No. 16-___

IN THE

Supreme Court of the United States

JASON GARNER,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Lynn Noesner
Senior Deputy State
Public Defender
OFFICE OF THE COLORADO
STATE PUBLIC
DEFENDER APPELLATE
DIVISION
1300 Broadway
Suite 300
Denver, CO 80203

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

QUESTION PRESENTED

An intractable conflict has arisen over the performance prong of the test for ineffective assistance of counsel laid out in *Strickland v. Washington*, 466 U.S. 668 (1984): When the actual basis for counsel's acts or omissions was unreasonable, may a court nevertheless hold, based on an invented rationale, that defense counsel's performance was reasonable?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Garner respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals (Pet. App. 1a) is reported at 381 P.3d 320 (Colo. App. 2015). The opinion of the District Court (Pet. App. 32a) is unreported.

JURISDICTION

The judgment of the Colorado Court of Appeals was entered on December 17, 2015. Pet. App. 1a. The Colorado Supreme Court denied petitioner's timely petition for discretionary review on September 6, 2016. Pet. App. 68a. On November 17, 2016, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 4, 2017. No. 16A493. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

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

STATEMENT OF THE CASE

In 2004, petitioner Jason Garner was sentenced to life in prison without the possibility of parole. At his

trial for first-degree murder, the State's theory was that he had killed a companion while in a drug-fueled craze. Nevertheless, petitioner's counsel neither requested a jury instruction that intoxication can be a defense to first-degree murder nor objected to the prosecution's incomplete proposed instruction regarding intoxication. In response to petitioner's claim of ineffective assistance of counsel, the court below found that defense counsel's rationale for her failure was unreasonable, but nevertheless upheld her performance under the first prong of this Court's test in *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Factual Background

In the winter of 1998, petitioner, then twenty years old, spent several days with his girlfriend, Coty Vernon, using and attempting to sell methamphetamine in the western Colorado town of Grand Junction. One evening, the couple set out in Ms. Vernon's car to drive more than 100 miles to Gypsum. Early the following morning, petitioner arrived on foot, shivering and disoriented, at a ranch in Parachute, a town at about the halfway point, saying he had lost his girlfriend and asking to use the phone. Tr. 38-40 (12/6).[1] He telephoned his grandmother and asked her to pick him up. *Id.* 15-16. He then called Ms. Vernon's mother. Tr. 91-93 (12/2). Learning that Ms. Vernon had not returned, and despite knowing of a prior warrant for his arrest, petitioner called 911 to report Ms. Vernon missing. *Id.*; Tr. 196-97 (12/7).

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[1] References to the transcript of petitioner's 2004 trial are indicated with "Tr. XX (YY)," where XX provides the page number, and YY refers to the date.

Petitioner attempted to help the police find Ms. Vernon, but they were unsuccessful. Tr. 208-09 (12/3). Ms. Vernon was presumed missing until 2002, when hunters came upon her skeletal remains at the bottom of a ravine about two miles from where her car had been found during the initial search in 1998. Pet. App. 2a.

B. Petitioner's Trial

1. Several months after Ms. Vernon's remains were found, the Mesa County District Attorney charged petitioner with first degree murder. The State's theory was that petitioner, "crazed on methamphetamine, chased her down and stabbed her to death." Tr. 4 (12/02); *see* Pet. App. 3a. To prove the stabbing, the State pointed to a single small mark on Ms. Vernon's sacrum and a rip in the band of her underwear. Tr. 114-17, 122-23, 148 (12/9). No corresponding rip was found in her jeans, nor was there any blood on her clothes. *Id.* 73, 89-92, 156-57. No weapon was ever found. Tr. 91 (12/13).

At trial, the State called several jailhouse snitches to testify about petitioner's involvement in Ms. Vernon's death. On the stand, each denied knowing anything, but the State introduced prior statements in which they had claimed to investigators that petitioner had incriminated himself to them. Tr. 24-34, 70-71 (12/8); 32-41, 191-205 (12/9); 5-7 (12/13). One such witness, who faced a 96-year sentence, claimed petitioner had told him that he chased Ms. Vernon and stabbed her repeatedly after an argument. *Id.* 32-33, 50-51 (12/08).

At the close of the State's case, after being reminded to do so by the judge, defense counsel moved

for a judgment of acquittal on the first degree murder charge. Tr. 89 (12/13). Counsel argued that there was insufficient evidence of premeditation, which Colorado law requires for a first degree murder conviction. *Id.* Despite there being "certainly a lot less evidence" to support premeditation than to support the other elements of first degree murder, *id.* 93-94, the court found there was sufficient evidence to permit a jury to find premeditation. *Id.* 94. The relevant evidence consisted of an allegation that petitioner had admitted to "chasing" Ms. Vernon; the allegation came in the form of a prior statement from the jailhouse informant facing a 96-year sentence. *Id.*

2. Petitioner took the stand in his own defense and denied killing Ms. Vernon. He testified that he had fallen asleep while she was driving them to Gypsum. After the car became stuck, the couple left together to find help. Due to the cold, Ms. Vernon eventually decided to return to the car. Tr. 9 (12/15). The two separated, calling out to one another until petitioner lost track of Ms. Vernon's voice. Tr. 184-85 (12/14). Petitioner testified that he was also hearing other voices due to drug-induced hallucination. *Id.* 183; Tr. 20 (12/15). Unable to find her after circling back, petitioner decided to seek help, ultimately arriving at the Parachute ranch. Tr. 185 (12/14).

3. The jury was instructed on the elements of first degree murder, as well as the lesser included offenses of second degree murder and manslaughter. Pet. App. 25a. In response to a request from the prosecution, the court instructed the jury that "[d]iminished responsibility due to self-induced intoxication is not a defense to murder in the second degree or manslaughter." *Id.* (alteration in original). Petitioner's

counsel did not object to this instruction. *Id.* 26a. Nor did they ask for an instruction telling the jury that diminished responsibility due to self-induced intoxication *is* a defense to murder in the *first* degree if the intoxication "negates the specific intent necessary to carry out" the offense. *Brown v. People*, 239 P.3d 764, 769 (Colo. 2010) (en banc); Colo. Rev. Stat. § 18-1-804(1).

4. After deliberating for twelve hours, the jury convicted petitioner of first degree murder. The judge sentenced him to life in prison without the possibility of parole.

C. Post-Conviction Proceedings and Appeal

1. After his conviction was affirmed on direct appeal, *People v. Garner*, 2006 WL 3028152 (Colo. App. Oct. 26, 2006), petitioner filed a pro se motion for post-conviction relief in state court under Rule 35(c) of the Colorado Rules of Criminal Procedure. Ultimately represented by post-conviction counsel from the Office of the Public Defender, petitioner alleged that he had received ineffective assistance of counsel at trial.

Under this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant establishes ineffective assistance by demonstrating deficient performance and prejudice. The performance inquiry considers whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. The prejudice inquiry asks whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

As relevant here, petitioner claimed his counsel's performance was deficient because they failed either

to object to the prosecution's proposed instruction on voluntary intoxication or to propose a proper one. Pet. App. 26a. Petitioner argued that he was prejudiced as a result.

After an evidentiary hearing, the trial court denied relief, holding that petitioner's counsel were not ineffective. Pet. App. 66a-67a.

2. On appeal, the Colorado Court of Appeals found that trial counsel's explanation for failing to object or to propose a proper instruction was unreasonable. Pet. App. 26a-27a. Petitioner's lead trial counsel had testified at the evidentiary hearing that she had not proposed a voluntary intoxication instruction because proposing one "would not have been consistent" with petitioner's denial defense. *Id.* 26a. She stated that requesting such an instruction would have required her to argue, "one, that [defendant] did not kill [the victim], and two, if he did, he . . . didn't have the requisite mental state." *Id.* (alterations in original). Counsel believed she could "only pick one" to "have any kind of credibility with the jury." *Id.*

The court found that counsel's explanation did "not apply where, as here, the subject of intoxication had already been injected into the case via an instruction" requested by the other party. Pet. App. 27a. And it determined that counsel was wrong to think that a proper instruction would have undercut her credibility. Under Colorado law, "counsel could have asked to have the jury fully instructed on intoxication . . . without the jury knowing that the instruction had been requested by the defense." *Id.*; *see also People v. Welsh*, 176 P.3d 781, 788 (Colo. App. 2007). Rather, the court explained, asking for an intoxication instruction with respect to first degree

murder "would have allowed the defense to rely, in argument, solely on the position that defendant did not kill the victim, while, at the same time, allowing for the possibility that the jury would convict him of a lesser offense if it found that he did." Pet. App. 27a.

Nonetheless, the court of appeals held that petitioner had not shown deficient performance. The court recognized a split of authority over whether assessment of counsel's performance is based on the actual reasons for the challenged conduct, Pet. App. 29a n.9 (citing decisions of the Fourth Circuit and the District of Columbia Court of Appeals), or can instead rely upon hypothetical rationales, *id.* 28a-29a (citing decisions of the First and Eleventh Circuits and the courts of last resort in Arkansas, Missouri, and Pennsylvania). The Colorado court allied itself with the second camp. *Id.* 29a n.9. Thus, despite having found that counsel's own reasons were not defensible, the court supplied a different reason why a hypothetical lawyer might have chosen to forego a proper jury instruction. The court speculated that "[l]eaving the instruction as it was allowed the jury to infer that, inasmuch as self-induced intoxication was *not* a defense to [second degree murder and manslaughter], it *would* be a defense to first degree murder." *Id.* 29a (emphasis added). In other words, a jury could infer and render a verdict based on the negative pregnant.

The court further suggested that the hypothetical lawyer might find this inferred defense route preferable to an actual instruction because it might lead the jury "to acquit defendant of first degree murder based on intoxication alone." Pet. App. 30a. Under this scenario, a jury would be able to find a

defendant not guilty "without having to consider whether the intoxication had the requisite effect" of negating the "specific intent" element of first degree murder. *Id.*

Based on this counterfactual rationale, the court found defense counsel's performance adequate. Pet. App. 31a.

3. Petitioner sought discretionary review from the Colorado Supreme Court. That court denied his petition, but two justices would have granted review to decide "[w]hether the court of appeals erred in adopting a novel rule of law that allows appellate courts to invent *post hoc* strategic justifications for counsel's actions, regardless of the evidence at the Crim. P. 35(c) hearing." Pet. App. 68a.

REASONS FOR GRANTING THE WRIT

The decision below implicates a deep and mature split regarding the nature of the inquiry into counsel's performance required by *Strickland v. Washington*, 466 U.S. 668 (1984). Seven federal courts of appeals or state courts of last resort hold that *Strickland*'s performance prong looks at whether the challenged acts or omissions are the result of unreasonable professional judgment by the defendant's actual lawyer. But five others refuse to find deficient performance even in such cases if a court can identify some acceptable rationale a hypothetical lawyer could potentially have had for the challenged acts or omissions – and they do so even if that invented rationale contradicts the record.

The rule this latter camp espouses is wrong. It requires a court to find adequate performance even when the record shows that counsel's conduct is the

result of ignorance, inattention, slumber, or laziness. Relying on hypothetical justifications flouts this Court's decisions since *Strickland*, which have consistently rooted the performance analysis in the actual record. And for good reason. When courts can uphold lawyers' performances based on invented rationales that never occurred to counsel, the process of litigating and deciding ineffective assistance claims becomes unfair, cumbersome, and inaccurate. Such an approach cheats defendants whose actual counsel were incompetent of their Sixth Amendment right to a lawyer who is effective in fact – not in theory. Only this Court can resolve the conflict, and this case presents an ideal opportunity to do so.

I. Courts Are Divided Over Whether, in Analyzing Defense Counsel's Performance, They Can Rely on Hypothetical Justifications When the Actual Basis for Counsel's Acts or Omissions Was Unreasonable.

The Colorado Court of Appeals acknowledged that its interpretation of *Strickland* "is not universally held across the country." Pet. App. 29a n.9. That observation understates the matter: At least a dozen federal courts of appeals or state courts of last resort have weighed in on whether a court may replace the actual, indefensible reasons for an attorney's actions with a hypothetical *post hoc* justification, and they are split seven to five.

1. Six federal circuits and the District of Columbia's highest court refuse to use invented, counterfactual rationalizations in order to cure a deficiency in the actual basis for counsel's conduct.

The Fourth Circuit's articulation is typical: when evaluating counsel's performance under *Strickland*, "courts should not conjure up tactical decisions an attorney could have made, but plainly did not." *Tice v. Johnson*, 647 F.3d 87, 105 (4th Cir. 2011) (quoting *Griffin v. Warden, Maryland Corr. Adj. Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992)). In *Tice*, the record showed that counsel "simply overlooked" evidence that would have supported filing a meritorious suppression motion. *Id.* at 105. The Fourth Circuit found his performance deficient, rejecting the State's barrage of suggested reasons why a hypothetical lawyer might have foregone such a motion. The court refused to "engage in after-the-fact rationalization of a litigation strategy that almost certainly was never contemplated." *Id. See also Grueninger v. Virginia Dep't of Corr.*, 813 F.3d 517, 529-30 (4th Cir. 2016) (refusing to consider hypothetical strategic explanations when counsel's failure was due to "legal misapprehension").

The Fifth Circuit has similarly refused "to fabricate tactical decisions on behalf of counsel" when "the face of the record" refutes their existence. *Richards v. Quarterman*, 566 F.3d 553, 564, 570 (5th Cir. 2009) (finding deficient performance). *See also Anderson v. Johnson*, 338 F.3d 382, 392–93 (5th Cir. 2003) (rejecting *post hoc* "rationalizations" offered by the state when counsel failed to investigate because of "indolence or incompetence").

The Sixth Circuit likewise prohibits courts from substituting their own justifications to cure attorneys' deficient performances. In *Caldwell v. Lewis*, 414 Fed. Appx. 809 (6th Cir. 2011), the Sixth Circuit rejected justifications for counsel's performance "fabricated" by

a state court "with the benefit of hindsight," *id.* at 816-17; such justifications cannot vindicate counsel's performance when they are "different [from] the ones given by trial counsel." *Id.* at 816. Thus, the Sixth Circuit found deficient performance when "[c]ounsel's explanations [did] not provide a tactical justification for their failure" to call particular witnesses to testify. *Id.*

So too, the Seventh Circuit has long held that "[j]ust as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990). For example, in *Goodman v. Bertrand*, 467 F.3d 1022 (7th Cir. 2006), the Seventh Circuit court granted relief where trial counsel failed to subpoena a key witness because he erroneously believed the prosecution would call her. Inventing justifications for counsel's incompetence "is not the role of a reviewing court." *Id.* at 1029. *Accord Brown v. Sternes*, 304 F.3d 677, 691 (7th Cir. 2002).

The Eighth Circuit takes a similar approach, holding that courts assessing performance under the first prong of *Strickland* must not "invent strategic reasons or accept any strategy counsel could have followed, without regard to what actually happened . . . even if the government offers a possible strategic reason that could have, but did not, prompt counsel's course of action." *Marcrum v. Luebbers*, 509 F.3d 489, 502 (8th Cir. 2007), *cert. denied*, 555 U.S. 1068 (2008). *See also Gabaree v. Steele*, 792 F.3d 991, 998-99 (8th Cir. 2015) (rejecting a state habeas court's *post hoc* justification for counsel's failure to object, because that justification found "no support in the

record" and courts "cannot impute to counsel a trial strategy that the record reveals she did not follow"), *cert. denied*, 136 S. Ct. 1194 (2016).

The Ninth Circuit also bars courts from "substitut[ing] their own strategic reasoning" for counsel's "actual reasons." *Duncan v. Ornoski*, 528 F.3d 1222, 1237 n.7 (9th Cir. 2008), *cert. denied*, 556 U.S. 1131 (2009). It therefore held the defendant entitled to habeas relief after rejecting the "speculative justifications" state courts and the federal district court had supplied for counsel's failure to determine the defendant's blood type or consult a serology expert about potentially exculpatory blood evidence. *Id. See also Alcala v. Woodford*, 334 F.3d 862, 871 (9th Cir. 2003) (rejecting the state's invitation to "find a strategic basis" for trial counsel's decision not to call an alibi witness because that invitation was "inconsistent with the evidence in the record"). *Accord Avila v. Galaza*, 297 F.3d 911, 920 (9th Cir. 2002).

