COLORADO COURT OF APPEALS Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	DATE FILED November 03, 2025 11:58 PM
Arapahoe County District Court Honorable Eric B. White Case No. 09CR1113	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, **v.** **COREY RAY ALBAT,** Defendant-Appellant.	▲COURT USE ONLY ▲
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REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. This Reply Brief contains 3,647 words.

s/ Gail K. Johnson
Gail K. Johnson

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I. The State Has Not Refuted The Conclusion That Mr. Albat Received Ineffective Assistance Of Counsel Due To His Trial Counsel's Failure To Investigate And Present Evidence To Support An Intoxication Defense.

A. Trial counsel's performance was deficient because their failure to consult with experts who would have supported an intoxication defense was not reasonable.

As criminal defense counsel, Mr. Albat's trial attorneys had a Sixth-Amendment duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). They failed to fulfill this duty. It is undisputed that trial counsel failed to consult with any applicable experts who would have knowledge about the effects of the combination of intoxication with multiple prescription and other drugs and alcohol on someone who had, just weeks before the charged homicide, suffered a traumatic brain injury (TBI) akin to internal decapitation. (Tr. 01/09/24 at pp 6-9.)

The Supreme Court has long recognized that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). This is such a case.

As Margaret Baker, defense expert in criminal defense and ineffective assistance of counsel, testified at the Rule 35(c) hearing, "[B]ecause [trial counsel] did not reasonably investigate the intoxication defense, he could not make a reasonable strategic decision to not run that defense." (Tr. 01/09/24 at p 79:21-24.)

The "mere incantation of 'strategy' does not insulate attorney behavior from review." *Fisher v. Gibson,* 282 F.3d 1283, 1296 (10th Cir. 2002). "The relevant question is not whether counsel's choices were *strategic*, but whether they were *reasonable*." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (emphases added); *see also Washington v. Hofbauer*, 228 F.3d 689, 703-04 (6th Cir. 2000) (even if counsel made a trial decision for strategic reasons, the court "cannot stop there, [but] ... must also assess if this strategy was constitutionally deficient") (finding deficient performance under *Strickland* because counsel's failure to object to prosecutorial misconduct in closing argument was not "sound trial strategy").

Here, defense counsel's failure to consult any experts on the topic of intoxication was unreasonable and therefore deficient. As in *Hooper v. Mullin*, 314 F.3d 1162, 1169-70 (10th Cir. 2002), "Defense counsel's strategic decision was not based on a 'thorough investigation of law and facts relevant to plausible options.'" (citing *Strickland*, 466 U.S. at 690).

Trial counsel were unable to engage in a strategically valid weighing of the potential advantages and disadvantages of running a defense of intoxication versus self-defense—or both—because their assessment of what the defense of intoxication would look like was uninformed by any expert opinions. *See Elmore v. Ozmint*, 661 F.3d 783, 864 (4th Cir. 2011), as amended (Dec. 12, 2012) ("Because Elmore's lawyers' investigation into the State's forensic evidence never started, there could be no reasonable strategic decision either to stop the investigation or to forgo use of the evidence that the investigation would have uncovered."); *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005) ("A purportedly strategic decision is not objectively reasonable 'when the attorney has failed to investigate his options and make a reasonable choice between them.'"); *Battenfield v. Gibson*, 236 F.3d 1215, 1228-29 (10th Cir. 2001) (failure to investigate client's background and other readily apparent mitigation including mental-health experts rendered counsel's alleged penalty-phase strategy unreasonable; "[T]here was no strategic decision at all because [counsel] was ignorant of various other mitigation strategies he could have employed.").

Here, trial counsel were representing a client facing a charge of first-degree murder after deliberation (and a resulting mandatory life-without-parole sentence) for a homicide that made no logical sense—a homicide that under the

prosecution's own, implausible theory of the case had occurred due to a minor dispute about an unpaid debt of merely $250. (Tr. 04/26/10 at pp 142-35, 139.) A homicide where according to the sole eyewitness, the decedent was unarmed and made no aggressive moves towards Mr. Albat. (Tr. 04/20/10, pp 162:20-24, 173-74.) A homicide where there was no disputing the identity of the defendant as the killer, and the sole eyewitness had described Mr. Albat's speech as mumbled and slurred and perceived that he was "obviously on something and acting strange … ." (Tr. 04/20/10, pp 160:19-24, 163:14-15.) A homicide where just before the shooting, Mr. Albat expressed paranoid suspicion about a random car that happened to be driving by. (Tr. 04/20/10, pp 170-71.) This Court should conclude that "counsel's uncontroverted failure to investigate some of the most obvious aspects of the case was unreasonable and deficient." *Fisher*, 282 F.3d at 1296.

