (June 2, 2018), Ex. N She stated that she asked her boss for co-counsel and there wasn't anyone available. P.C.R. Hrg. Transcr. 44:25, 45:1-3 (June 25, 2018), Aff. of Jennifer Streano, Ex. N, *Petition for Post-Conviction Relief* (Sept. 14, 2015).

15. Ms. Streano testified that she failed to consult with an accident reconstruction expert and secure appropriate testing. Evid. Hr'g Tr. 9:22-24, June 25, 2018.

16. Ms. Streano was assigned Steven Scott as co-counsel to assist her in representation of Petitioner on July 8, 2010. P.C.R. Hrg. Transcr. 11:15-23 (June 25, 2018); 72:12-13 (June 26, 2018).

17. Ms. Streano removed Mr. Scott from the case because she did not need his assistance. P.C.R. Hrg. Transcr. 72:19-25, 73:1-15 (June 26, 2018).

18. Mr. Scott testified he had over 11 years of experience as an attorney at the time of Petitioner's trial and had personally tried over 25 homicides. P.C.R. Hrg. Transcr. 67:9, 68:23-25 (June 26, 2018).

19. Upon being reminded that Steven Scott filed a Notice of Appearance in the case and had attempted to assist her on several occasions, Ms. Streano testified that she did not believe Mr. Scott was experienced and didn't consider him valuable co-counsel or assistance. P.C.R. Hrg. Transcr. 42:12, 16-17 (June 25, 2018).

20. Ms. Streano tried a vehicular homicide case prior to Petitioner's case wherein she utilized an accident reconstructionist David Rochford. P.C.R. Hrg. Transcr. 39:18-25, 40:1-5 (June 25, 2018). Ms. Streano acknowledged that she was aware an accident reconstructionist could offer valuable insight to a case. P.C.R. Hrg. Transcr. 40:6-9 (June 25, 2018). Mr. Rochford testified that Ms. Streano appeared to be

competent in the presentation of his report in the trial at which he testified. P.C.R. Hrg. Transcr. 25:11-13 (June 26, 2018).

21. Ms. Streano consulted with three investigators, Dr. Bennett, and staffed the case with other attorneys in the office. P.C.R. Hrg. Transcr. 41:5-14, 43:13-25, 44:8 (June 25, 2018). The public defender's office had attorney meetings where they would regularly meet and discuss cases. P.C.R. Hrg. Transcr. 41:8-10 (June 25, 2018).

22. Neither the State, nor the defense, conducted a crash reconstruction prior to trial nor called an accident reconstruction expert to testify at trial.

23. Attorneys David Ness and Wendy Holton reviewed this case. Mr. Ness is a Federal Defender while Ms. Holton is a solo practitioner. P.C.R. Hrg. Transcr. 73:11-12, 79:11-14 (June 25, 2018).

24. Ms. Streano did not discuss the contents of her affidavit with Wendy Holton or David Ness. P.C.R. Hrg. Transcr. 33:23-25, 34:1. (June 25, 2018).

25. Mr. Ness and Ms. Holton stated they relied on Ms. Streano's August 13, 2015, Affidavit regarding her own performance at trial in reaching their respective conclusions that Ms. Streano was ineffective. Mr. Ness signed his affidavit on July 21, 2015. Ms. Holton signed her affidavit on

August 4, 2015. Aff. of David Ness, Ex. O, and Aff. of Wendy Holton, Ex. P, *Petition for Post-Conviction Relief* (Sept. 14, 2015).

26. Mr. Rochford testified at the hearing that he would have been able to conduct a reconstruction in 2010. He stated that in order to estimate speed from throw distance you need to know point of impact. P.C.R. Hrg. Transcr. 19:16-19 (June 26, 2018). Mr. Rochford agreed that looking at the injuries on a pedestrian is one way to base speed. P.C.R. Hrg. Transcr. 19:23-25 (June 26, 2018). Mr. Rochford agreed that minor injuries to a pedestrian reflects a lower speed. P.C.R. Hrg. Transcr. 22:17-19 (June 26, 2018).