Finally, the District of Columbia's highest court will "consider only those trial strategies and tactics that counsel actually embraced as disclosed either in an affidavit . . . or in testimony at a hearing." *Chatmon v. United States*, 801 A.2d 92, 108 (D.C. 2002). It has rejected the argument that *Strickland* allows courts to "consider the adequacy of counsel's performance in light of *any possible strategies*," *id.* (emphasis added), reasoning that "once the record establishes the actual tactical explanation for counsel's actions, the government is not free to invent a better-reasoned explanation of its own," *id.* at 108-09 (finding counsel's performance deficient). *Accord Young v. United States*, 56 A.3d 1184, 1198 (D.C. 2012) (reiterating that "a reviewing court must rely upon trial counsel's

actual decision-making process . . . rather than invent a *post hoc* rationalization").

2. In sharp contrast, two other federal courts of appeals and three state high courts have held, along with the Colorado Court of Appeals here, that "the actual reason" for counsel's actions "does not matter," so long as a court itself can supply a justification that a hypothetical reasonable attorney might have had, *Hammond v. Hall*, 586 F.3d 1289, 1332 (11th Cir. 2009), *cert. denied*, 562 U.S. 1145 (2011). And this is so even where the record shows that the actual reason for the challenged performance is "inattention, misguided tactics, or unawareness" of the governing law. *Id.*

During the defendant's capital sentencing proceeding in *Hammond*, the prosecutor made a comment that entitled the defendant to a mistrial. 586 F.3d at 1328. His counsel failed to request one, later testifying that he had "just let it slip by," *id.* at 1329. The Eleventh Circuit nonetheless declined to find deficient performance, on the basis of a grab bag of hypothetical reasons why a different attorney might not have sought a mistrial, including that "the racial composition of the jury was favorable" and "the chance of benefitting from residual doubt" was greater with the already-sitting jury. *Id.* For the Eleventh Circuit, "it matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight. The relevant question is not what actually motivated counsel, but what reasonably could have motivated counsel." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008); *accord Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1204 (2001).

The First Circuit also follows this rule. In *Wilder v. United States*, 806 F.3d 653 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 2031 (2016), defense counsel failed to object to voir dire being conducted partially in private because "he did not know" that the Sixth Amendment provided a right to a public trial. *Id.* at 657. The First Circuit held this "ignorance of the law" was not a performance violation, because it was possible that a different, "reasonable counsel could have made a strategic choice not to object to the selection procedure here." *Id.* at 660. *Accord Bucci v. United States*, 662 F.3d 18, 31 n.11 (1st Cir. 2011), *cert. denied*, 133 S. Ct. 277 (2012).

Three state supreme courts ally themselves with this position. The Pennsylvania Supreme Court has held that "instead of limiting ourselves to those strategies counsel says he pursued," courts may sustain an attorney's performance when they can identify any "reasonable basis for counsel's conduct." *Commonwealth v. Philistin*, 53 A.3d 1, 29 n.23 (Pa. 2012). In *Philistin*, the court held that counsel had performed reasonably despite failing to introduce the defendant's lack of criminal history as mitigation evidence at a capital sentencing proceeding. *Id.* at 28-29. The court based its holding in part on the hypothesis that a different counsel *could* have done so for strategic reasons never adverted to by the actual counsel.

Likewise, in *Dorsey v. State*, 448 S.W.3d 276 (Mo. 2014), the Missouri Supreme Court held that the actual reason counsel failed to contact the defendant's treating physician was "irrelevant" because the *Strickland* test asks only: "What would a reasonably

competent attorney do in a similar situation?" *Id.* at 295 n.13

So too in Georgia. In *Jones v. State*, 740 S.E.2d 147 (Ga. 2013), the Georgia Supreme Court upheld an attorney's performance because it could "think of several reasons that a reasonable lawyer might not have objected" to the improper testimony at issue. *Id.* at 153. Thus, it disregarded the fact that trial counsel was unable to "offer any strategic reasons for his failure to object." *Id.* at 153 n.7. According to the Georgia Supreme Court, a lawyer's inability to provide a reasonable basis for his conduct "makes no difference." *Id.* (citing *Chandler*, 218 F.3d at 1316).

II. The Decision Below Is Incorrect.

When a defendant shows that the actual basis for his attorney's conduct is deficient, the defendant has met his burden under the performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984). A court may not then uphold the attorney's performance by substituting a hypothetical justification for the actual explanation. Doing so contradicts this Court's decisions from *Strickland* to the present and hollows out the Sixth Amendment right to effective assistance of counsel.

A. This Court's Decisions Provide No Support for Using Invented Rationalizations To Find That a Lawyer Performed Competently.

1. Under the performance prong of *Strickland*, defendants must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 466 U.S. at 690.

The court must then "reconstruct the circumstances of counsel's challenged conduct" and ask whether, "from counsel's perspective at the time," his decisions complied with "prevailing professional norms." *Id.* at 689, 688. In conducting this assessment, courts must make every effort to "eliminate the distorting effects of hindsight." *Id.* at 689. In short, *Strickland*'s performance prong requires courts to focus on the actual lawyer who represented the defendant and the actual decision that lawyer made. That is why this Court characterized the performance inquiry as a "mixed" question "of law *and fact*." *Id.* at 698 (emphasis added).

Applying these principles in *Strickland* itself, this Court trained its inquiry on the actual basis for counsel's conduct. The Court described in substantial detail what respondent's counsel had actually done to prepare for and conduct the penalty phase hearing at respondent's trial. *See id.* at 672-74. In finding that defense counsel's decisions fell "within the range of professionally reasonable judgments," this Court focused entirely on what "the record show[ed]" with regard to "*[c]ounsel's* strategy choice." *Id.* at 699 (emphasis added). It relied on "[t]he facts as described" to explain why "the conduct of respondent's counsel at and before respondent's sentencing proceeding" was reasonable. *Id.* at 698.

2. Nothing in this Court's decisions since *Strickland* suggests that it is permissible to short-circuit the factual performance inquiry by replacing it with speculations about acceptable justifications for a lawyer's incompetence. To the contrary, this Court has consistently rooted the performance analysis in the conduct and reasoning of the actual lawyer whose

representation has been challenged. Indeed, even when AEDPA requires using a "doubly deferential" standard to review a defendant's state-court conviction, *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011), the "heavy measure of deference" goes "to counsel's judgments" about the course of action, *Strickland*, 466 U.S. at 691, and the state courts' findings about those judgments. This Court has never looked to the decisions that some hypothetical lawyer might have made.

a. In cases where this Court has found deficient performance, it has repeatedly rejected speculation from lower courts or the government to justify counsel's performance. When "[t]he record establishes" that a challenged act, omission, or judgment resulted from something counsel "erroneously believed," rather than from a defensible "tactical decision," the Court has not hesitated to find deficient performance. *Williams v. Taylor*, 529 U.S. 362, 395, 373, 396 (2000). *See also Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (finding deficient performance when counsel's conduct and explanations demonstrated a "startling ignorance of the law").

The Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), squarely rejected substituting "*post hoc* rationalization of counsel's conduct" for "an accurate description of their deliberations." *Id.* at 526-27. Counsel there had presented only "a halfhearted mitigation case," *id.* at 526, after failing to conduct a diligent investigation into Wiggins's background and life history. This Court found the explanation for counsel's actions was "inattention." *Id.* Accordingly, it rejected the position of the warden, the state courts, and the Fourth Circuit that counsel's performance

could be upheld as a "strategic decision" to focus the penalty phase argument elsewhere. *Id.* at 526-27, 519.

So too in *Rompilla v. Beard*, 545 U.S. 374 (2005). There, despite knowing the prosecution would heavily rely on prior convictions in the penalty phase, counsel failed to examine their client's past conviction file. *Id.* at 383-85. The Third Circuit nonetheless denied habeas relief, finding counsel's performance adequate. *Id.* at 379. That court speculated that not examining the file could have rested on a belief that the file would not "yield anything helpful." *Id.* This Court, however, refused to credit that *post hoc* rationalization. Instead, after extensive discussion of what Rompilla's lawyers actually knew and did, it found their performance deficient. *Id.* at 383-85. Justice O'Connor's concurring opinion expressly contrasted the reasons why a hypothetical lawyer might not have examined his client's file with the reasons why Rompilla's lawyers had not done so. The hypothetical lawyer might, for example, have decided that the examination "would necessarily divert them from other trial-preparation tasks they thought more promising." *Id.* at 395 (O'Connor, J., concurring). By contrast, Rompilla's lawyers failed to examine the file as a "result of inattention." *Id.* at 395-96 (quoting *Wiggins*, 539 U.S. at 534). The hypothetical reasons could not excuse the carelessness of Rompilla's actual lawyers.

b. The Colorado Court of Appeals and other courts on its side of the split err in thinking that *Cullen v. Pinholster*, 563 U.S. 170 (2011), or *Harrington v. Richter*, 562 U.S. 86 (2011), permit courts to uphold counsel's performance based on a hypothetical rationale contradicted by the actual record.

Pinholster argued that his counsel "failed to adequately investigate and present mitigating evidence" during the penalty phase of his trial. *Pinholster*, 563 U.S. at 177. This Court found that further investigation was unnecessary because counsel had decided to offer a "family sympathy mitigation defense" in which they would seek "to create sympathy not for Pinholster, but for his mother." *Id.* at 192. Given that such a defense was "known to the defense bar," counsel's actual decision fell within prevailing professional norms. *Id.* at 191. Nothing in *Pinholster* invites courts to depart from the record and instead entertain reasons that *hypothetical* lawyers could conceivably have had.

The Colorado Court of Appeals nonetheless pointed to language in *Pinholster* directing courts "to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did." Pet. App. 28a (quoting *Pinholster*, 563 U.S. at 196). But nothing about that passage supports concocting theories for why defense counsel may have done something. To the contrary, this Court looked to only the range of reasons the defendant's actual counsel had for acting "as *they* did," 563 U.S. at 196 (emphasis added); the range did not encompass conceivable reasons some hypothetical counsel could have had, had he acted similarly.

Nor does *Richter* support the decision below. The Colorado Court of Appeals fastened on this Court's explanation that *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." Pet. App. 28a (quoting *Richter*, 562 U.S. at 110). The court below read this as a license to disregard the actual, deficient

basis for counsel's decision in favor of supplying a more acceptable *post hoc* rationalization.

But *Richter* did no such thing. In that case, this Court upheld the denial of relief where the defendant claimed counsel had been deficient for failing to retain a blood evidence expert. 562 U.S. at 106, 96. The statement relied upon by the Colorado court appears in this Court's explanation that courts should not be swayed by trial counsel's retrospective tendency to ask "whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome." *Id.* at 109. The proper inquiry under *Strickland* is whether a reviewing court finds the lawyer's performance deficient based on reconstructing the circumstances as they existed at the time of the challenged conduct or omission; it is not whether the lawyer's "subjective" judgment in hindsight is that his performance was inadequate. Indeed, the Court reaffirmed that "courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Id.* (quoting *Wiggins*, 539 U.S. at 526-27). Accordingly, the Court reviewed in detail the actual record of Richter's trial, *id.* at 94-96.

The conclusion that the Colorado court misread *Pinholster* and *Richter* is reinforced by this Court's decision in *Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (per curiam). In *Hinton*, counsel hired "an expert he knew to be inadequate" because of "a mistaken belief that available funding was capped at $1,000." *Id.* at 1088. A choice of an expert witness, this Court recognized, would be "virtually unchallengeable" were it based on strategic considerations. *Id.* at 1089. But

this Court held that Hinton's lawyer's actual choice rendered his performance deficient because "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance." *Id.* at 1089. Unlike the Colorado court, this Court did not try to hypothesize some theoretical reason for choosing this witness and then paper over the deficits in the performance of the defendant's actual lawyer.

B. Disregarding the Actual Basis for Counsel's Conduct Violates Defendants' Sixth Amendment Rights.

The Sixth Amendment guarantees defendants the right to counsel who are effective in fact – not in theory. The Colorado Court of Appeals' rule wrongly permits courts to uphold criminal convictions by replacing the performance of the flesh and blood lawyer a defendant actually had with the imagined performance of a lawyer the court conjures up. Make no mistake: the rule embraced here allows courts to ignore or excuse grave deficiencies and incompetence. Faced with a lawyer who failed to raise a proper objection because she was drunk to the point of incapacitation, a court that embraces the rule adopted below must hold that the lawyer's performance comports with prevailing professional norms if it can imagine any reasonable basis for why a sentient lawyer might have remained silent. So too with cases in which the actual explanation for the lawyer's act or omission is ignorance of the law, laziness, or slumber. That cannot be right.

1. The Sixth Amendment guarantee of the assistance of counsel runs to "the accused," U.S. Const. amend. VI – a real person who "suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 820 (1975). Any inquiry into whether the accused was deprived of this fundamental protection must therefore turn on the actual assistance that he received. A hypothetical lawyer, every bit as much as an unwanted one, "represents the defendant only through a tenuous and unacceptable legal fiction," *id.* at 821. Thus, "in a very real sense," analysis that looks at what a hypothetical lawyer might have done for a defendant does not describe "*his* defense." *Id.*; *cf. United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (explaining that "speculat[ing]" about what a different attorney might have done is not "remotely comparable" to the *Strickland* inquiry which concerns "mistakes committed by the actual counsel").

Such speculation shifts the focus from the competence of the defendant's lawyer to the ingenuity of the government's post-conviction counsel or of a reviewing court. That inquiry can no longer be described as the "fair assessment of attorney performance" that *Strickland* demands, 466 U.S. at 689.

2. Allowing invented justifications expands the performance inquiry to include not only consideration of the judgments and conduct of the lawyer who actually represented the defendant, but also consideration of the potential rationale hypothetical lawyers might have had for making similar judgments or engaging in similar conduct. This expansion makes post-conviction proceedings simultaneously more cumbersome and less accurate.

a. When the performance inquiry under *Strickland* is limited to the conduct and decisions of the defendant's actual lawyer, the responsibilities of post-conviction counsel and judges adjudicating ineffectiveness claims are well-defined and circumscribed. Post-conviction counsel knows that she should present evidence and argument limited to what the defendant's lawyer actually did, what prompted him to do it, and why that performance fell outside prevailing professional norms. Courts know they are responsible for evaluating a particular lawyer's performance. This understanding will cabin the scope of evidence the court needs to consider and the extent of any proceedings the court needs to hold.

Now contrast a regime permitting *post hoc* rationalizations. This regime has its real bite in precisely those cases where, as here, the court has already found that the actual lawyer did something he or she could not defend. The court can find this lawyer's performance deficient only if it determines there is no conceivable explanation for why a competent lawyer might have acted or failed to act similarly. In this regime, defendant's post-conviction counsel will need to identify, investigate, and prepare rebuttals to all those explanations. This may require providing defendants with testifying experts even in cases where there is no disagreement either over why counsel acted as she did or her failure to conform to prevailing professional norms (rather than requiring appointed experts only in cases where there is a question whether counsel's actual rationale satisfies prevailing professional norms). Otherwise, defendants may be robbed of their opportunity for adversarial testing of potential rationales.

Indeed, in a world in which any conceivable justification for a lawyer's actions can render the actions reasonable, the scope of potential rationales is not necessarily limited to those advanced by the government; courts can just invent their own rationales, as occurred here. This drags post-conviction counsel into a perverse version of the adversarial process in which they must identify for the court (and worse, for opposing counsel) all potential arguments against their position. Otherwise, defendants challenging their convictions risk the possibility that a judge back in chambers will simply invent – and then deny relief based on – a rationale post-conviction counsel could have refuted had she been aware that she needed to. These *post hoc* rationalizations threaten to introduce an additional source of error into the analysis of attorney performance – namely, that courts may justify counsel's conduct with hypothetical rationales that are themselves unreasonable.

Judicial invention is even more unfair when undertaken by an appellate court, as happened here. As a practical matter, if intermediate appellate courts are free to speculate, defendants may lack any real opportunity to challenge those speculations because of the difficulty of obtaining further review from higher courts, whose jurisdiction is discretionary.