The state argues that trial counsel's failure to investigate the available evidence supporting an intoxication defense was "reasonably strategic." (Answer Br. at 24.) Relying on *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994), the state invokes the "strong presumption" that trial counsel's conduct fell within "the wide range of reasonable professional assistance." (Answer Br. at 24.) But the state overlooks other key legal principles from *Davis*, including that:

- "A defendant is entitled to a pretrial investigation sufficient to reveal potential defenses and the facts relevant to guilt or penalty." (citing *People v. Norman*, 703 P.2d 1261, 1272 (Colo. 1985), and *People v. White*, 514 P.2d 69, 71 (Colo. 1973); and
- "This is so because proper investigation of the case is essential for adequate representation." (citing *Hutchinson v. People*, 742 P.2d 875, 881 (Colo. 1987); and *People v. Cole*, 775 P.2d 551, 555 (Colo. 1989).

Moreover, in a failure-to-investigate claim such as is at issue here, "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Here, there was no reasonable professional judgment that supported trial counsel's utter failure to investigate the intoxication defense in this case.

Mr. Albat's case is similar to *Miller v. Terhune*, 510 F. Supp. 2d 486, 497-98 (E.D. Cal. 2007), which granted federal habeas relief on a California state murder conviction due to trial counsel's ineffectiveness in failing to adequately investigate an intoxication defense:

> [T]he record reflects that counsel failed to investigate the effects of intoxication on petitioner. Accordingly, counsel was in no position to make a reasoned or strategic decision regarding the use of intoxication evidence. It is well settled that under *Strickland*, "attorneys have considerable latitude to make strategic decisions about what investigations to conduct once they have gathered sufficient evidence upon which to base their tactical choices." *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002). In the instant case, there is simply no indication that defense counsel gathered any evidence upon which to base their decision to not investigate or present evidence of intoxication.

Id. at 499.

> In conclusion, it is apparent that trial counsel never investigated the effects of alcohol on petitioner's perception, cognition, or ability to form the requisite intent. Nor did counsel consult any expert who could have educated the jury as to the effects of alcohol. Instead, counsel acted on their own assumptions about intoxication evidence. Accordingly, their choice of strategy was not based on any investigation and was unreasonable under *Strickland*.

Id. at 501.[1]

Other courts have likewise held that a failure to investigate or present an intoxication defense was deficient under *Strickland*. *See, e.g.*, *People v. Norfleet*, 267 A.D.2d 881 (N.Y. App. 1999) (reversing burglary and attempted sex-assault

[1] Ms. Baker briefly discussed *Miller* during her postconviction testimony. (Tr. 01/09/24, pp 70-71, 74.)

and other convictions); *Bridges v. State*, 466 So.2d 348 (Fl. App. 1985) (reversing aggravated assault and other convictions).

The Colorado cases the state relies on (Answer Br. at 25-29) are easily distinguished. The voluntary intoxication evidence addressed in *People v. Terry*, 2019 COA 9, ¶ 28, *overruled in part on other grounds by People v. Segura*, 2024 CO 70, ¶ 38, bears little to no resemblance to the circumstances at issue here. *Terry* involved a defendant who was allegedly drunk on alcohol, and the postconviction court had expressly relied on its observation "that voluntary intoxication defenses are, generally, not well received by juries" in reaching its ruling that counsel were not ineffective for failing to raise such a defense in that case. 2019 COA 9, ¶ 28. Here, by contrast, the constellation of circumstances afflicting Mr. Albat—including the consequences of having been victimized by physical abuse during his childhood, his TBI resulting from an accident, and strong medications prescribed to him by doctors for pain and anxiety that may have interacted negatively with each other and with alcohol and/or marijuana—did not carry the same level of moral blameworthiness as would someone who voluntarily gets extremely drunk.

At issue in *People v. Garner*, 2015 COA 174, ¶¶ 64-74, was not inadequate investigation of potential expert testimony regarding a potential intoxication defense, as here, but instead, trial counsel's failure to seek a complete jury

instruction on the impact of intoxication as a defense. The Court of Appeals noted that the defendant had presented neither criminal-defense expert testimony about trial counsels' failure to seek a complete instruction on intoxication nor "any argument on the matter at the postconviction hearing." *Id.* at ¶ 69. And the Court of Appeals recognized that a more complete instruction on the intoxication defense would have actually been *worse* for the defendant than the partial instruction given. *Id.* at ¶¶ 70-74; *id.* at ¶ 74 ("Allowing the jury to conclude that voluntary intoxication was a defense to first degree murder 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."). Moreover, unlike here, the defense theory at trial in *Garner* was that the defendant had not killed the victim. *Id.* at ¶ 66.