27. Trooper Smart has been in law enforcement since 2007. He possesses a degree in physics. P.C.R. Hrg. Transcr. 89:9-17 (June 26, 2018). He is currently the traffic homicide investigator for District One, which means he is called to assist with serious injury or fatal crashes as the subject matter expert for total station or reconstruction. P.C.R. Hrg. Transcr. 90:5-14 (June 26, 2018).

28. Trooper Smart has investigated around 850 crashes, 115 being fatal with a fair number of vehicle versus pedestrian crashes. P.C.R. Hrg. Transcr. 91:3-14, 92:1-2 (June 26, 2018). Trooper Smart is recognized as an expert in general crash reconstruction and investigation. In his

experience, reality doesn't defy physics, but it oftentimes defies our expectations meaning that he has seen fatal crashes where the evidence suggests it should have not been fatal. P.C.R. Hrg. Transcr. 92:17-19 (June 26, 2018). A formula isn't always going to give you the result you see on the street. P.C.R. Hrg. Transcr. 94:1-2 (June 26, 2018).

29. Trooper Smart testified that he "did do the math because that's how a – crash reconstructionists (*sic*) try to do it. But when the math doesn't match the reality, you have to realize this math isn't valuable." Evid. Hrg. Transcr. 128:12-15, June 26, 2018.

30. In reconstructing a crash, Trooper Smart agrees with Petitioner's experts that there are three sources of evidence: the vehicle, the road, and the people involved. P.C.R. Hrg. Transcr. 94:19-21 (June 26, 2018). If any piece of information is missing, he does the best with what is present, but a full reconstruction cannot be accomplished. P.C.R. Hrg. Transcr. 94:22-25, 95:1, 97:20-25 (June 26, 2018).

31. Trooper Smart testified that calculations involving physics rely on data, and inaccurate data results in a "garbage in, garbage out" analysis. P.C.R. Hrg. Transcr. 128:12-17 (June 26, 2018). There are too many

variables in crashes and none can be reproduced with precision. P.C.R. Hrg. Transcr.129:10-12 (June 26, 2018).

32. The bulk of the evidence in this case is the injury to Mr. Parsons. P.C.R. Hrg. Transcr. 101:8-9 (June 26, 2018). Trooper Smart relied upon Dr. Dale's testimony for the injuries to Mr. Parsons. P.C.R. Hrg. Transcr. 102:4-7 (June 26, 2018).

33. There was insufficient evidence on the road to determine the speed of the vehicle. P.C.R. Hrg. Transcr. 97:7-14 (June 26, 2018).

34. Trooper Smart used 93 feet as an approximation for the distance between where Mr. Parsons' was struck and where he came to rest. P.C.R. Hrg. Transcr. 107:9-22 (June 26, 2018). Trooper Smart testified that the standard formulas used in reconstruction do not work with the evidence that was left at the scene. P.C.R. Hrg. Transcr. 108:1-4, 116:6-8 (June 26, 2018).

35. Trooper Smart agreed that the paper by *Appel, Sturtz and Gotzen* (Petitioner's tab 22 in Exhibit book) stated secondary collision produces at all speeds less severe injuries than the primary contact and notes that the evaluated data is not always statistically assured. P.C.R. Hrg. Transcr. 112:8-19 (June 26, 2018).

36. Trooper Smart discussed *Comprehensive Analysis Methods for Vehicle/Pedestrian Collisions* by Andrew Happer. P.C.R. Hrg. Transcr. 119:17-20 (June 26, 2018). The paper states, "If the pedestrian has not moved off of the side of the vehicle, then there will be secondary contact between the pedestrian and the vehicle." P.C.R. Hrg. Transcr. 121:5-8 (June 26, 2018). This correlates with what Trooper Smart's training and experience that a person will sustain injury from the initial point of contact and then depending on their travel path, they may have a secondary impact with the vehicle. P.C.R. Hrg. Transcr. 122:7-12 (June 26, 2018). Trooper Smart pointed out that the results in the paper are speed sensitive and at lower speeds you will not see the same results. P.C.R. Hrg. Transcr.123:6-13 (June 26, 2018).