In addition to being unfair to defendants, the speculative regime will waste courts' resources. Courts will confront overstuffed briefs and potential demands from attorneys to present expert witnesses to offer or rebut potential justifications, even in cases where it is clear that the actual lawyer was flatly incompetent. And if the court has not yet seen an acceptable

rationale for defense counsel's conduct after considering the evidence and briefing presented by the parties, it might still perceive an independent obligation to identify any such rationale, which may require additional research on the part of the court. The upshot will be post-conviction proceedings that balloon into protracted affairs, burdening everyone involved. Far better to stick to what actually happened.[2]

b. Permitting judicially invented justifications muddles the two prongs of *Strickland*. Instead of leaving the performance prong as it should be – a fact-based analysis regarding the quality of a specific attorney's representation – the approach injects a counterfactual inquiry better suited for the prejudice prong. In the course of doing so, it undermines the process *Strickland* established.

First, the approach mangles the performance prong. Honesty about the quality of a lawyer's representation is important. If courts hold that ignorant, intoxicated, or otherwise impaired attorneys were not "deficient," they create pernicious precedent. They send the message that such conduct falls within prevailing professional norms. It is simply false to say that a lawyer who did no investigation due to laziness,

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[2] To be sure, there may be cases where it is difficult to figure out the actual basis for the challenged conduct – for example, if trial counsel is unavailable or does not remember. In those cases, courts "reconstruct[ing] the circumstances of counsel's challenged conduct," *Strickland*, 466 U.S. at 689, may be more justified in considering a variety of explanations. But the inquiry must still be aimed at discerning the *actual* basis for counsel's conduct – not at fabricating hypothetical rationales that never occurred to counsel.

or a lawyer who failed to object due to ignorance of the law, has somehow provided his client with competent representation. This Court should not countenance a rule that says he did.

Second, *post hoc* rationalization smuggles into the performance prong an incorrect version of the question whether an attorney's performance made a difference to his client's case. And asking the wrong question will deny relief to defendants even when they have not received the representation demanded by the Sixth Amendment.

The right version of that question is already posed in the prejudice prong. Prejudice, as outlined in *Strickland*, turns on whether, had the defendant's lawyer behaved differently, there is a reasonable probability that the defendant would have received a different outcome. In *Hinton*, for example, it turned on whether "there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt." 134 S. Ct. at 1089. In other words, *Strickland*'s prejudice prong considers whether there is (1) a reasonable probability that (2) different behavior by (3) the same lawyer could have changed the outcome.

By contrast, the rule adopted below asks, as part of the performance inquiry, whether there is (1) a conceivable possibility that (2) the same behavior might have been undertaken by (3) a different lawyer. This inquiry rests on the unexamined assumption that, if it is possible to identify any hypothetical competent lawyer who might have acted as defense counsel did, courts should have the kind of "confidence in the outcome," *Strickland*, 466 U.S. at 694, that

justifies rejecting a defendant's ineffective assistance claim. That assumption is wrong.

To see why, suppose a case like *Hinton* were to arise in Colorado. Now suppose that the evidence shows, first, that defense counsel's decision about which expert to hire was due to ignorance of the law, and second, that a better expert would have had a reasonable probability of instilling doubt in the jury. A reviewing court might simply ignore that evidence of both ignorance and prejudice, and uphold the defendant's conviction, by imagining that some unidentified lawyer might have had a strategy, however tenuous, for picking the expert (perhaps that the expert's folksy personality might appeal to jurors). Hence, *post hoc* rationalization will lead courts to uphold convictions even in cases where a defendant's attorney made an unreasonable mistake that actually affected the outcome of defendant's case.

To be sure, there will be some cases where the approach a court takes to the performance prong will not affect the bottom line. In some of the cases where the defendant should be denied relief because there was no prejudice, it would no doubt also be possible to say that a hypothetical attorney could have done for strategic reasons what that defendant's lawyer did due to incompetence. For example, return to the just-discussed hypothetical where the lawyer settled on a particular expert based solely on ignorance of the entitlement to funds for a different one. But suppose other lawyers in the same jurisdiction, aware of the entitlement to more funds, nonetheless generally pick this same expert because he has proven to have excellent rapport with jurors. In that case, the defendant may be unable to show that a more

expensive expert would have provided more effective testimony. Under those circumstances, the court may rightly find there was no prejudice. That determination on prejudice is the proper explanation for why relief should be denied. A court should not instead pretend that the ignorant lawyer did a good job.

3. This case provides a powerful illustration of many of the problems that arise from *post hoc* justifications unsupported by the record.

In order to deny petitioner relief, the Colorado Court of Appeals invented its own explanation for why a hypothetical lawyer might have chosen neither to object to the prosecution's instruction on voluntary intoxication nor to submit a complete, legally accurate instruction. Because the court's suggested rationale had neither been proposed by the state nor presented by the court to counsel before its appearance in the published appellate opinion, petitioner never had a full opportunity as of right to highlight the flaws in the court's reasoning.

And flaws there were. Contrary to the holding below, petitioner's trial counsel in fact performed deficiently. An inquiry rooted in the facts and record was straightforward here. Petitioner identified a precise omission that constituted deficient performance: a failure to object to a particular jury instruction and to request a relevant and necessary one. The hearing elicited from trial counsel the basis for that omission: She thought it would contradict her denial defense. Pet. App. 26a. Petitioner's post-conviction counsel showed the court why that thought was wrong. The court of appeals agreed, recognizing that "counsel could have asked to have the jury fully

instructed on intoxication as it relates to first degree murder without the jury knowing that the instruction had been requested by the defense." *Id.* 27a. Having agreed, the court's inquiry into performance should have stopped there.

Instead, the court erred by searching for hypothetical justifications for counsel's omission, and compounded that error by injecting a new rationale into the case that is itself unreasonable. The court hypothesized that, even though trial counsel's fear of undermining a denial defense did not justify acquiescing in the state's incomplete instruction, *some* lawyer might have chosen not to have the jury properly instructed for a different reason.

The court speculated, first, that the hypothetical lawyer could think that jurors would "infer" a voluntary intoxication defense to first degree murder from the fact that they had been instructed that self-induced intoxication was *not* a defense to second degree murder or manslaughter. Pet. App. 29a. This speculation virtually refutes itself. A competent lawyer would expect jurors to follow their instructions rather than to imagine defenses about which they have not been instructed.

The court's further speculation – that a reasonable lawyer might have remained silent on the belief that petitioner would actually be better off with a jury left to invent its own version of the voluntary intoxication instruction, Pet. App. 30a-31a – is even worse. It posits that a hypothetical reasonable lawyer would gamble on the hope that a jury would not only infer a voluntary intoxication defense to first degree murder, but that it would somehow infer a broader defense than the law actually provides: one where the

jury would not have to find that "intoxication had the requisite effect" of negating the specific intent requirement, but provided a blanket defense. *Id.* 30a.

This explanation defies logic. Nowhere does the court explain why a competent lawyer would expect that an improperly instructed jury would somehow create a defense more favorable to her client than the law allows.

In short, the performance analysis of *Strickland* should focus on the behavior of an actual lawyer, not a hypothetical one. Doing otherwise would "extend the speculative to the metaphysical." *Tice v. Johnson*, 647 F.3d 87, 105 (4th Cir. 2011). And it risks relying on hypothetical reasons that would wilt upon proper adversarial analysis.

III. The Question Presented Is Important.

1. The question presented in this case is frequently recurring. It goes to the heart of what a defendant must prove, and what courts can permissibly consider, under *Strickland*'s performance prong. And ineffective assistance of counsel is one of the most frequently raised challenges to criminal convictions. For example, one study of federal habeas petitions filed between 2000 and 2006 found that claims of ineffective assistance appeared in more than half of those petitions brought by state prisoners. Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 14-18, 28 (2007), http://bit.ly/2gH7Oaa. Perhaps not surprisingly then, *Strickland* has been cited in more than 150,000 state and federal court decisions since it was decided three decades ago.

2. Because the constitutional right to the effective assistance of counsel extends nationwide, it is untenable that the legal standard for how to determine whether counsel's performance was deficient should differ across jurisdictions. It is worse yet for criminal defendants' constitutional rights in this respect to depend on whether a state or federal court is reviewing their convictions. Yet in some places, federal courts look only at actual reasons while state courts entertain hypothetical rationalizations. *Compare, e.g.*, *Marcrum v. Luebbers*, 509 F.3d 489, 502 (8th Cir. 2007), *cert. denied*, 555 U.S. 1068 (2008), *with Dorsey v. State*, 448 S.W.3d 276 (Mo. 2014).

Moreover, in those jurisdictions that have not yet clearly embraced one of the two competing rules, post-conviction counsel and courts necessarily face uncertainty about how to litigate and adjudicate ineffective assistance claims. Post-conviction counsel need to know what they must prove to establish deficient performance. Courts need to know whether an evidentiary hearing is necessary, what the scope of the hearing should be, and what sorts of findings they are required or permitted to make with respect to the performance of the actual counsel in a defendant's case.

3. It is important that *this* Court resolve the question presented. The conflict among federal courts of appeals and state courts of last resort is a product, in significant part, of how they read this Court's decisions. Without this Court's intervention, it is improbable that the conflict will be resolved.

IV. This Case Presents an Ideal Vehicle for Resolving the Question Presented.

1. This case comes to the Court in the best posture for reaching the question presented. The courts below expressly framed and passed upon the issue. Pet. App. 25a-31a.

A decision in a Colorado Rule 35(c) proceeding offers a straightforward avenue for answering questions about the meaning and scope of the performance prong of *Strickland*. In Colorado, as in many states, state post-conviction proceedings offer the first meaningful opportunity for a defendant to bring a Sixth Amendment challenge to counsel's "omissions" or other "seemingly unusual or misguided action." *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003) (en banc). *Cf. Trevino v. Thaler*, 133 S. Ct. 1911, 1915 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (both treating state post-conviction proceedings as the equivalent of direct review for purposes of raising Sixth Amendment claims). Moreover, because this case does not involve AEDPA, this Court can resolve the lower courts' conflict over the *Strickland* standard free of any complications imposed by the "doubly deferential" standard of review for claims of ineffective assistance in state court prosecutions, *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).

2. The question presented matters to petitioner's case. Petitioner has already explained why, once the Colorado Court of Appeals rejected the justification his counsel advanced for not ensuring a complete jury instruction on a critical issue, that court should have held that he satisfied the performance prong of *Strickland*. *See supra* at 28-30.

Petitioner also has a strong argument that he was prejudiced as a result.[3] The trial judge herself observed there was "certainly a lot less evidence" on specific intent than on other pieces of the prosecution's case. Tr. 93-94 (12/13). Counsel's failure to ensure that the jury was properly instructed went directly to the question of specific intent.

A complete jury instruction would have informed the jury that, under Colorado law, evidence of voluntary intoxication may negate the specific intent (premeditation) element of first degree murder. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (en banc); Colo. Rev. Stat. § 18-1-804(1). Armed with that instruction, a jury would have understood that, if it believed the prosecution's theory of the case, it would have a responsibility to think hard about petitioner's state of mind. After all, the State had claimed that petitioner killed Ms. Vernon while "crazed on methamphetamine." Tr. 4 (12/02). A properly instructed jury would have understood that it was required to consider the impact of petitioner's methamphetamine intoxication on his ability to form the heightened level of intent required to convict him of first degree murder. If the jury believed that he was too "crazed" to form that intent, it would have been required to acquit him of first degree murder, even if

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[3] Of course, this Court need not determine whether petitioner was actually prejudiced in order to answer the question presented. It can remand the case for determination of that issue, as it did in *Kimmelman v. Morrison*, 477 U.S. 365, 390 (1986). *See also Maples v. Thomas*, 132 S. Ct. 912, 922, 927-28 (2012) (remanding a case for determination of "actual prejudice" after finding that counsel's unreasonable behavior provided "cause" for a habeas petitioner's procedural default).

it believed he was responsible for Ms. Vernon's death. At most, it could then have convicted him of second degree murder or manslaughter – for which, as the jury was instructed, voluntary intoxication provides no defense.

There is no reason to believe that petitioner's actual jury somehow inferred anything resembling a proper instruction here. Having never been instructed that voluntary intoxication was a potential defense to first degree murder, there was no reason for a jury to infer such a defense from the instruction informing them that it is *not* a defense to less serious charges. It seems far more likely that a jury instructed like petitioner's would infer that voluntary intoxication was simply irrelevant to any of the charges they were considering.

Petitioner was convicted by a jury that was never told that voluntary intoxication could provide a defense to the charge that landed him in prison for the rest of his life. His counsel's failure to ensure that the jury was properly instructed requires reversal of the judgment below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Lynn Noesner
Senior Deputy State
Public Defender
OFFICE OF THE COLORADO
STATE PUBLIC
DEFENDER APPELLATE
DIVISION
1300 Broadway
Suite 300
Denver, CO 80203

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

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APPENDIX A

COLORADO COURT OF APPEALS **2015COA174**

Court of Appeals No. 12CA0575
Mesa County District Court No. 03CR1137
Honorable Valerie J. Robison, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jason Garner,

Defendant-Appellant.

ORDER AFFIRMED
Division II
Opinion by JUDGE DAILEY
Booras and Navarro, JJ., concur
Announced December 17, 2015

¶1 Defendant, Jason Garner, appeals the district court's order denying his Crim. P. 35(c) motion for postconviction relief. We affirm.

I. Background

¶2 Defendant filed a pro se motion for postconviction relief, in which he alleged various grounds for vacating his conviction and sentence for first degree murder.

¶3 Defendant's conviction arose out of a February 1998 incident that occurred when he and a female friend (the victim) drove to Gypsum, returning from Grand Junction. Defendant was aware that the victim

had large amounts of methamphetamine and cash in her possession, and the two ingested methamphetamine at least three times within forty-eight hours of leaving Gypsum.

¶4 After visiting with friends in Grand Junction, the two left one evening to return to Gypsum. The next morning, defendant contacted the police and told them that, after the car in which he and the victim were travelling had gotten stuck on a back road, the victim had gotten lost in the woods. Within hours, police recovered the vehicle, but the victim's methamphetamine and cash were no longer inside.

¶5 In December 2002, almost five years later, a hunter and his son discovered the victim's remains at the bottom of a ravine approximately two miles from where the vehicle was found in 1998.

¶6 In August 2003, defendant was arrested and charged with first degree murder of the victim. At trial, the prosecution presented (1) a forensic anthropologist, who opined that the victim suffered a perimortem[1] sharp force trauma injury, typical of a stab wound to the abdomen and consistent with one made by a single-edged knife; and (2) a forensic pathologist who, after collecting the victim's remains, examining them and the victim's medical history, and consulting with the forensic anthropologist, opined that the cause of death was the sharp force trauma injury identified by the anthropologist.

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[1] The anthropologist testified that "perimortem" meant "at, during, or slightly after the time of death."

¶7 The prosecution also presented evidence that (3) defendant bought methamphetamine from the victim; (4) because she supplied him methamphetamine, the victim was able to exercise control over defendant; (5) before going on the trip, defendant had obtained an eight-inch single blade knife from a friend; (6) defendant never returned the knife; (7) defendant told others that he and the victim had been using methamphetamine and had gotten into an argument; (8) some of the victim's clothing had been cut in several places; (9) when his brother confronted him, saying, "you know you killed her. Why don't you just admit it?," defendant told him to "shut the fuck up"; (10) defendant told one individual that, after he had tried to scare the victim into giving him drugs, she had attacked him and he had accidentally stabbed her; and (11) defendant told a friend that he had killed the victim.

¶8 The prosecution's theory was that defendant, "crazed on methamphetamine, chased [the victim] down and stabbed her to death." Defendant denied killing her, testifying that, after their car had gotten stuck, they had become separated in the woods and that, once he was no longer able to hear her, he decided to go to the closest house and call for help. He also presented one witness who related a different description of the knife that had been provided to defendant; two witnesses to impeach the testimony of the friend whom the prosecution had presented; three witnesses to testify to the effect drugs had on defendant (e.g., when on drugs, he would be "calm" or "mellow," not violent, and, when "coming down from drugs," he would be unable to recall things); and

several other witnesses to testify to search and rescue efforts or the conditions of the areas where the car broke down and the victim was found.

¶9 The jury found defendant guilty as charged, and the trial court sentenced him to life imprisonment without the possibility of parole. A division of this court affirmed his conviction on direct appeal. *See People v. Garner*, 2006 WL 3028152 (Colo. App. No., Oct. 26, 2006) (not published pursuant to C.A.R. 35(f)).