37. Trooper Smart considered that Mr. Parsons' received minor injuries to his fibula from the initial impact and that doesn't correlate to the data with the speeds discussed in the papers. P.C.R. Hrg. Transcr. 125:12-21 (June 26, 2018). Trooper Smart notes other discrepancies between the tests in the studies and the evidence in the instant case. They used a vehicle stopping after impact and a body being projected, falling and sliding. The evidence does not support either of those things occurring. P.C.R. Hrg. Transcr. 127:10-21 (June 26, 2018).

38. The physical evidence and the eye-witness statements in this case match a wrap and carry collision. P.C.R. Hrg. Transcr. 127:22-24 (June 26, 2018).

39. Any factual findings contained in the Conclusions of Law are hereby incorporated in these Findings of Fact. To the extent that any of the foregoing Findings of Fact are better construed as Conclusions of Law, they should be so construed.

From the foregoing Findings of Fact, the Court draws these:

CONCLUSIONS OF LAW

A. *BRADY* VIOLATION

1. The Court has jurisdiction of this matter.

2. The Court adopts any Findings of Fact that are more appropriately Conclusions of Law.

3. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

4. The United State Supreme Court has held that a *Brady* violation encompasses three elements: (1) the evidence at issue must be

favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

5. Montana has broken the analysis into four prongs: 1) the State possessed evidence favorable to the Defendant; 2) the defendant did not possess the evidence nor could he have obtained it with reasonable diligence; 3) the State suppressed the favorable evidence; and 4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *State v. Parrish*, 2010 MT 212, ¶17.

6. Not all favorable evidence is *Brady* material and suppression does not always warrant a new trial. The evidence must be material either to guilt or to punishment. *State v. Reinhart*, 2018 MT 111 ¶ 16, 391 Mont. 263; *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97; *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 3379 (1985).

7. Materiality of the evidence is determined by looking at the entire record, considering the cumulative effect of the evidence and determining if the evidence would produce a reasonable probability that the result would have been different. *Barker v. Fleming*, 423 F.3d 1085, 1094, 2005 U.S. App. LEXIS 19372, 18 (2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 436, 507, 115 S. Ct. 1555, 1567 (1995). A reasonable probability means a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682; *Barker v. Fleming*, 423 F.3d 1085, 1096, 2005 U.S. App. LEXIS 19372, 18 (2005); *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 630 (2012); *United States v. Olsen*, 704 F.3d 1172, 1183, 2013 U.S. App. LEXIS 450, 23 (2013).

8. The touchstone of the inquiry is whether the defendant received a fair trial that resulted in a verdict "worthy of confidence." *Barker*, 423 F. 3d at 1096; *Kyles*, 514 US at 434.

9. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Olsen*, 704 F.3d at 1184; *Barker*, 423 F.3d

at 1099. If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. *United State v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402 (1976). "A critical point is that there is no constitutional violation unless the omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Agurs*, 427 U.S. at 108.

10. The prosecution must disclose all reports or statements of experts who have personally examined…**any evidence in the particular case...** Mont. Code Ann. § 46-15-322(1)(c) (emphasis added).

11. The obligation does not require the State to assist the defendant with procuring evidence. The mere fact that these photos were later placed into the medical examiner's file does not make them *Brady* material. The information is about an unrelated crash with unrelated parties and the mere fact that it may have been beneficial to the Defendant is insufficient to constitute *Brady* material.

12. The photos of the car and the deceased from the 2005 crash contain insufficient information to determine relevancy and

exculpatory value. The size of the car, the speed of the car, the manner in which it struck the decedent are all factors that the Court needs to determine whether or not the photos are exculpatory. The fact that this one vehicle had body damage is unpersuasive that every vehicle would have damage.