¶10 Subsequently, defendant filed the pro se motion for postconviction relief that is the subject of this appeal. In his motion, defendant alleged, among other things, several claims of ineffective assistance of trial counsel. After determining that defendant's allegations were "of such a nature that the Court is unable to determine clearly . . . that Defendant is not entitled to post-conviction relief," the court referred defendant's motion to the public defender's office for consideration. A public defender entered the case as postconviction counsel for defendant and filed a supplement to defendant's motion, in which counsel alleged six claims of ineffective assistance of trial counsel and requested an evidentiary hearing.

¶11 At the hearing, testimony was provided by two drug experts, both of defendant's trial counsel, a criminal defense investigator, a witness who had not testified at trial, an attorney who was an expert in criminal defense, and defendant himself. In an eighteen-page written order, the court denied defendant's motion for postconviction relief.

II. Analysis

¶12 On appeal, defendant contends that the postconviction court erred in denying his motion. Specifically, he asserts that the evidence at the postconviction hearing established that his trial counsel was ineffective for failing to (1) present evidence from experts in forensic anthropology, hypothermia, and the effects of methamphetamine use; (2) present a particular witness to impeach one of the prosecution's witnesses; (3) disclose a potential conflict of interest; and (4) ensure the jury was properly instructed as to voluntary intoxication.[2] We disagree.

A. General Legal Principles and Standard of Review

¶13 "The constitutional right to effective assistance of counsel 'is not a guarantee against mistakes of strategy or exercise of judgment in the course of a trial as viewed through the 20-20 vision of hindsight following the return of a verdict in a criminal case.'" *People v. Gandiaga*, 70 P.3d 523, 525 (Colo. App. 2002) (quoting *Dolan v. People*, 168 Colo. 19, 22-23, 449 P.2d 828, 830 (1969)).

¶14 To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Dunlap v. People*, 173 P.3d 1054, 1062-63 (Colo. 2007).

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[2] Defendant raised additional claims of ineffective assistance of trial counsel in his postconviction motion. Because, however, he does not reassert them on appeal, those claims are abandoned. *See People v. Aguilar*, 2012 COA 181, ¶36, 317 P.3d 1255.

¶15 In assessing the first prong of the *Strickland* test, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see Davis v. People*, 871 P.2d 769, 772 (Colo. 1994). Counsel's performance is deficient when, falling below "an objective standard of reasonableness," *Dunlap*, 173 P.3d at 1062 (quoting *Strickland*, 466 U.S. at 688), it amounts to "gross incompetence," *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *see Le v. Mullin*, 311 F.3d 1002, 1025 (10th Cir. 2002) ("For counsel's performance to be constitutionally ineffective, it must have been 'completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy.'" (quoting *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997))).

¶16 To establish prejudice under the second prong of the *Strickland* test, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Dunlap*, 173 P.3d at 1063 (quoting *Strickland*, 466 U.S. at 694).

¶17 To obtain relief, a defendant must prove, by a preponderance of the evidence, each prong of the *Strickland* test. *People v. Russell*, 36 P.3d 92, 95 (Colo. App. 2001). If a court determines that counsel's performance was not constitutionally deficient, it need not consider the prejudice prong of the ineffective

assistance of counsel test. *People v. Sparks*, 914 P.2d 544, 547 (Colo. App. 1996). Similarly, if a court determines that a defendant failed to affirmatively demonstrate prejudice, it may resolve the claim on that basis alone. *People v. Garcia*, 815 P.2d 937, 941 (Colo. 1991).

¶18 We review defendant's ineffective assistance of counsel claim as a mixed question of fact and law, giving deference to the court's factual findings as long as they are supported by the record, but reviewing the court's legal conclusions de novo. *People v. Valdez*, 178 P.3d 1269, 1278 (Colo. App. 2007); *cf. People v. Washington*, 2014 COA 41, ¶ 17 ("The postconviction court determines the weight and credibility to be given to the testimony of witnesses in a Crim. P. 35(c) hearing.").

¶ 19 With these principles and standard of review in mind, we now consider defendant's contentions.

B. Failing To Present Expert Evidence

1. Forensic Anthropologist

¶ 20 At trial, the prosecution presented testimony from two expert witnesses regarding the victim's cause of death. The first, a forensic anthropologist, testified that, upon examining the victim's body, she found a defect in the sacrum that was consistent with a single-edged knife wound travelling from the victim's abdomen back to her sacrum. She also testified that the defect was made perimortem and that a scavenging animal could not have left such a mark. The second witness, a coroner, relied on the forensic anthropologist's conclusion to opine that the cause of death was a homicide caused by a fatal stab wound.

¶21 Defense counsel planned to call a forensic anthropologist to rebut the prosecution's evidence; however, shortly before trial, the defense expert told counsel that she had changed her mind and now agreed with the position taken by the prosecution's forensic anthropologist.

¶22 The parties agree that counsel acted properly by not calling the defense forensic anthropologist to testify. *Vorgvongsa v. State*, 785 A.2d 542, 549 (R.I. 2001) (When counsel's expert changed his opinion one week before trial, counsel "had no choice but to not call him to testify because [the expert]'s report now confirmed the accuracy of the state's ballistics report."). Defendant contends, however, that counsel was ineffective in not obtaining another expert to replace the first, reasoning that "[s]ince [the first witness] initially formed the opinion . . . , it is reasonable to assume that other experts would also agree with her initial conclusion." We conclude that counsel was not, under the circumstances, ineffective.

¶23 At the postconviction hearing, the lead trial counsel expressed doubts about finding an expert to oppose the prosecution's theory that the defect in the victim's sacrum was caused by a knife: "We [now] had two very well-respected experts saying the same thing and I wondered [about] the likelihood of finding someone else to say something different." The other counsel testified that, even if they were able to find someone, "[w]e didn't think we could find anybody who would be very credible . . . from a qualification sense to go up against [the prosecution's experts]." The prosecution's forensic anthropologist and the defense's forensic anthropologist were two of the three most

preeminent experts in the western United States on the subject. *Cf. In re Gomez*, 325 P.3d 142, 152 (Wash. 2014) ("[Counsel] was not required to search the entire country for experts . . . .").

¶24 In addition to the issue of finding a new expert with the same or similar credentials as the prosecution's expert, trial counsel would have had to ask for a continuance from a judge who "did not grant continuances easily." And, even if they were granted a continuance, it would, in counsel's view, likely have been short given the timing of the request, and "[a] half a day wouldn't have been enough to go find another expert, interview that person, have that person review the material they needed to review, and I guess get past the Rule 16 deadlines for calling witnesses and things like that."

¶25 Lastly, a late request for a continuance would have required the defense to reveal its predicament to the prosecution and, whether the continuance was granted or denied, the defense ran the risk of the prosecution then asking the defense's former expert to testify regarding her newly formed opinion, further incriminating defendant with, now, the testimony of two of the three preeminent experts in the region. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 243, n.28 (2011) (Sotomayor, J., dissenting) (noting that the State retained defense's expert as its own after the expert changed his opinion).

¶26 Notably, at the postconviction hearing, defendant's criminal defense expert was not asked whether counsels' decision to forego presenting evidence from a forensic anthropologist fell below the standard of reasonableness. Nor did defendant provide

testimony from a forensic anthropologist who believed the defect was not a stab wound. Without evidence that such an expert exists, we cannot assume counsel acted unreasonably in foregoing the testimony shortly before trial. *Ingram v. State*, 439 S.W.3d 670, 674 (Ark. 2014) (The defendant's ineffectiveness claim failed because, "[w]hile appellant appeared to allege in a conclusory fashion that calling a different expert would have produced a different result at trial, he failed entirely to provide any support for the claim that another expert would have come to a different conclusion . . . ."); *State v. DiFrisco*, 804 A.2d 507, 524 (N.J. 2002) ("[C]ounsel made a reasonable, tactical decision . . . not to replace [their expert] . . . [and] would have been reasonable in expecting that another expert would have arrived at a like conclusion.").

¶27 Under the circumstances, we conclude that it was entirely reasonable for trial counsel to proceed in the cautious manner in which they did. *See Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir. 2002) ("It is easy to imagine that, on the eve of trial, a thoughtful lawyer may remain unsure as to whether to call . . . a witness. If such uncertainty exists, however, it is an abecedarian principle that the lawyer must exercise some degree of circumspection.").[3]

2. Expert on Hypothermia

¶28 Trial counsel planned to call a hypothermia expert to testify about "what the phases of [hypothermia] are and what sort of behaviors can manifest in a person who's suffering from

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[3] "Abecedarian" means "rudimentary." *Webster's Third New International Dictionary* 3 (2002).

hypothermia." In consulting with the expert, the defense wanted "to figure out if there was an answer to [the victim] being where she was. Could she have wandered off. Could she have removed her own clothing. Could she have died from exposure."

¶29 As one of the trial counsel explained, however, the expert "had a very specific timeline that he wanted us to comply with . . . and we couldn't accomplish it. . . . And it was, as I recall, a bit contentious." Rather than enforce the expert's subpoena, trial counsel chose not to call the expert because "it was a concern to us that his testimony might not be as helpful or impactful to the jury . . . because of his being unhappy with the schedule situation."[4] The other trial counsel expressed similar concerns: "I was concerned that if we were to have [the expert] escorted to the courthouse . . . by a sheriff's deputy how that would affect his testimony."

¶30 According to both trial counsel, calling this particular expert was a "risk" and much of what they wanted to establish regarding hypothermia and its effects had already been established through the testimony of other witnesses. Thus, trial counsel decided not to have the hypothermia expert testify.

¶31 The postconviction court determined that "[d]efendant has not shown that counsel's decision not to call [the expert] was unreasonable." It reached that decision, in part, because "[d]efendant offered no evidence or argument addressing the reasonableness of counsel's concerns" and "[m]ore importantly, evidence

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[4] Counsel was particularly concerned with offering "impactful" testimony because the trial took place through early-to-mid-December, with the holiday season approaching.

of hypothermia was not that important to the defense." In this latter regard, the court noted that (1) trial counsel made no reference to hypothermia in their opening statement, which was given *before* counsel had any reason to believe that the expert would be unwilling, at that time, to testify;[5] and (2) given compelling evidence from the prosecution's experts that the victim "was *in fact* killed by stabbing, testimony that someone outdoors under the circumstances *could have* died from cold exposure would have been of limited value."

¶32 Defendant contends that the postconviction court's ruling "missed the larger point":

> [H]ypothermia should have been central to the defense. Having both a forensic anthropologist and a hypothermia expert would have substantiated [defendant]'s innocence and provided a natural cause of death. In forfeiting both of these experts at the eleventh hour, [defendant] lost his best defense and the most persuasive, coherent theory of the case.

¶33 Defendant's argument as to the importance of hypothermia as a potential nonhomicidal cause of death depends, then, on the admission of forensic evidence supporting the proposition that the victim was not stabbed to death.[6] Previously, however, we

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[5] In opening statement, counsel said, "we don't know where [the victim] went from there. We may never know how [she] died or who or what caused her death."

[6] There is no suggestion in the record or in defendant's briefs that the hypothermia expert would have testified that the victim died of hypothermia rather than of a stab wound. Neither this

noted that the defense did not have, would most likely have been unable to timely find, and had (as of the postconviction hearing) not produced credible experts to testify in support of that proposition. Thus, the subject of hypothermia as a potential cause of death was not central to the case.

¶34 Defendant also contends that hypothermia should have been central to the case because "evidence of its effects would have explained [his] actions and supported his credibility." The record reflects that trial counsel had initially sought to call the hypothermia expert to help explain the victim's, not defendant's, behavior — for example, "why there were items of clothing that she had removed." How hypothermia may have affected defendant's actions of walking to someone's home to get help, calling the police, and telling varying stories about what happened were not, apparently, what trial counsel had in mind for the expert.

¶35 That said, as the postconviction court found, defendant "did not present any evidence at the hearing that [the expert] would have been able to testify definitively that the Defendant was suffering from hypothermia or that it could explain his giving such wildly different versions of events."

¶36 Notably, in closing argument, trial counsel suggested that variations in defendant's statements could have been attributable to being "out in the cold in the middle of February trying to recall what happened," apparently playing off of evidence the

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expert, nor any other expert on hypothermia, testified at the postconviction hearing.

defense team had elicited from a detective that people act irrationally "when [they] get really cold."[7]

¶37 In light of

- the tension between counsel and the witness;
- counsels' concern about keeping the jury engaged with "impactful" testimony;
- the unlikelihood of the court, ten days into trial, granting a continuance to allow the witness to testify, in effect, at a more convenient time;
- hypothermia not being "that important" to the defense; and
- the strong presumption that counsels' conduct fell within the wide range of reasonable professional assistance,

we cannot conclude that the decision to forego the hypothermia expert's testimony fell below the objective standard of reasonableness necessary to establish deficient performance on counsels' part. Consequently, defendant is not entitled to relief on this ground.

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[7] The detective testified, with respect to the victim:

> [W]hen people get really cold, they, for whatever reason, take off their clothes because they think they're warm when they're really freezing. So because we had nothing else really to work from, that was the only theory that we came to was, well, maybe she's freezing to death and takes the coat off.

3. Experts on the Effects of Methamphetamine Use

¶38 Defendant contends that trial counsel was ineffective for not presenting experts who would have testified that methamphetamine use distorts perception and memory to explain why defendant gave varying statements about the events leading up to the victim's disappearance.

¶39 At the postconviction hearing, two experts related that they were prepared to testify on behalf of the defense at trial. The first expert, a certified addiction counselor and director of a rehabilitation program, recounted that, because methamphetamine use can cause "whiteouts" (the equivalent of an alcohol-induced blackout), "[i]t's very common to run into someone that's had lost periods of time under the effect of long-term use and heavy use of methamphetamine." On cross-examination, he stated that he also would have testified about the paranoid delusions and violent behavior methamphetamine use can cause.

¶40 The second expert, a clinical psychologist specializing in addiction, testified that it would be "typical" for someone in a psychotic state under the influence of methamphetamine to struggle to remember things accurately, and that the person "may even try and fabricate, fill in the blanks of what they think might have occurred." He also said that someone in a psychotic state would not be using good judgment, which could explain why defendant was not properly dressed for a winter road trip. On cross-examination, the expert acknowledged that, had he been called to testify at trial, he would have said that "crazy people do crazy things" and that "when someone's under the influence of

methamphetamine, they're in an agitated, sometimes paranoid state, and the likelihood of them behaving violently is increased."

¶41 Both trial counsel testified that, following their consultations with these experts, they ultimately decided not to have them testify at trial. One counsel testified that, in deciding not to call either expert, he and his co-counsel believed "that the harmful things . . . may outweigh any of the good things" the experts could testify about. The second counsel agreed, stating that she was "really afraid that by putting either one of those gentlemen on, that was just going to give additional information to [the] prosecution to support [their] theory" that defendant killed the victim in a drug-fueled rage.

¶42 Defendant's criminal defense expert did not, in his testimony, address whether trial counsels' decision was reasonable. The postconviction court, however, left no doubt about its views of the propriety of counsels' decision:

> For defense counsel to put on additional evidence from experts of the violent, aggressive, delusional, paranoid tendencies of methamphetamine users would merely bolster the prosecution's position and undermine the Defendant's testimony that he was not violent when he ran out of methamphetamine. The Defendant certainly has not shown that the beneficial evidence these two witnesses could have offered so outweigh[s] these negative considerations as to make it unreasonable not to call them.

¶43 We perceive no error in the postconviction court's determination that counsels' decision was "perfectly reasonable" under the circumstances. *See People v. Newmiller*, 2014 COA 84, ¶ 48 (Counsel's decision not to call an expert to testify "was strategic and adequately informed, and defendant has not overcome the 'virtually unchallengeable' presumption that counsel's decision was objectively reasonable." (quoting *Bullock v. Carver*, 297 F.3d 1036, 1047 (10th Cir. 2002))); *People v. Bradley*, 25 P.3d 1271, 1276 (Colo. App. 2001) ("[T]he tactical decision not to call . . . an expert witness was within the discretion of trial counsel and does not support defendant's claim of ineffective assistance of counsel."); *see also Harrington v. Richter*, 562 U.S. 86, 108-09 (2011) (concluding that an attorney's decision not to pursue expert testimony was a sound strategy under *Strickland* because such testimony could have had negative consequences for the defense); *United States v. Maxwell*, 966 F.2d 545, 548-49 (10th Cir. 1992) ("Because countless ways exist to provide effective legal assistance in any given case," counsel's decision not to call a substance abuse expert to testify as to "addict[] behavior" did not "fall below professional standards of reasonableness.").