13. Petitioner argued the speeds were similar but there is no evidence to support this assertion.

14. McCrone's analysis supported the State's theory and eye-witness testimony that the windshield of the striking vehicle didn't break and refuted the assertions by the MTIP that the 2005 crash photos are relevant, material and exculpatory.

15. There was no prejudice to the Petitioner. The theory Petitioner asserts the photos would support was presented at trial.

16. The 2005 photographs are not exculpatory because they only indicate external bruising, whereas Dr. Dale testified that internal tearing is the most crucial evidence for determining the point of impact on the decedent's body. Dr. Dale did not complete an internal examination of the 2005 victim's legs. Thus, the photographs do not establish to any degree of certainty that the two victims' injuries are the same.

17. The 2005 photos do not show that Petitioner was not involved in this crash. Dr. Dale even testified at trial that another bumper/vehicle could have cause the injury to Mr. Parsons' legs. They do not offer evidence that wasn't already presented at trial.

18. The injuries to Mr. Parsons do not support the Petitioner's theory that the impact would have caused damage to the car and that Mr. Parsons struck the windshield. There were no injuries to Mr. Parsons' torso to indicate that his body struck the body of a vehicle. The lack of torso injuries to Mr. Parsons are consistent with the lack of damage to the Petitioner's Blazer.

19. The photos are not material. They are not evidence in this particular case. When looking at the record as a whole, they provide insufficient information needed for accurate comparison of the 2005 crash and the crash at issue here.

20. The Court concludes Petitioner has not demonstrated reasonable probability of a different outcome if the State had disclosed the 2005 photos prior to trial.

21. In light of all of the evidence, Petitioner's newly discovered evidence claim regarding the 2005 photos, does not create a reasonable probability of a different outcome at trial and does not

meet the standards set forth in *Marble v. State*, 2015 MT 242, 380 Mont. 366, 355 P.3d 742.

B. INEFFECTIVE ASSISTANCE

22. Claims of ineffective assistance of counsel in Montana are analyzed under the tenets of the United States Supreme Court case *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Hagen*, 2002 MT 190, ¶ 17, 311 Mont. 117, 53 P.3d 885; 466 U.S. 668 (1984); *see also Whitlow v. State*, 2008 MT 140, ¶¶ 20-21, 343 Mont. 90, 183 P.3d 861.

23. A petitioner bears that heavy burden to prove: (1) her counsel's performance was deficient; and (2) her counsel's performance was so deficient as to prejudice the defendant to the point that she is deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

24. When analyzing the reasonableness of counsel's performance, Montana adheres to the confines of the reasonableness standard articulated in *Strickland*—the Montana standard is not broader. *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861.

25. In discussing the application of the *Strickland* standards, the *Whitlow* court stated: "[T]he question which must be answered is whether counsel's conduct fell below an objective standard of reasonableness

measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, 2008 MT 140, ¶ 20.

26. There is always a strong presumption that counsel performed within the broad bounds of reasonable professional assistance based on sound trial strategy—a petitioner alleging ineffective assistance of counsel bears a substantial, heavy burden to prove otherwise. *Whitlow*, 2008 MT 140, ¶ 21

27. The point of an ineffectiveness claim can never be to grade counsel's performance. *Whitlow*, 2008 MT 140, ¶ 19. Even instances where counsel could have done a "better" or "more thorough" job do not rise to the level of ineffective assistance. *Id.* at ¶ 23.

28. When an ineffective assistance of counsel claim alleges a failure to investigate, the standard to determine deficiency under *Strickland* is that defense counsel must either perform a reasonable investigation into an evidentiary matter, or make a reasonable decision that a particular investigation is unneeded. *Hagen*, ¶ 26; *Strickland*, 466 U.S. at 690-91. Retrospective analysis is not permitted because under *Strickland*, the objective reasonableness of counsel's conduct is not analyzed through the wisdom of hindsight, but rather on the facts of

the particular case, as they were viewed at the time of counsel's conduct. *Strickland*, 466 U.S. at 690.

29. Although counsel's thorough investigation of law and "facts relevant to plausible options" is nearly barred from challenge, strategic choices formulated after less exhaustive investigation can prove no less formidable when bolstered by a reasonable professional judgment that curtailed the investigation. *Strickland*, 466 U.S. at 690-91.

30. The issue at the heart of the matter in any ineffectiveness claim is whether counsel's representation rose to the level of incompetence under "prevailing professional norms," not whether that representation differed in some way from best practices or most common custom. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). When counsel's strategy is reasonable, counsel's performance is not deficient. *Whitlow*, ¶ 19.

31. There is therefore a substantial burden placed upon a defendant seeking to demonstrate her former counsel's ineffectiveness for a failure to investigate. *Hagen*, ¶ 26. A particular decision not to investigate can only be analyzed in an ineffectiveness case by assessing the reasonableness of counsel's conduct in light of all surrounding circumstances at the time, and even then, only by

deferring in "heavy measure" to counsel's judgments. *Id.; Strickland*, 466 U.S. at 691. This extreme deference is proper and owed to every defense counsel because the representation of a criminal defendant is a weighty matter, riddled with a great variety of circumstances and a swath of legitimate decisions to be made for which there cannot possibly be a preordained course, or a set of detailed rules to constrain counsel's thoughts on how best to represent a defendant. *Strickland*, 466 U.S. at 688-89.

32. Courts are well within the wide latitude of reasonable judicial determination to find that counsel followed a strategy that did not necessitate the use of experts. *Harrington*, 562 U.S. at 789.

33. It sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." *Id*. at 109. Defense counsel are entitled to use this strategy when seeking to use their limited resources efficiently, and in accord with effective trial tactics. *Harrington,* 562 at 106-07.

34. Since there is a strong presumption that counsel's focus on some issues more than others is a matter of trial tactics rather than neglect, courts are not permitted to insist that counsel account for every facet

of the strategic basis governing her actions. *Harrington,* 562 at 109-10.

35. If the defendant cannot overcome the presumption that a decision under the circumstances "might be considered a sound trial strategy," a claim for ineffective assistance will not stand. *Strickland,* 466 U.S. at 689. Even though expert testimony might prove useful to the defense, there are circumstances where it is perfectly reasonable for a competent attorney to choose not to use it—and it is error for a court to dismiss such strategic considerations as "an inaccurate account of counsel's actual thinking." *Harrington*, 562 U.S. at 108-1.

36. A lack of foresight, miscalculation, or the failure to prepare for what may appear to be a remote possibility does not render counsel's performance faulty. *Harrington* at 110-11. Counsel need not anticipate nor be prepared for every eventuality to render competent counsel under *Strickland* and the Sixth Amendment. *Id.*

37. Indeed, the Montana Supreme Court cautioned against criticizing counsel with hindsight: "in scrutinizing counsel's performance, every 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).

38. Counsel need be only reasonably competent; representation is constitutionally deficient only when the adversarial process has been sufficiently undermined as to deprive the defendant of a fair trial. *Harrington*, at 110-11.

39. A mistake or omission in strategy does not rise to such a level because counsel are not expected to be flawless tacticians. *Id*. As a result, a reviewing court will err if it finds ineffectiveness where it is even debatable that counsel's performance called the fairness of the trial into doubt. *Id*.

40. In terms of offering expert evidence, this expansive deference to the judgment of counsel encompasses even a decision to leave adverse expert testimony and evidence unopposed. *Id.*

41. For such a decision to be considered a deficiency in representation, it must be indisputable that counsel should have offered expert testimony to rebut prosecutorial evidence. *Id*.

42. There is no requirement under the Sixth Amendment or *Strickland* that mandates the rebuttal of every piece of expert evidence and testimony. *Id*.

43. A mere finding that counsel could have done a better job, a more thorough job, or even a different job and that the defendant suffered some prejudice as a result does not satisfy the tenets of Strickland. *Hagen*, ¶ 23; *St. Germain v. State*, 2012 MT 86, 364 Mont. 494, 276 P. 3d 886, ¶ 10 (citing *Strickland*, 466 U.S. at 689).