C. Failing To Call a Particular Impeachment Witness

¶44 At trial, the prosecution called defendant's friend (the friend) to testify that defendant admitted to him that he had murdered the victim. After being detained in jail himself, the friend relayed defendant's statements to a detective and testified to them before a grand jury. At trial, however, the friend claimed not to remember having heard the information from defendant, telling the detective what he had heard, or

testifying about the conversation before a grand jury. After the prosecution confronted the friend with the statements he had made, the prosecution introduced those statements, as substantive evidence of defendant's guilt, through the testimony of a detective. *See* § 16-10-201, C.R.S. 2015 (addressing admissibility of prior inconsistent statements for impeachment and substantive proof purposes).

¶45 To undermine the credibility of the friend's prior statements, defense counsel called two witnesses who had been in jail with the friend at the time he came forward with the information. The first witness, Mr. Z., testified that the friend approached him wanting to know if he would like to get in on the "scam" to testify that defendant admitted to murdering the victim in exchange for receiving a shorter sentence. The second witness, Mr. T., testified that the friend had said he "had heard . . . bits and pieces of the story and that he thought he knew enough that he could . . . put together a fabricated story well enough to get time off his sentence." Because Mr. T. testified that some of the "bits and pieces" of the story came from yet another person, Mr. K., defendant argues trial counsel should have called Mr. K. to verify that he did, in fact, provide the friend with that information.

¶46 At the postconviction hearing, Mr. K. said that he was willing, at the time, to testify for defendant because he thought it was wrong for the friend to lie in order to help his own cause. To support this testimony, postconviction defense counsel admitted into evidence a letter Mr. K. had written to defendant stating his willingness to testify. Defendant testified that he gave this letter to one of his trial counsel, who said that he

did not recognize the letter. The letter, nonetheless, was found in defendant's case file.

¶47 Defendant's criminal defense expert expressed no opinion about whether it was unreasonable for trial counsel to forego calling Mr. K. to testify. One of defendant's trial counsel thought Mr. K.'s testimony was unnecessary based on counsel's impression of the friend's testimony and the jurors' response to it: counsel "didn't think there was anyone in the room, jurors included, who really would believe anything [the friend] had to say." Further, counsel said, "if I had my choice between witnesses to come in and testify for my case, [Mr. K.] wouldn't be on the top of my list . . . ." Mr. K. was readily impeachable: he had three felony convictions as of 2004 and had met defendant in the "drug scene."

¶48 Because trial counsel impeached the friend's prior statements with the testimony of two inmates, counsels' failure to call yet another inmate to impeach him, particularly given that inmate's criminal record, was not unreasonable. *See Arko v. People*, 183 P.3d 555, 558 (Colo. 2008) (Decisions that are "strategic or tactical in nature . . . [are] reserved to defense counsel . . . [and] include what witnesses to call (excepting the defendant) . . . ." (citations omitted)).

¶49 Nor, in any event, was defendant prejudiced by counsels' decision. As the Attorney General argues, there was "no reasonable probability that calling one more jailhouse snitch, who was [also] defendant's friend, would have discredited [the friend's prior statements] to such an extent that it would have

mattered in the end."[8] *See Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003) (In the *Strickland* context, "a reasonable probability means a probability sufficient to undermine confidence in the outcome."); *see also Pinholster*, 563 U.S. at 239 (finding no prejudice where additional evidence "largely duplicated" other evidence and was of "questionable mitigating value"); *People v. Rivas*, 77 P.3d 882, 893-94 (Colo. App. 2003) (finding no prejudice from counsel's failure to call witnesses who were willing to testify for defendant because their testimonies were impeachable on multiple grounds and would have been duplicative of similar testimony already admitted at trial).

¶50 For these reasons, defendant was not entitled to relief on this ground.

D. Conflict of Interest

¶51 Defendant's lead trial counsel was appointed to represent him in this case in August 2003. She had previously represented the potential defense witness mentioned above, Mr. K., in an entirely separate case and continued to represent him until he was sentenced in September 2003. Defendant asserts that this roughly one-month overlap of representation, as well as counsel's continuing duties of loyalty and confidentiality to her former client, the potential

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[8] In this regard, the postconviction court noted that "[e]ven if [trial] counsel should have done more to undermine [the friend's] credibility, the Defendant cannot show prejudice because [the friend] was not [a] key witness . . . [and] the jury could easily have disbelieved [him] and nevertheless convicted the Defendant as [it] did."

witness, constituted a conflict of interest that should have been disclosed to defendant. We disagree.

¶52 A conflict of interest claim is a species of ineffective assistance of counsel claims, *see People v. Nozolino*, 2013 CO 19, ¶ 12, but a peculiar one, at that. In contrast to the *Strickland* standard that applies for other ineffective assistance claims, a successful conflict of interest claim requires a showing only that counsel was subject to an actual conflict of interest that adversely affected his or her performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980); *Dunlap*, 173 P.3d at 1073.

¶ 53 A conflict of interest exists when an attorney's ability to represent a client is materially limited by the attorney's responsibility to another client or to a third person. *People v. Edebohls*, 944 P.2d 552, 556 (Colo. App. 1996); *see* Colo. RPC 1.7. In this regard, a conflict of interest can arise when one attorney simultaneously represents a defendant and a witness in that defendant's trial. *West v. People*, 2015 CO 5, ¶ 16. Similarly, a conflict may arise when an attorney has previously represented a trial witness, as such "'successive representation' may restrict the attorney's present representation of the defendant 'because of the [attorney's] duty to maintain the confidentiality of information' that he received in his prior representation of the trial witness." *Id.* at ¶ 17 (quoting *Rodriguez v. Dist. Court*, 719 P.2d 699, 704 (Colo. 1986)) (alteration in original).

¶54 The Sixth Amendment right to conflict-free counsel embraces only the right to be free from "actual," not "possible," conflicts of interest. *See id.* at ¶ 18 ("A defendant seeking post-conviction relief based

on ineffective assistance of counsel resulting from an attorney's alleged conflict 'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" (quoting *Cuyler*, 446 U.S. at 348)).

¶55 The actual conflict of interest required under the Sixth Amendment "is more than a theoretical conflict." *Anderson v. Comm'r of Corr.*, 15 A.3d 658, 666 (Conn. App. Ct. 2011), *aff'd*, 64 A.3d 325 (Conn. 2013); *see Shefelbine v. Comm'r of Corr.*, 90 A.3d 987, 994 (Conn. App. Ct. 2014) ("A mere theoretical division of loyalties is not enough.") (citation omitted). It is "a conflict of interest that adversely affects counsel's performance." *West*, ¶ 28 (quoting *Mickens v. Taylor*, 535 U.S. 162, 211 (2002)); *see also United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003) (noting that, in the Sixth Amendment context, "'actual conflict' is a term of art defined by reference not to the nature of the alleged conflict itself, but to the effect of the conflict on the attorney's ability to advocate effectively").

¶56 To show a qualifying "actual conflict," then, "a defendant . . . must show (1) that counsel had a conflict of interest (2) that adversely affected the representation." *West*, ¶ 28 (citation omitted). Defendant, however, failed to meet this burden.

¶57 At the postconviction hearing, defendant's criminal defense expert testified that "*once counsel's aware* of either an actual or a potential conflict, [he or she] must inform the Defendant of the nature of the conflict [and] must describe in plain terms the specific ways in which the conflict may affect counsel's ability to effectively represent the Defendant." (Emphasis

added.) A conflict of interest could have arisen in this case, the expert said, because if Mr. K. had been endorsed as a defense witness for defendant, it could have harmed his plea negotiations with the prosecution in his own case. Thus, trial counsel could have found herself "in a position of having to decide 'do I want to help [defendant] with [Mr. K.] being a witness or do I want to make sure that [Mr. K.] doesn't get hurt in his case by becoming a defense witness in the other case.'" Once trial counsel was in a position where she had to weigh different clients' interests, she had a conflict which should have been discussed with other clients.

¶58 Defendant, however, failed to present any evidence of when trial counsel became aware that Mr. K. was a potential witness in defendant's case. Mr. K. testified that he did not contact either of defendant's trial counsel, nor did he "take any affirmative steps to share that information with anybody other than writing [the] letter" to defendant.

¶59 True, Mr. K.'s letter was found in defendant's case file; but, defendant presented no evidence as to who placed the letter there or when. Although defendant said he gave the letter to one counsel, that counsel related that it didn't "look or sound familiar" to him. The other counsel — the one with the purported conflict — said that she did not recognize the letter. Because neither of defendant's trial counsel testified to possessing the letter at any time, we cannot assume that the one counsel was aware, prior to her previous client's sentencing, of that client's willingness to testify on defendant's behalf.

¶60 Moreover, even if the lead counsel had received the letter or been made aware of its contents in a timely fashion, her representation of Mr. K. would not have conflicted with her representation of defendant. We note, as did the postconviction court, that the "[t]rial in this case took place well over a year after [Mr. K.]'s sentencing. This allowed plenty of time for counsel to have become aware of [Mr. K.] as a potential witness well after [counsel]'s representation of him terminated."

¶61 Although, as defendant asserts, attorneys must retain duties of loyalty and confidentiality to their former clients under Colo. RPC 1.9, the record does not indicate that any confidential information trial counsel would have acquired while representing Mr. K. had any relevance to defendant's case. Without some link between the two cases, representing the potential witness in a separate, earlier matter would not have restricted counsel's representation of defendant in this case. *See West*, ¶ 17; *see also Pina v. State*, 29 S.W.3d 315, 318 (Tex. App. 2000) (Because, in part, "there was no evidence showing trial counsel had a continuing obligation to the witness [he previously represented]," there was no actual conflict of interest.).

¶62 Further, if he had testified, Mr. K. would not have been an adverse witness to defendant. Rather, he said that he wrote the letter because he "felt it was kinda wrong . . . that [the friend] would make up some stories to get out of his trouble." Because Mr. K. would have testified for defendant to impeach one of the prosecution's witnesses, trial counsel would not have cross-examined Mr. K. Thus, the typical concern in conflict of interest cases — an attorney's inability to

cross-examine a former client who is testifying on behalf of the prosecution while currently representing the defendant — is not present here. *See People v. Samuels*, 228 P.3d 229, 240 (Colo. App. 2009) ("[T]he duty of confidentiality that survives the termination of an attorney-client relationship . . . creates the possibility that the attorney will be hindered in cross-examining the witness, which thus impedes the attorney's ability to zealously represent the current client." (quoting *Dunlap*, 173 P.3d at 1070)); *State v. Kelly*, 164 So. 3d 866, 879 (La. Ct. App. 2014) (Defense counsel was not "forced to labor under an actual conflict with clearly divided loyalties" where the witness testified for the defendant and counsel previously represented the witness in a limited capacity for an unrelated matter.).

¶63 In light of these considerations, we conclude that the postconviction court correctly determined that defendant had not shown an actual conflict of interest adversely affecting his counsel's performance. Consequently, defendant was not entitled to relief on this ground either.

E. Inadequate Intoxication Instruction

¶64 The prosecution's theory was that defendant killed the victim while "crazed on methamphetamine." The jury was instructed on the elements of first degree murder, second degree murder, and manslaughter. At the prosecution's request, the jury was instructed that "[d]iminished responsibility due to self-induced intoxication is not a defense to murder in the second degree or manslaughter."

¶65 Defendant asserts that this was but a partial instruction regarding intoxication law, and that trial counsel should have either (1) objected, on that ground, to the instruction; or (2) requested that the jury be fully and properly instructed that voluntary intoxication *is* a defense to the charged crime in this case, first degree murder.

¶66 At the postconviction hearing, trial counsel was asked why she chose not to ask to have the jury instructed on voluntary intoxication as it related to the first degree murder charge. Counsel testified that the defense's theory of the case was that defendant had not killed the victim, and an intoxication instruction "would not have been consistent" with that theory. She also testified that she did not consider voluntary intoxication a viable theory because, in her thirty years of experience as a defense attorney, she did not "think that that's a defense juries like." In light of the defense's theory, she stated that she did not request the voluntary intoxication instruction because she "could not have argued, one, that [defendant] did not kill [the victim], and two, if he did, he . . . didn't have the requisite mental state. We could . . . only pick one and have any kind of credibility with the jury."

¶67 This was a reasonable explanation for not injecting the subject of intoxication into the case. *See People v. Villarreal*, 231 P.3d 29, 35 (Colo. App. 2009) (finding whether to request a voluntary intoxication instruction is a strategic decision within counsel's purview), *aff'd on other grounds*, 2012 CO 64; *see also Jackson v. Shanks*, 143 F.3d 1313, 1320 (10th Cir. 1998) ("[C]ounsel's failure to seek an intoxication

instruction was reasonable, because the instruction would have conflicted with his chosen trial strategy.").

¶68 But that explanation does not apply where, as here, the subject of intoxication had already been injected into the case via an instruction. In this instance, counsel could have asked to have the jury fully instructed on intoxication as it relates to first degree murder without the jury knowing that the instruction had been requested by the defense. *See People v. Welsh*, 176 P.3d 781, 788 (Colo. App. 2007) ("[T]rial courts are to refrain from distinguishing between the 'court's instructions' and the 'defendant's instruction' . . . ."). That would have allowed the defense to rely, in argument, solely on the position that defendant did not kill the victim, while, at the same time, allowing for the possibility that the jury would convict him of a lesser offense if it found that he did.

¶69 Nonetheless, it was for defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *People v. Vicente-Sontay*, 2014 COA 175, ¶ 18 (quoting *Strickland,* 466 U.S. at 689, in turn quoting *Michel*, 350 U.S. at 101). Defendant did not attempt to do so here. He did not ask his criminal defense expert whether trial counsels' failure to seek a complete instruction on intoxication was a decision falling within the reasonable standard of practice for a criminal defense attorney in Mesa County. Nor did defendant present any argument on the matter at the postconviction hearing.

¶70 Moreover, in applying the presumption that the challenged action might be considered sound strategy, courts are "required not simply to give [the]

attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did." *Pinholster*, 563 U.S. at 196 (alteration in original) (citation omitted); *see Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (To overcome the presumption that counsel rendered reasonable and adequate assistance, "a petitioner must establish that no competent counsel would have taken the action that his counsel did take." (quoting *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc))); *Holloway v. State*, 426 S.W.3d 462, 467 (Ark. 2013) (The defendant "has the burden of overcoming this presumption by identifying specific acts or omissions of counsel that, when viewed from counsel's perspective at the time of trial, could not have been the result of professional judgment."); *see also Richter*, 562 U.S. at 110 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."); *Cofske v. United States*, 290 F.3d 437, 444 (1st Cir. 2002) (Because the test is objective, "as long as counsel performed as a competent lawyer would, his or her detailed subjective reasoning is beside the point."); *Dorsey v. State*, 448 S.W.3d 276, 295 n.13 (Mo. 2014) ("The fact that [counsel] could not explain why he did not contact [a particular expert] does not necessarily mean he was ineffective. The *Strickland* test for ineffectiveness is an objective one: What would a reasonably competent attorney do in a similar situation? So long as [counsel] performed as a reasonably competent attorney would, his subjective reasoning behind his performance is irrelevant.") (citation omitted); *Commonwealth v. Philistin*, 53 A.3d 1, 29 n.23 (Pa. 2012) ("[I]nstead of limiting ourselves to

those strategies counsel says he pursued, we determine whether there was any objectively reasonable basis for counsel's conduct.").[9]

¶71 Here, we perceive possible reasonable strategic grounds for not having the jury completely instructed on the subject of voluntary intoxication. Leaving the instruction as it was allowed the jury to infer that, inasmuch as self-induced intoxication was not a defense to the other charges, it would be a defense to first degree murder.[10] The point that defendant wishes

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[9] We recognize that this is a view that is not universally held across the country. *See Tice v. Johnson*, 647 F.3d 87, 105 (4th Cir. 2011) ("[C]ourts should not conjure up tactical decisions an attorney could have made, but plainly did not.") (citation omitted); *Young v. United States*, 56 A.3d 1184, 1198 (D.C. 2012) ("A reviewing court must rely upon trial counsel's actual decision-making process, . . . rather than invent a *post hoc* rationalization . . . .") (citation omitted). But it is, we think, more consistent with the Supreme Court's decisions in *Cullen v. Pinholster*, 563 U.S. 170 (2011), and *Harrington v. Richter*, 562 U.S. 86 (2011), where the reasonableness of counsels' actions was upheld based on considerations to which counsel had never alluded.