44. To establish prejudice, petitioner must show that, but for the errors of counsel, there was a reasonable probability that the result of the proceeding would have been different. A reasonable probability must be a probability sufficient to undermine confidence in the outcome of the proceedings. *St. Germain*, ¶ 11. The likelihood of a different result must be substantial, not just conceivable. *Harrington*, 562 U.S. at 112.

45. Defense counsel's decision to not offer expert testimony does not automatically constitute ineffective assistance. *Dawson v. State*, 2000 MT 219, ¶¶ 109-110, 301 Mont. 135, 10 P.3d 49.

46. It is not ineffective for defense counsel to rely on cross examination in lieu of an independent analysis. *Kenfield v. State*, 2016 MT 197, ¶ 19, 384 Mont. 322, 377 P. 3d 1207.

47. Ms. Streano discussed the case with three investigators, her expert Dr. Bennett, and other attorneys in the office. No one felt that an accident

reconstruction was appropriate in the case. This was not alone her decision or conclusion.

48. Ms. Streano testified she did not have co-counsel available and thus felt overwhelmed through the entirety of the case. When confronted with the fact that she did have co-counsel available, she stated it was inadequate co-counsel.

49. Steven Scott provided compelling testimony that he was assigned to assist Ms. Streano. He tried several times to meet and discuss the case. Each time, she informed him that she didn't need assistance. Mr. Scott requested to be released from the case, so he could work on his other cases. Mr. Scott further testified that Ms. Streano did not seem overwhelmed.

50. This Court finds Mr. Scott's testimony credible. Ms. Streano had co-counsel available, had meetings with others in the office where she could discuss the case and had worked with an accident reconstructionist prior to Ms. Garding's case. Ms. Streano's self-serving statements are not credible.

51. Petitioner did not plead that Ms. Streano was ineffective for releasing Mr. Scott and is barred from raising that issue.

52. Mr. Scott's testimony provided that such a choice was strategic and personal in nature as opposed to a naive oversight.

53. Mr. Ness and Ms. Holton relied on Ms. Streano's Affidavit, which was not finalized until after both witnesses provided their affidavits. Neither Mr. Ness nor Ms. Holton discussed Ms. Streano's Affidavit with her prior to rendering an opinion.

54. Mr. Ness and Ms. Holton each acknowledged that cross examination can be used as a preferred method for defense counsel to try a case as opposed to eliciting expert testimony.

55. Mr. Ness and Ms. Holton were not aware of the inaccuracies in Ms. Streano's Affidavit when rendering their opinions.

56. Ms. Streano's performance was not deficient. She called witnesses and effectively cross examined the State's witnesses. She raised the issue of the first suspect in the case and called into question the investigation by law enforcement. She called into question the recollection of the witnesses that night. She challenged Teuray Cornell and James Bordeaux on their motives. She subjected Dr. Dale to scrutiny on cross-examination that he independently consulted former case files afterwards to ensure that his opinion in the instant case was still valid.

57. A review of the trial transcript shows that Ms. Streano effectively cross-examined the State's witnesses on matters that called into question the vehicle involved in the crash. She further called witnesses that countered the State's witnesses. She provided alternate suspects and theories for the crash.

58. Ms. Streano effectively cross-examined Dr. Dale regarding the fracture and that it did nothing to identify this vehicle as the one that struck Mr. Parsons. She had him concede several times that there was nothing from the injuries that stated this was the vehicle. He also conceded that any vehicle with the same bumper height could have been involved.

59. Ms. Streano's strategic decision to not use an accident reconstructionist was reasonable. It was a sound trial strategy, as she relied heavily on cross-examination of witnesses to provide her defense. Based on the hearing evidence, there was no indication that she was struggling during her trial preparation and defense of Petitioner. In fact, the Court finds that Ms. Streano made a calculated decision.