The Court in *Richter* did, however, somewhat limit the type of additional matters that could be considered when it said that courts should "not indulge *post hoc* rationalization for counsel's decision-making *that contradicts the available evidence* . . . ." 562 U.S. at 109 (emphasis added) (citation omitted). The reasons on which we rely here do not contradict anything trial counsel said at the postconviction proceeding: counsel were not asked about – and thus did not provide any reason for – not requesting a more complete treatment of the subject of intoxication once it was injected into the instructions.

[10] The postconviction court recognized this when it found that, "[i]f anything, the fact that first-degree murder was omitted from this instruction would logically lead the jury to conclude that

was explicitly included in the instruction was nonetheless implicitly conveyed to the jury.

¶72 Any attempt to explicitly include that point in the instruction would have been problematic. Under the law, voluntary intoxication is not, in and of itself, a defense to first degree murder. It is only "a partial defense that, *under appropriate circumstances*, negates the specific intent necessary to carry out certain offenses." *Brown v. People*, 239 P.3d 764, 769 (Colo. 2010) (emphasis added); *see* § 18-1-804, C.R.S. 2015; *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (noting that, under section 18-1-804, evidence of voluntary intoxication may be offered to negate the specific intent elements of first degree "after deliberation" murder).

¶73 A proper and complete instruction on voluntary intoxication would have informed the jury that it would not be a ground for acquitting defendant of first degree murder *unless* defendant's intoxication was shown to have had a specific effect, i.e., that because of intoxication, defendant did not form the requisite specific intent. The absence of a proper and complete instruction allowed the jury to acquit defendant of first degree murder based on intoxication alone — and without having to consider whether the intoxication had the requisite effect (negating one or the other specific intent elements of first degree murder).

¶74 Allowing the jury to conclude that voluntary intoxication was a defense to first degree murder

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voluntary intoxication *was* a defense to that charge in contrast to the others that were mentioned." (Emphasis added.)

effectively put defendant in a better position than if the court had expressly limited the application of this defense. Consequently, a plausible reason exists for trial counsels' not having asked for a full and proper instruction on voluntary intoxication, and defendant cannot demonstrate that counsels' performance was constitutionally deficient. Thus, defendant is not entitled to relief on this ground. *See, e.g.*, *People v. Gioglio*, 815 N.W.2d 589, 597 (Mich. Ct. App. 2012) ("[I]f, after affirmatively entertaining the range of possible reasons for the act or omission," a reviewing court determines that "there might have been a legitimate strategic reason for the act or omission," it must conclude that the act or omission fell within the range of reasonable professional conduct.), *vacated in part on other grounds*, 820 N.W.2d 922 (Mich. 2012).

III. Cumulative Error

¶75 Finally, because we do not find any individual error, defendant is not entitled to reversal on a theory of cumulative error. *See People v. Fears*, 962 P.2d 272, 285 (Colo. App. 1997) ("Since we found no error that substantially prejudiced the defendant's right to a fair trial, there is no error to compound.").

IV. Conclusion

¶76 The order is affirmed.

JUDGE BOORAS and JUDGE NAVARRO concur.

APPENDIX B

DISTRICT COURT 125 North Spruce St. Grand Junction, Mesa County, Colorado	FILED IN COMBINED COURT **FEB 10 2012** MESA COUNTY COMBINED COURT MESA COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO, v. JASON GARNER, Defendant.	COURT USE ONLY
	Case Number: 03CR1137 Division: 5 Courtroom: Robison

ORDER RE: DEFENDANT'S RULE 35(c) MOTION FOR POST-CONVICTION RELIEF

On January 23, 2012, the Court held a hearing on the Defendant's claims for postconviction relief pursuant to C.Crim.P. Rule 35(c). At the hearing, the Defendant appeared personally and was represented by Stacey Colling, Esq. District Attorney, Peter Hautzinger, Esq. appeared and represented the People of the State of Colorado. At the conclusion of the hearing, the Court took this matter under advisement. The Court considered the testimony of the witnesses and the evidence presented at the hearing. In addition to the evidence and argument received at the hearing, the Court has reviewed the Petition and Amended Petition filed by Defendant *pro* se on December 5, 2007, and October 9, 2008,

respectively; the Supplement filed through counsel on November 23, 2009; the People's Response, filed December 18, 2009; the trial transcript; as well as the rest of the case file and other relevant legal authority. Based upon the testimony presented at the hearing, the Court's determination of credibility and assessment of the sufficiency, probative effect and weight of the evidence, as well as the reasonable inferences and reasonable conclusion that the Court drew from the assessment of the evidence, the Court now concludes and Orders as follows:

The relevant background is adequately summarized in defense counsel's Supplement to Defendant's *pro* se Petition and the opinion from the Colorado Court of Appeals affirming Defendant's conviction, *People v. Garner* (Colo. App. No. 05CA0310, Oct. 26, 2006) (not published pursuant to C.A.R. 35(f)). Defendant's Supplemental Petition, which was the subject of the hearing, can be divided into six distinct claims for relief, all alleging ineffective assistance of counsel.

In a post-conviction proceeding under Crim. P. 35(c), the court presumes that the conviction is valid and the defendant bears the burden of proving his claims by a preponderance of the evidence. *Dunlap* v. *People,* 173 P.3d 1054, 1061 (Colo. 2007).

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the test established in *Strickland* v. *Washington,* 466 U.S. 668 (1984). *People* v. *Cole,* 775 P.2d 551, 554 (Colo. 1989). Under *Strickland,* a successful claimant must first show that counsel's performance was deficient, which "requires showing that counsel made errors so

serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. A successful defendant must then demonstrate that he was prejudiced by the deficient performance, which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Failure to establish either the deficient-performance prong or the prejudice prong of the *Strickland* test defeats an ineffective assistance of counsel claim. *Id.* at 700, 2071.

Pertinent language from *Strickland* with regard to the deficient-performance prong bears repeating here. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688, 2065. A court must be mindful that its review of counsel's performance "must be highly deferential" because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689, 2065. The court should "eliminate the distorting effects of hindsight . . . [and] evaluate the conduct from counsel's perspective at the time." *Id.* The court must engage a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" because "[t]here are countless ways to provide effective assistance in any given case." *Id.* The *Strickland* court was mindful of the undesirable consequence that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its

evaluation would encourage the proliferation of ineffectiveness challenges." *Id.* at 690. Accordingly, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*

The Court considers each allegation of ineffective assistance in turn.

I. Counsel's decision not to request an instruction on voluntary intoxication

The Defendant was convicted of first-degree murder after deliberation, § 18-3-1 02(1)(a), C.R.S., in the death of Coty Vernon. First-degree murder after deliberation is a specific intent crime for which evidence of voluntary intoxication may be presented to negate the existence of the requisite *mens rea.* *People* v. *Miller,* 113 P.3d 743, 750 (Colo. 2005). When a voluntary intoxication instruction is warranted, the court should instruct the jury that "after deliberation" is part of the culpable mental state required for first-degree murder and it may be negated by evidence of voluntary intoxication. *Id.* at 751. Voluntary intoxication is not an affirmative defense completely absolving a defendant of liability. *Brown* v. *People,* 239 P.3d 764, 769 (Colo. 2010). Rather, a defendant who successfully introduces evidence of his voluntary intoxication may avoid liability on a more serious specific intent crime while being liable for a lesser-included general-intent offense. *Id.* Even though a defendant maintains innocence, he may receive an inconsistent voluntary intoxication instruction, provided there is some rational basis for it in the evidence. *Id.* at 769-70.

Counsel stands as "captain of the ship," with the authority to make strategic and tactical decisions over the objection of the Defendant. *Arko* v. *People,* 183 P.3d 555, 558 (Colo. 2008). The decision not to submit a voluntary intoxication instruction is such a strategic decision, and a defendant's mere disagreement with it will not support a claim of ineffectiveness. *People* v. *Villarreal,* 231 P.3d 29, 36 (Colo. App. 2009), *cert. granted,* 09SC846, 2010 WL 2026625 (Colo. May 24, 2010).[1]

In the instant case, the jury was instructed on the lesser included offenses of second-degree murder and manslaughter. It was also instructed that "[d]iminished responsibility due to self-induced intoxication is not a defense to murder in the second degree or manslaughter." However, no instruction on voluntary intoxication as negating the specific intent required for first-degree murder was requested or given.

There is no dispute that there was evidence of the Defendant's voluntary ingestion of methamphetamine in the days and hours prior to the murder, such that there was a rational basis in the evidence for a voluntary intoxication instruction. Nevertheless, counsel chose not to request one for strategic reasons. Marna Lake testified that as lead

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[1] The issue on which *certiorari* was granted does not concern the court of appeals' holding on the issue addressed here. It concerns the court's reasoning that a finding on direct appeal of no plain error regarding other defective or missing jury instructions precluded the defendant from establishing the prejudice prong of an ineffective assistance claim based on counsel's failure to object to or request those instructions.

counsel, she did not consider pursuing a voluntary intoxication defense in this case. She explained that in her experience of some thirty years practicing criminal defense, mostly in the Grand Valley, she has found that juries are not very receptive to it. She testified that she believed that she has only ever used the defense in trials to the court. She also pointed out that such a defense was inconsistent with the defense's theory in this case that the Defendant did not kill the victim.

Ms. Lake's testimony that the defense was inconsistent with her theory of the case is borne out by the record. The prosecution presented evidence that it was approximately three miles from where the victim's car was found up the road to the area where her remains were found, or 1.9 miles "as the crow flies" (Vol. 10 at 7).[2] The Defendant denied ever driving the car any further up the road than the point where it was found, because he believed it was stuck (Vol. 12 at 175-76). He claimed that he and the victim left the car together (Vol. 12 at 176) before getting separated because the victim said her feet hurt and she wanted to go back to the car while he continued looking for a house from which to call a friend (Vol. 12 at 184-85). The Defendant denied knowing what happened to the victim and denied killing her (Vol. 12 at 202). Counsel argued accordingly. In opening statements, co-counsel Andrew Nolan told the jury that "[w]e don't know where Coty went" after she was separated from the Defendant and "[w]e may never know how Coty died

[2] Citations to the record are to the volume and page number of the trial transcript.

or who or what caused her death" (Vol. 5 at 49). Ms. Lake capped the introduction to her closing argument by remarking that "[w]e don't know what happened to Coty Vernon, and that is a sad fact" (Vol. 13 at 131). Later, she concluded a recitation of the forensic findings by remarking that "[w]e don't know where Coty died. And we don't know who caused that stab wound." (Vol. 13 at 134). This, combined with Ms. Lake's considered view on the limited persuasiveness of voluntary intoxication defenses generally, is sufficient to place the decision squarely within the province of "virtually unchallengeable" strategic decisions made after proper investigation.

Nevertheless, the Defendant argues that the decision was unreasonable, relying upon *Villarreal, supra.* There, the defendant was convicted of attempted first degree murder and other charges. She presented an alibi defense and claimed that the victim misidentified her as the assailant. In post-conviction proceedings, she claimed that counsel was ineffective for failing to request an instruction on voluntary intoxication. She presented expert testimony that, even though such an instruction was inconsistent with her defense, there was no reason not to ask for the instruction. The expert reasoned that there would be no harm in presenting the jury with the option of considering the defense, because the jury would not know which side was responsible for the instruction and the defense would not have to undermine its position by arguing voluntary intoxication.

The trial court rejected this opinion and the appellate court agreed. As the court explained, " 'defense attorneys studiously avoid allowing and

requesting jury instructions that have the jury picturing their client at the scene, drunk, angry, such as heat of passion, doing a second degree rather than a first degree . . . when their defense is she wasn't there.' " 231 P.3d at 35 (quoting the trial court). The court continued, "[w]hen the jury reads the instructions in the jury room, instead of picturing defendant 'at home petting the cat,' it starts to 'focus on the defendant being at the scene assaulting the victim.' " *Id.* (quoting the trial court). Under such circumstances, a reasonable tactical choice "is not to allow jury instructions that would thus distract and entice the jury to even imagine the defendant in proximity to the victim." *Id.*

The Defendant argues that here, by contrast, the jury was already going to be in a position of picturing him at the scene of the crime because the defense had agreed to instructions on lesser included offenses. Therefore, he reasons, the considerations that swayed the *Villarreal* court do not factor here and the decision to forgo a voluntary intoxication instruction could not have been a reasonable, strategic one.

The Defendant fails to recognize that *Villarreal* does not purport to provide the only circumstances under which it would be reasonable not to request an instruction on voluntary intoxication. The fact that this case is distinguishable from *Villarreal* does not, in and of itself, say anything about the reasonableness of counsel's decision. The Defendant presents no argument, authority, or expert testimony to suggest that Ms. Lake's reasons for not requesting a voluntary intoxication instruction were so unreasonable as to render her strategic decision an instance of deficient performance.

The Defendant also claims that the supposed error in failing to request the instruction was compounded by the fact that the jury was instructed that intoxication is *not* a defense to the lesser included offenses of second-degree murder and manslaughter. He contends that because of this the jury could have been laboring under the misconception that intoxication was not a defense to *any* of the charges.

The jury is presumed to follow the instructions it is given. *People* v. *McKeel,* 246 P.3d 638, 641 (Colo. 201 0). Because the instruction at issue referred only to the lesser included offenses, there is no reason to accept Defendant's speculation. If anything, the fact that first-degree murder was omitted from this instruction would logically lead the jury to conclude that voluntary intoxication was a defense to that charge in contrast to the others that were mentioned.

Accordingly, the Court finds that the Defendant has failed to establish that counsel performed deficiently by not requesting a jury instruction on voluntary intoxication.

II. Counsel's decision not to have Dr. Kenneth Scissors testify

The Defendant endorsed Dr. Scissors as an expert in hypothermia. He could have offered evidence that hypothermia results in impaired judgment and confusion, as well as causing people suffering from it to feel like they are hot and shed their clothing. The Defendant claims that this evidence would have helped explain why he gave inconsistent accounts of what happened between the time he and Ms. Vernon left Grand junction and his arrival at the Nassif

ranch around dawn the following morning. It could also help explain why he was not wearing a jacket when he was found, why Vernon's jacket was found hanging in a tree, and how she could have wandered off and gotten lost, succumbing to exposure.

Decisions as to what witnesses to call are strategic decisions reserved to counsel. *Arko, supra.*

Both Ms. Lake and Mr. Nolan testified about the circumstances surrounding the decision not to call Dr. Scissors as a witness. Dr. Scissors was under subpoena, and present for trial the afternoon that counsel thought they would be calling him. Their prior witnesses went on longer than expected and they were unable to put him on the stand that afternoon and asked him to come the next morning. He informed them that he had other plans and would not come to court as requested. Counsel were not previously aware that this would be a problem. Counsel testified that this became a point of contention or animosity between them and Dr. Scissors, to the point that they were afraid that he would not be a very effective witness. Both counsel testified that they were not afraid that Dr. Scissors would change his opinions or perjure himself; rather, they were concerned about how engaging he would be to the jury, or that he would be "flat." Mr. Nolan noted that attorneys generally are worried about keeping the jury engaged, and that the concern about Dr. Scissors not engaging the jury was heightened by the fact that the trial was taking place through early- to mid-December, with the holiday season approaching. Ms. Lake, who ultimately made the decision not to enforce Dr. Scissors' subpoena, considered forcing him to testify, but believed this

would not encourage him to be a very effective witness. She could not remember specifically, but was sure that she would have reminded him of the fact that he was under subpoena, to no avail. She testified that this was the only time in her career when she had had this kind of problem with an expert witness. Finally, Mr. Nolan thought he recalled getting some of the necessary evidence about hypothermia admitted through Dr. Robert Kurtzman, the coroner, or another witness.

The Defendant offered no evidence or argument addressing the reasonableness of counsel's concerns. He contends only that the evidence that Dr. Scissors would have presented was significant enough that counsel should have enforced his subpoena.

The record reflects that defense counsel anticipated calling Dr. Scissors to testify the afternoon of December 14 (Vol. 12 at 93) but he never testified. This was two weeks into trial and eleven days before the Christmas holiday, raising the concern of juror engagement to which Mr. Nolan referred. More importantly, evidence of hypothermia was not that important to the defense. Mr. Nolan's opening argument, made before the defense had any reason to believe that Dr. Scissors would not be able to testify, makes no reference to hypothermia. Given the compelling evidence from the prosecution's forensic experts that Ms. Vernon was *in fact* killed by stabbing, testimony that someone outdoors under the circumstances *could have* died from cold exposure would have been of limited value.

Also, the Defendant did not present any evidence at the hearing that Dr. Scissors would have been able

to testify definitively that the Defendant was suffering from hypothermia or that it could explain his giving such wildly different versions of events. Mr. Nolan was the one who consulted with Dr. Scissors before trial, and he could not recall anything specific that Dr. Scissors had told him. He did testify that he knew either from Dr. Scissors or through prior experience that hypothermia eventually can cause people to feel hot and remove their clothing. But there is no evidence that Dr. Scissors would have testified that either the Defendant or Ms. Vernon was probably suffering from hypothermia.

Mr. Nolan's memory about the evidence coming in from another source was partially correct. Detective Beaumont, a former Eagle County Sheriff's deputy and prosecution witness, testified to his reasons for spearheading a search and rescue effort outside of his jurisdiction, explaining that he still believed that Ms. Vernon might be alive (Vol. 7 at 156-57). He wanted to focus a search on the area near where her coat was found because "if it's really cold out, people who have hypothermia will disrobe . . . " (Vol. 7 at 160). Ms. Lake returned to the testimony on cross-examination, having Beaumont explain that

> the only logical thing that I could think of was, you know, if it's extremely cold, I can't think of the actual term for it, when people get really cold, they, for whatever reason, take off their clothes because they think they're warm when they're really freezing. So because we had nothing else really to work from, that was the only theory that we came to was, well, maybe she's freezing to death and takes the coat off and, thus, she wouldn't

> – you know, might not be that much further from there is she was walking.

(Vol. 7 at 189-90).

Under these circumstances, the Defendant has not shown that counsel's decision not to call Dr. Scissors was unreasonable. Evidence of hypothermia was not central to the defense, there was some evidence to explain the clothes-shedding introduced through a prosecution witness, Dr. Scissors could not plausibly have contradicted the forensic evidence of the cause of death with the hypothetical testimony that Ms. Vernon could have died from exposure, and there is no reason to doubt the legitimacy of counsel's concerns that Dr. Scissors' testimony would have been substantially less engaging than desired if they had forced him to testify.

For the same reasons, counsel did not perform deficiently by failing to request a mid-trial continuance to accommodate Scissors' schedule or find a replacement for him. Ms. Lake testified plausibly that, based on her experience with Judge Bailey, she would not have gotten one because continuances were not freely given in any event. There is no reason to believe that Judge Bailey would have granted a continuance on the tenth day of an eleven-day jury trial to accommodate a witness who was not central to Defendant's case, and whose subpoena could have been enforced if his testimony was necessary.

III. Counsel's decision not to seek a continuance in order to find an expert to replace Dr. Diane France

Dr. France was enlisted by the defense as an expert in forensic anthropology. She originally provided an opinion helpful to the defense, but changed her mind to agree with the prosecution's forensic anthropology expert. The Defendant argues that it was ineffective of counsel not to obtain another expert in Dr. France's stead, reasoning that if Dr. France originally believed as she did, surely some other expert in the field could be found who shared Dr. France's initial opinion.

At trial, the prosecution presented opinion testimony from Dr. Debra Komar, an expert in forensic anthropology. She performed a forensic examination of Ms. Vernon's remains. Specifically, there was a defect on the sacrum, which she examined. She explained to the jury how she and experts in her field are able to determine whether abnormalities in bone remains occurred well before death, around the time of death (perimortem), or after death. She explained how experts could distinguish between defects made by animal teeth and those made by human-made objects. She concluded that the defect was consistent with being made by a single edge knife (Vol. 10 at 123). She determined that the defect was perimortem and she could rule out animal scavenging as a cause of the defect (Vol. 1 0 at 129). She testified that because of the placement of the defect, the blade would have travelled from Ms. Vernon's front to the sacrum, through about four to six inches of soft tissue (Vol. 10 at 124).

The prosecution also presented the testimony of Dr. Kurtzman, the Mesa County coroner and a forensic pathologist. He enlisted Dr. Komar's aid and relied in part on her conclusion to determine that the manner of death was a homicide caused by a stab wound (Vol. 11 at 46-48).

Finally, the prosecution presented evidence in the form of statements made by Eric Pennington to Detective George Barley that Mr. Pennington gave the Defendant a knife prior to his leaving with Ms. Vernon for Grand Junction (Vol. 11 at 6) It was described as having an eight-inch single blade (Vol. 11 at 6). Mr. Pennington claimed that he never got the knife back (Vol. 11 at 6-7).

Mr. Nolan explained that he and Ms. Lake hoped Dr. France could contradict Dr. Komar's opinion that the defect on the victim's sacrum was caused by a knife. Mr. Nolan characterized Dr. Komar's opinion as providing important evidence of a homicide. He explained that Dr. France originally disagreed with Dr. Komar's analysis, but changed her mind shortly before trial to concur that the defect was caused by a knife. Because she agreed with the prosecution's expert, counsel decided not to call her as a witness. Mr. Nolan testified that he and Ms. Lake considered looking for another expert, but decided not to due to concern over finding someone with credible credentials who would offer a different opinion. As Ms. Lake explained, Dr. France was an eminent expert in the western United States in her field. Given that she and Dr. Komar agreed, Ms. Lake was concerned that they would not be able to find a credible expert who disagreed. Therefore, she did not request a continuance in order to obtain another

forensic anthropology expert. Beyond her concern with being able to find an expert with a helpful opinion for the defense, Ms. Lake explained that because Judge Bailey was disinclined to grant continuances, the defense would have had to explain their need for a continuance in detail in a motion. She feared letting the prosecution know that another eminent expert agreed with Dr. Komar, and feared that the prosecution would subpoena Dr. France to provide an additional expert opinion supporting its case.

The expert evidence that Ms. Vernon was killed by a single blade knife was undoubtedly of great importance to the prosecution's case. It ruled out any argument by the defense that she may have died of exposure or been killed by an animal in the wild after becoming separated from the Defendant. It established that Ms. Vernon was the victim of a homicide. Moreover, the Defendant had been given a single blade knife days before the murder which was never found.

The Defendant has not shown that counsel was unreasonable for deciding not to seek another expert to testify on this issue. Counsel were aware that there was no guarantee that a continuance would be granted. At best, the defense could have gotten a continuance and found an expert willing to offer a helpful opinion. But the prosecution would then have two highly qualified experts at its disposal, in addition to the county coroner, who would disagree with the defense's lone expert. At worst, the continuance would be denied or the defense would not be able to find another expert, and the prosecution would have two highly qualified experts

at its disposal, in addition to the county coroner, while the defense had none. Given the fact that a continuance was not guaranteed and that even the defense's own expert had come around to agree with Dr. Komar after rethinking her analysis, the worst case scenario was a significant possibility.

In short, the Defendant's argument assumes that finding another expert was a risk-free course of action that counsel should have attempted. The circumstances defense counsel faced belie that assumption. Accordingly, counsel did not perform deficiently by failing to seek a replacement for Dr. France.

IV. Counsel's decision not to present the testimony of James Lupp or Dr. Nick Taylor

The Defendant argues that counsel was ineffective for not calling as witnesses two experts in methamphetamine use and abuse that they consulted before trial. These experts were consulted because counsel knew of the Defendant's heavy methamphetamine use prior Ms. Vernon's disappearance. Counsel hoped that his methamphetamine use could help explain why his memory was so hazy and why he gave varying versions of the events leading up to Ms. Vernon's disappearance.

Both experts testified at the post-conviction hearing to the information they relayed to counsel, and which they could have testified to if they had been called as witnesses. James Lupp is Director of Men's Programming at the local Salvation Army. He was a lead counselor with Colorado West Residential Treatment Program at the time of trial who worked

with people suffering from addiction, some 40 to 50 percent of whom suffered from methamphetamine addiction. Prior to becoming a counselor, Mr. Lupp overcame his own problems with methamphetamine abuse. Mr. Nolan described to Mr. Lupp the Defendant's sleep deprivation over the two week period prior to Ms. Vernon's disappearance, his extensive use of methamphetamine, and lack of food, which Mr. Lupp described as a "perfect storm." Mr. Lupp explained to Mr. Nolan that it was possible under the circumstances that the Defendant could have suffered a "whiteout," which is the methamphetamine analogue of an alcohol-induced "blackout." Mr. Lupp explained that it is common with the heavy users of methamphetamine that he treats to find people who have lost significant periods of time. Such users can experience hallucinations which they may or may not remember when sober.

Mr. Lupp acknowledged on cross-examination that he could not have testified that the Defendant definitely had a whiteout. He could only have offered a probability based upon an educated guess. He also relayed how he explained to Mr. Nolan that methamphetamine can cause users to be violent. It tends to give them a sense of heightened awareness (hence the term "whiteout" as opposed to "blackout") and can cause paranoia, violent behavior, and delusions. It has been known to cause symptoms similar to those of paranoid schizophrenia, he explained.

Dr. Taylor is, and was at the time of trial, a clinical psychologist specializing in addiction. Counsel consulted him for the same reasons they consulted Mr. Lupp. He discussed with counsel the

stages of methamphetamine use and its effects on memory and ability to cause psychosis. He explained that someone whose use has gotten them to the point of hallucinating is by definition psychotic. Psychotics, Dr. Taylor explained, will not have accurate memories. Once sober or out of the psychotic state, they will remember either the hallucinations or everything will be a blur and not make any sense, in which case they will try to "fill in the blanks" by fabricating memories. Dr. Taylor also opined that if the Defendant were in a psychotic state it could explain why he was out in the cold without proper dress.

On cross-examination, Dr. Taylor acknowledged the prosecutor's characterization that he would have effectively testified to "crazy people doing crazy things." He would have testified that methamphetamine use increases the chance of violent behavior, and that persons on meth can easily become fearful and feel threatened, especially if they have been using for a prolonged period without sleep.

Both counsel testified about why they decided not to present the testimony of either expert. In short, while the information about methamphetamine's ability to cause loss of memory and hallucinations was valuable, counsel felt that its value was outweighed by the damaging evidence that the same prolonged use that can cause these effects can cause violence, paranoia, and fear. They did not want to provide the prosecution with evidence to support its case that the Defendant killed Ms. Vernon in a drug-induced rage.

A propos counsel's concerns, the prosecution's opening statement began by telling the jury that "[t]his man, Jason Garner, crazed on methamphetamine, chased [Ms. Vernon] down and stabbed her to death in a remote area where her cries for help could not be heard." (Vol. 5 at 4). The prosecution introduced evidence through police officer Robert Rentfrow about the violent means methamphetamine addicts may use to get more of the drug when they have run out:

> Depending on the stage of the cycle, it could be a very aggressive or violent means to get drugs or money to get the drugs or it could be a very subtle way. But once . . . they finish their crash and are kind of through that mellow stage and really needing to get the drug to supplement their addiction, then it becomes more aggressive and more violent as that – the longer they're without them.

(Vol. 8 at 78-79). He also testified to how law enforcement is trained to deal with people on methamphetamine:

> You want to try and remain calm, talk slowly, mostly because their reception or perception of their environment around them is very accelerated and anything like that would tend to kinda freak 'em out and throw 'em off keel. You don't want to get into that stage of combat with them.

(Vol. 8 at 79).

In closing, the prosecution presented the Defendant's desire for methamphetamine as a motive for murder:

> Why did Jason Garner kill Coty Vernon? Two things: drugs and money. Two things that none of us would ever think about killing somebody over. But remember, methamphetamine changes the way someone looks at things. It doesn't put them in a stupor or make them unable to plan. It does, however, alter their perspective of what is important. And at the time Jason Garner killed Coty, his whole world was focused on getting more methamphetamine . . . .

(Vol. 13 at 94-95).

Reasonably enough, the defense tried to portray the Defendant as an exception to this characterization. The following exchange occurred on direct examination:

> NOLAN: What would happen after you ran out?
>
> DEFENDANT: Usually just chalk it up as a run and go to bed. You start –
>
> NOLAN: Okay.
>
> DEFENDANT: You know, after you sleep, you wake up, you start eating and things like that.
>
> NOLAN: Okay. When you – when you ran out, would it – would it make you angry?
>
> DEFENDANT: No.

NOLAN: And I'm talking about you personally.

DEFENDANT: No.

NOLAN: Would it – would it make you violent?

DEFENDANT: No.

(Vol. 12 at 128-29). Mr. Nolan then elicited testimony from the Defendant that it was not difficult for him to get meth at the time, that he had sources in Grand Junction and Gypsum (Vol. 12 at 129-30).

Counsel's grounds for not presenting the testimony of Mr. Lupp and Dr. Taylor were perfectly reasonable under the circumstances. For defense counsel to put on additional evidence from experts of the violent, aggressive, delusional, paranoid tendencies of methamphetamine users would merely bolster the prosecution's position and undermine the Defendant's testimony that he was not violent when he ran out of methamphetamine. The Defendant certainly has not shown that the beneficial evidence these two witnesses could have offered so outweighed these negative considerations as to make it unreasonable not to call them.

Accordingly, counsel did not perform deficiently by deciding not to have Mr. Lupp and Dr. Taylor testify.

V. Counsel's alleged failure to effectively impeach Robert Orr and Ms. **Lake's alleged conflict arising from her representation of Jixi Kruckenberg**

Mr. Orr was called early in trial by the prosecution to testify based upon statements he made

to Detective Barley and testimony he gave before the grand jury. These statements and testimony relayed conversations that Orr claimed to have had with the Defendant, in which the Defendant told him about murdering Ms. Vernon. During his trial testimony for the prosecution, Mr. Orr claimed not to remember the conversations and not to remember ever talking to Detective Barley about them or testifying about them before the grand jury (Vol. 8 at 14-34). The prosecution then confronted him with statements he had made to prosecutors Frank Daniels and Brian Flynn, and Detective Barley, when the three visited him in jail prior to trial. Those statements were to the effect that he had been fighting and feared for his life because of his statements to Detective Barley and grand jury testimony. Mr. Orr denied making any such statements. Later, the prosecution introduced Mr. Orr's statements about what the Defendant told him through the testimony of Detective Barley (Vol. 10 at 192-204).

The Defendant called Toran Taulbee to undermine the credibility of Mr. Orr's prior statements. Mr. Taulbee testified that at some point when he was in jail with Mr. Orr, Mr. Orr told him about testifying against the Defendant before the grand jury. Mr. Taulbee testified that Mr. Orr told him that Mr. Orr had done so in order "to get time off his sentence because he was - he was getting ready to serve a lengthy sentence and he thought that it would help him get a shorter sentence" (Vol. 11 at 1 09). Then the following exchange occurred:

> NOLAN: Did he tell you that – that what he said – or did he say anything about the truth of his testimony?

> TAULBEE: He said it was not true. He said that he had heard from Jixi Kruckenberg and from Austin Hall bits and pieces of the story and that he thought he knew enough that he could – he could put together a fabricated story well enough to get time off his sentence.

(Vol. 11 at 109).

The Defendant argued in his brief that counsel was ineffective for not calling Mr. Kruckenberg and Mr. Hall as witnesses to corroborate Mr. Taulbee's testimony. At the hearing, however, there was no evidence presented to indicate that Mr. Hall was a credible witness who could have corroborated Mr. Taulbee's testimony or evidence about what he would have testified to had he been called. Instead, the Defendant focused upon Mr. Kruckenberg, whom Ms. Lake represented in an unrelated matter until his sentencing in September 2003. This representation overlapped with her representation of the Defendant in this case, which began after his arrest on August 26, 2003. The Defendant argues that this presented a conflict of interest for Ms. Lake, and this conflict resulted in her not pursuing Mr. Kruckenberg as a potential witness.