60. Under the circumstances, Ms. Streano's decision to not utilize an expert may be considered sound trial strategy and Defendant has not overcome the presumption.

61. Any failure on the part of Ms. Streano does not meet the standard necessary to constitute ineffectiveness.

62. Petitioner has not met his burden of proof in establishing that Ms. Streano's performance was ineffective as it relates to her failure to retain an accident reconstructionist, even though she had previously done so in another case.

63. The experts presented by the Petitioner offer only one analysis of the case. Many experts run multiple calculations to arrive at an opinion. There is a counter-analysis in this case that supports the finding that Petitioner was responsible.

64. The Court has reviewed and considered the Petitioner's experts and their reports and finds the testimony of Trooper Smart more credible. The only evidence at the scene was the injury to Mr. Parsons. Mr. Parsons had a minor crack to his fibula, no injuries to his torso, and a head injury that Dr. Dale determined was caused by ground impact.

65. The injuries to Mr. Parsons match the testimony at trial and Trooper Smart's analysis. A low speed collision would cause minimal injury to Mr. Parsons' legs. The lack of injury to his torso shows that his body didn't contact the striking vehicle and thus no damage would be caused

to the vehicle. No evidence supports the broken windshield theory. Glass at the scene was not from a windshield.

66. Petitioner's experts do not offer convincing proof that their analyses, had they been introduced at trial, would have produced a different result at trial. They provide a counter to Trooper Smart's investigation. They use an assumed speed of 35-miles-per-hour based on the speed limit in the area and the distance Mr. Parsons' stopped from the presumed point of impact. Their analyses do not look at the most exact evidence at the scene, Mr. Parsons. They do not account for the minor fibular fracture, the crushed muscle and the lack of torso injuries. Collisions at speeds in the 35-mile-per-hour-range would cause greater injuries than what is seen here. While Parsons' head injury was fatal and thus serious, the direct injuries to his legs and lack of injuries to the torso from the contact with the vehicle support Trooper Smart's conclusion that this was a slower-speed collision. It also accounts for the eye-witness testimony from two witnesses that observed a dark SUV and Mr. Bordeaux's testimony that he was in the vehicle and that Petitioner struck Mr. Parsons.

67. For the aforementioned reasons, Ms. Streano's performance was not so deficient as to prejudice the defendant to the point that she is deprived of a fair trial. *Whitlow*, citing *Strickland*, supra.

68. Further, the analyses provided by the new witnesses do not establish prejudice. Petitioner must show that, but for the errors of counsel, there was a reasonable probability that the result of the proceeding would have been different. There is not a reasonable probability sufficient to undermine confidence in the outcome of the proceedings. Based on the new analyses, the likelihood of a different result is merely conceivable, but it isn't substantial.

69. Therefore, this Court concludes that, Petitioner was not denied her rights under the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution, and pursuant to the standards set forth in *Strickland v. Washington* and *Whitlow v. State*, and their progeny.

From the foregoing Findings of Fact and Conclusions of Law, the Court makes the following.

ORDER

IT IS HEREBY ORDERED that Petitioner's Petition and Amended Petition for Post-Conviction Relief are DISMISSED.

DATED this 26th day of March, 2019.

JOHN W. LARSON, District Judge

Copies of the foregoing were sent to:

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APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 25 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KATIE GARDING, Petitioner-Appellee, v. MONTANA DEPARTMENT OF CORRECTIONS, Respondent-Appellant.	No. 23-35272 D.C. No. 9:20-cv-00105-DLC-KLD District of Montana, Missoula ORDER

KATIE GARDING, Petitioner-Appellant, v. MONTANA DEPARTMENT OF CORRECTIONS, Respondent-Appellee.	No. 23-35327 D.C. No. 9:20-cv-00105-DLC-KLD

Before: W. FLETCHER, R. NELSON, and COLLINS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. Dkt. 39. Judge W. Fletcher would grant the petition for panel rehearing and recommended granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35. The petitions for panel rehearing and rehearing en banc are **DENIED.**