Mr. Kruckenberg testified at the post-conviction hearing that he knew both the Defendant and Mr. Orr through the drug scene before being incarcerated with them in Mesa County jail in the latter part of 2003. He considered the Defendant a friend. He related an incident in the jail at mealtime during which Mr. Orr was "fishing" for information about the Defendant's case. The Defendant was not there, but others were, whom Mr. Kruckenberg could not

remember. Sometime later, Mr. Kruckenberg heard that Mr. Orr had spoken with law enforcement about the Defendant's case. He somehow got a hold of a portion of a police report containing the statements Mr. Orr made to police. He recognized most of what Mr. Orr had told police as having come up during the mealtime conversation, or as being information that was "floating around" the jail. This prompted him to write a letter to the Defendant about it. He also stated that he talked to the Defendant about it.

Mr. Kruckenberg's letter to the Defendant was introduced into evidence. It states that Mr. Orr "said the cops were asking about you and he wanted to know what I knew about the insident *[sic]*." Mr. Kruckenberg states that he told Mr. Orr what he knew "as far as Story's" *[sic]* but that Mr. Orr "did not know shit about your case" and "took a lot of what I sayed *[sic]* and made some big story out of it I was the one who told him how they turned Stockard's Diary over!" The latter part is an apparent reference to a search warrant executed at the dairy farm near the Defendant's grandparents' house, which was a hotbed of methamphetamine activity and which the Defendant and Ms. Vernon visited while in Grand junction. Mr. Kruckenberg goes on to call Mr. Orr a "habitual liar" and states that Mr. Kruckenberg would testify that Mr. Orr had asked him about "almost every one of those questions that he stating *[sic]* you told him." Later, Mr. Kruckenberg states that "I will testify after I'm sentenced wich *[sic]* is 29th of this month [illegible] I'm sorry I ever mentioned anything about this case to robby Its all hear say Ill call Marna and tell her everything about robby . . . . *[sic]*"

Mr. Kruckenberg testified that he believed "everybody" knew about the search of Mr. Stocker's dairy farm and that he did not remember saying that to Mr. Orr but he must have. He noted that Ms. Lake *(i.e., "*Marna") was his attorney at the time and he believed he wrote the letter because he thought it was wrong for Mr. Orr to lie in order to help his own cause. He stated that he could not recall his reason for wanting to wait until after sentencing to testify. He also testified that he intended for the letter to get to the Defendant, but did not remember what he did with it after writing it. He did not take any steps beyond writing the letter, such as speaking with Ms. Lake, nor did he speak about it to his attorneys at the time in other cases, Tony Link and Albert Stork.

The Defendant testified that in September 2003, someone stuck the letter under the door when he was in jail. He spoke with Mr. Kruckenberg at the door briefly.[3] He claimed that Mr. Kruckenberg told him that he was afraid that Ms. Lake would have to conflict off of his case if he had information regarding the Defendant's case, which is why he wanted to wait until after sentencing to bring the matter to anyone's attention. The Defendant then testified that he provided the letter to Mr. Nolan during a visit to the jail. Mr. Nolan said that they would look into it. He claimed that he spoke later with Mr. Nolan, who had told him that they were getting an investigator to talk to Mr. Kruckenberg in DOC, to which he had

[3] Although the Defendant was sure that it was Mr. Kruckenberg he spoke to on the other side of the door, he explained that he could not be sure who slipped the letter, as this sort of operation would usually involve one inmate standing to block the inmate doing the slipping from view of the guards.

been transported after his stay in the Mesa County jail. He also claimed that counsel never discussed with him the possibility of a conflict.

The Defendant also presented the testimony of David Eisner, an expert in criminal defense and the standard of care for criminal defense attorneys in Mesa County. He opined that if Ms. Lake knew that Mr. Kruckenberg was a potential witness in the Defendant's case at the time she was also representing Mr. Kruckenberg, she would be required to follow the procedure described in *People v. Curren,* 228 P.3d 253, 258-59 (Colo. App. 2009) by (1) informing the Defendant of the nature of the conflict; (2) describing in plain terms how the conflict may affect her ability to represent the Defendant; (3) informing the Court and placing on the record the nature of the conflict; and (4) advising the court that a complete disclosure had been made to the Defendant. Admittedly, Ms. Lake did not take any of these steps.

The undated letter was apparently written in September, 2003. It refers to Ms. Kruckenberg being sentenced later in the month, on the 29th, after which time he would be willing to testify. This was significant because, as the Defendant testified, Ms. Kruckenberg was worried about there being a conflict and losing Ms. Lake as his attorney. According to the Court's records, of which it takes judicial notice, *see People v. Linares-Guzman*, 195 P.3d 1130, 1135-36 (Colo. App. 2008), Mr. Kruckenberg was sentenced in case numbers 02CR918, 02CR1418, and 03CR402 on September 29, 2003. He was represented in those cases by Mr. Link, Ms. Lake, and Mr. Stork,

respectively. The Defendant testified that he received the letter in September 2003.

As Mr. Eisner acknowledged, key to the conflict inquiry is when Ms. Lake found out that Mr. Kruckenberg was a potential witness. There was no evidence that this occurred while she was still representing Mr. Kruckenberg. The Defendant did not state when he thought he gave the letter to Mr. Nolan, much less when Mr. Nolan might have brought it to Ms. Lake's attention. The fact that Ms. Lake only represented the Defendant a maximum of 29 days after the letter was written makes it less likely that she found out about it prior to Mr. Kruckenberg's sentencing. Moreover, both Mr. Nolan and Ms. Lake testified that they did not remember ever seeing the letter. Notwithstanding the reference in the letter to contacting Ms. Lake, Mr. Kruckenberg denied that he ever contacted anyone about the letter. Accordingly, the Court finds that there has been no showing that a conflict arose because Ms. Lake found out about Mr. Kruckenberg as a potential witness through his letter while she was still representing him.

Regardless of the letter, the Defendant points out that counsel must have become aware of Mr. Kruckenberg as a potential witness at some point prior to trial, because they asked about him in their questioning of Mr. Orr, which occurred prior to Mr. Taulbee's testimony stating that Mr. Orr heard information from Mr. Kruckenberg and Mr. Hall. Specifically, Mr. Nolan asked Mr. Orr, "And didn't you tell Mr. Taulbee back in 2003 while you were in jail that you got some information, some background information about this case from another inmate

named Jixi Kruckenberg?" (Vol. 11 at 1 00). The Defendant argues that this awareness caused a conflict due to Ms. Lake's prior representation of Mr. Kruckenberg, relying upon the rule that a conflict of interest can arise where a defense attorney previously represented a prosecution witness. Although Mr. Kruckenberg would not have been a prosecution witness, the Defendant reasons that he could have become an adverse witness for the defense, because he would be asked to testify about giving Mr. Orr "the information necessary to fabricate a false confession by Mr. Garner" and confronted about his "collusion with Mr. Orr to develop this alleged confession" which "would have placed Lake in a position to essentially cross-examine her former client," Mr. Kruckenberg (Supplement at 8).

A defendant's right to effective assistance of counsel includes the right to conflict-free representation. *Dunlap,* 173 P.3d at 1070. A conflict can arise where defense counsel previously represented a prosecution witness because counsel's duty of confidentiality toward the witness/former client survives termination of the attorney-client relationship. *Id.* Because counsel has a duty to keep confidential any information learned during the prior representation, she may be hindered in her zealous representation of the current client to the extent that her duty of confidentiality hinders her cross-examination of the witness. *Id.* The court must presume that the former client divulged confidential information to the attorney. *People* v. *Shari,* 204 P.3d 453, 461 (Colo. 2009).

However, there is no *per se* rule that a conflict exists where a defense attorney previously represented a prosecution witness. Citing *Dunlap, supra,* the Colorado Court of Appeals in *People* v. *Samuels,* 228 P.3d 229, 238-41 (Colo. App. 2009), held that the prior representation of a prosecution witness by one of the defendant's attorneys did not present a conflict of interest. There, the defense attorney represented a prosecution witness in two unrelated cases. He withdrew from representing the witness about a month prior to learning that his former client would likely be a witness against the defendant, and represented to the court that he did not believe he had obtained any confidential information from the witness that would play any role in the defense of his current client. He also had co-counsel make objections during the witness's testimony and cross-examine the witness. Distinguishing prior cases in which a conflict was found, the Appellate Court held that no conflict arose because the attorney had withdrawn from representing the witness prior to his plea negotiations that resulted in his becoming a witness for the prosecution and there was nothing in the record to cast doubt on counsel's representation that he obtained no confidential information from the witness relevant to his defense of the defendant.

Although the facts of *Samuels* are distinguishable from the present case, it is informative because there is just as little reason here to believe that a conflict actually arose. Thus, the Defendant's reliance upon the general rule about conflicts arising from prior representation of current witnesses is unavailing. In the first place, Mr. Kruckenberg would not have been an adverse witness to the Defendant. The Defendant

mischaracterizes the testimony that he would have offered. The evidence from the letter and Mr. Kruckenberg's testimony is not that he colluded with Mr. Orr to help him out at the Defendant's expense. Rather, Mr. Kruckenberg casually shared some information with Mr. Orr about the Defendant's case and later learned of the nefarious use to which Mr. Orr put it. Indeed, the fact that the Defendant claims that counsel was ineffective for not calling Mr. Kruckenberg belies the claim that he would have been an adverse witness. If Mr. Kruckenberg was going to be an adverse witness who needed to be attacked by defense counsel, then surely it was reasonable of counsel not to call him as a witness.

This also explains away the Defendant's speculation that Ms. Lake did not contact Mr. Kruckenberg because she wanted to avoid creating a conflict. She would have had no reason to fear a conflict if she believed that Mr. Kruckenberg had useful information in the Defendant's favor. As she testified, after her representation of Mr. Kruckenberg she was on friendly enough terms with him that if she had thought that he had something to add to the Defendant's case, she would simply have contacted him and asked him about it.

Moreover, as in *Samuels,* there is no evidence to suggest that Ms. Lake still represented Mr. Kruckenberg when she learned of his potential to be a witness. There is no indication that the confidential information Ms. Lake is presumed to have received from Mr. Kruckenberg had any relevance to the Defendant's case. Again, he denied bringing the letter to her attention. Trial in this case took place well over a year after Mr. Kruckenberg's sentencing. This

allowed plenty of time for counsel to have become aware of Mr. Kruckenberg as a potential witness well after Ms. Lake's representation of him terminated.

Accordingly, the Court finds that there was no conflict that arose from Ms. Lake's representation of Jixi Kruckenberg.

As to the separate claim that, even if there was no conflict, counsel were ineffective because they failed to call Mr. Kruckenberg and Mr. Hall to back up Mr. Taulbee's story, the Defendant has not shown that this decision was deficient. As noted, there was no evidence as to what Mr. Hall would have testified to or that he would have been a reliable witness. Mr. Kruckenberg testified to having three felony convictions as of 2004, so he would have been impeachable on those grounds. The fact that he was a friend of the Defendant and had known him 15 years would not have helped his credibility as a witness in the Defendant's favor.

Moreover, Mr. Nolan testified that he believed after Mr. Orr's claimed lack of memory on the stand, the jury would not find anything he had said credible, and Ms. Lake concurred that Mr. Orr did a good job undermining his own credibility. As it was, counsel already had two witnesses, Mr. Taulbee and Danny Zugelder, devoted to undermining Mr. Orr's credibility. Mr. Zugelder testified that Mr. Orr approached him while incarcerated claiming to have a "scam" going based on information about the Defendant that would reduce his sentence and wanting to know if Mr. Zugelder wanted to avail himself of the scam (Vol. 11, 118-120). The Defendant has not shown that it was unreasonable under these

circumstances for counsel not also to call Mr. Hall and Mr. Kruckenberg to undermine one of the less effective of numerous prosecution witnesses.

Even if counsel should have done more to undermine Mr. Orr's credibility, the Defendant cannot show prejudice because Mr. Orr was not the key witness that the Defendant makes him out to be. In his argument for denial of the defense's midtrial motion for judgment of acquittal, the only witness to whom the Defendant made incriminating statements that Mr. Daniels relied upon was Henry Martinez, and Judge Bailey relied upon Mr. Martinez's testimony in her order denying the motion. (Vol. 11 at 90-91, 92-94). Mr. Flynn's closing argument included a discussion of the incriminating statements the Defendant made to Jose Mata, Jr., and Mr. Martinez, as well as the statements by Pennington (Vol. 13 at 113-16), but did not mention Mr. Orr. Ms. Lake's closing mentioned Mr. Orr once, stating, "Do we need to talk about Robby Orr? Is it reasonable to doubt what Robby Orr told you? Anything?" (Vol. 13 at 159). On rebuttal, Mr. Daniels mentioned Mr. Orr once, essentially acknowledging his general lack of credibility by stating that "even Robby Orr's statement had a ring of truth to some extent," and pointing out some evidence that was consistent with Mr. Orr's statement (Vol. 13 at 183). In short, the jury could easily have disbelieved Mr. Orr and nevertheless convicted the Defendant as they did. Therefore, he has not shown that he was prejudiced by any error in failing to fully attack Mr. Orr's credibility.

VI. Counsel's failure to submit cigarette butts found on the ground near the car to DNA testing

Finally, the Defendant contends that counsel was ineffective for not having cigarette butts located on the ground near Ms. Vernon's car tested to see if they matched her DNA. He submitted at the hearing an exhibit showing that testing was subsequently done on the butts and they did show a DNA match. He claims that this evidence would have undermined the prosecution's story that the Defendant drove the car to its resting place after murdering Vernon, so that she was never there.

The prosecution glibly dismisses this claim as a "trivial red herring" because it did not matter, based on the other evidence of the Defendant's guilt, whether Ms. Vernon was ever at that location or not. Be that as it may, the story the jury heard from the prosecution was that the Defendant killed her at a different location, drove down to the river to dispose of the knife, and then drove back up onto the mesa to hide the car so that he could claim they got stuck and she wandered off (see Vol. 13 at 83-84).

Nevertheless, as Mr. Nolan testified, because there were a number of items found strewn on the ground around and near the car, the fact that the cigarettes had been smoked by Ms. Vernon would not tend to show that she had been there. They could just as easily have been smoked in the car at another location and thrown there. Given this, it was reasonable not to use resources to have them tested. Given the same considerations, the evidence would have been of limited probative value, and the failure to present it did not prejudice the Defendant.

VII. Cumulative effect of counsel's errors

The Defendant claims that the cumulative effect of all of these alleged errors should be considered when determining whether he was prejudiced. Since there was no deficient performance, however, the Defendant could not have been prejudiced.

VIII. Remaining claims from Defendant's *pro* se petition

The Defendant raised a few claims in his *pro se* petition that counsel did not pursue. Counsel, appointed to represent the Defendant on his petition, filed her own supplement arguing the claims she thought to have arguable merit, and presented evidence on those claims at hearing, resting on oral argument there and argument in her supplement. A criminal defendant does not have the right to mixed representation by both himself and counsel and the court may properly ignore *pro se* motions by a represented defendant where the issue raised involves a matter committed to the discretion of counsel. *People v. Davis*, __ P.3d __ , 2012 COA 1, ¶ 86 (Colo. App. 2012). Accordingly, to the extent that the Defendant's *pro se* petition raised claims not pursued by counsel, the Court deems them abandoned.

Accordingly **IT IS ORDERED** that Defendant's Petition seeking relief pursuant to C.Crim.P. Rule 35(c) is denied.

DATED this 6th day of February, 2012.

BY THE COURT:

Valerie Robinson
Valerie J. Robinson,
District Court Judge

APPENDIX C

CASE ANNOUNCEMENTS
COLORADO SUPREME COURT
TUESDAY, SEPTEMBER 6, 2016

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* * *

No. 16SC66
Court of Appeals Case No. 12CA575

Petitioner:
Jason Garner,
v.
Respondent:
The People of the State of Colorado

Petition for Writ of Ceriorari DENIED. EN BANC.

JUSTICE HOOD and JUSTICE GABRIEL would grant as to the following issue:

Whether the court of appeals erred in adopting a novel rule of law that allows appellate courts to invent post hoc strategic justifications for counsel's actions, regardless of the evidence at the Crim. P. 35(c) hearing.