The state's reliance on *People v. Villarreal*, 231 P.3d 29 (Colo. App. 2009), *abrogated on other grounds by Hagos v. People*, 2012 CO 63, is likewise misplaced. In *Villareal*, "[n]o physical evidence connected [the defendant] to the crimes, and [her] ex-boyfriend testified in support of an alibi defense." 231 P.3d at 31. The defense postconviction attorney expert had "agreed it was correct not to

argue intoxication to the jury." *Id.* at 35. The Court of Appeals affirmed the district court's reasoning that "when 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.* Thus, like *Garner*, *Villareal* is inapposite for the obvious reason that here, defense counsel were never going to dispute—and did not dispute—that Mr. Albat had killed the decedent.

Citing *People v. Dillard*, 680 P.2d 243 (Colo. App. 1984), the state next argues Mr. Albat's position that his trial counsel's failure to investigate the viability of an intoxication defense was unreasonable "fails because the one member of his team who testified at that hearing provided tactical reasons for that decision." (Answer Br. at 28.) But again, the relevant question is not whether trial counsel's decisions can be labeled "strategic" (or, by analogy, "tactical"), but rather whether they are objectively *reasonable*. *Flores-Ortega*, 528 U.S. at 481; *Strickland*, 466 U.S. at 690-91; *Hooper*, 314 F.3d at 1169-70; *Fisher*, 282 F.3d at 1296; *Washington*, 228 F.3d at 703-04. The Colorado Court of Appeals decided *Dillard* two months before the U.S. Supreme Court issued its decision in *Strickland*, and thus, the Court of Appeals did not have the benefit of that critically important precedent. *Compare Dillard*, 680 P.2d 243 (decided March 15, 1984), *with Strickland*, 466 U.S. 668 (decided May 14, 1984). In any event, in addressing

the intoxication-defense issue in *Dillard*, the Court of Appeals did not hold that *any* tactical reasoning would suffice to defeat an ineffectiveness claim, as the state incorrectly suggests; only "sound tactical reasoning." 680 P.2d at 245.

The state's attempt to undermine the factual basis for an intoxication defense in this case (Answer Br. at 29-33) fails. There is no dispute that Mr. Albat was regularly taking multiple significant prescribed medications, nor was there any dispute about the nature and the severity of his neck injury—a key factor here that the state continually overlooks in its Brief. Nor did the prosecution present any evidence during the postconviction evidentiary hearing to rebut the defense forensic psychologist's opinions that Mr. Albat had suffered from post-traumatic stress disorder as the result of physical abuse during his childhood as well as the very serious, life-threatening motor-vehicle accident approximately 40 days before the homicide; that as a result of that accident, Mr. Albat had become addicted to Xanax; and the likely effects of intoxication on him at the time of the encounter that resulted in him committing the homicide. (Tr. 08/23/23, pp. 19-27.) Nor did the prosecution dispute the eyewitness's account that Mr. Albat's speech was mumbled and slurred, and the eyewitness believe that he was "obviously on something and acting strange … ." (Tr. 04/20/10, pp 160:19-24, 163:14-15.) As trial counsel Michael Faye testified during the Rule 35(c) hearing, "I think we

could have presented a compelling circumstantial case that [Mr. Albat] was intoxicated." (Tr. 01-09-24, p 2:1-3.)[2]

The state seeks to undermine the account of Mr. Albat provided by the prosecution's own witness, the sole eyewitness to the shooting—the "passenger." (Answer Br. at 32.) Without citation to the record, the state claims that this witness, Travis Snow, had "limited observations" of Mr. Albat during their two encounters and lacked familiarity with the manner in which he spoke. (Answer Br. at 32.) But to be clear, Mr. Snow testified: "His speech was mumbled and slurred to the point that I could only make out, you know, a quarter of what he was saying." (Tr. 04/20/10, p 160:22-24.) One does not need to have familiarity with a particular person's manner of speaking to be able to observe that this was strange; it's common sense.

The state now suggests that defense counsel may not have wanted to rely on Mr. Snow's account of Mr. Albat's demeanor to help establish the basis for the intoxication defense. (Answer Br. at 32.) But that is pure speculation; the state did

[2] *People v. Donald*, 2020 CO 24, ¶ 30 (Answer Br. at 30), is inapposite; that case addresses the prosecution's stacking of inferences to support a finding of sufficient evidence for criminal liability beyond a reasonable doubt—not whether there is a reasonable probability that absent trial counsel's deficiencies, one or more jurors would have harbored a reasonable doubt about whether Mr. Albat killed the decedent intentionally and after deliberation, or whether he was too intoxicated to form such mental states.

not elicit any such explanation from trial counsel Mr. Faye during the post-conviction evidentiary hearing, when it had the opportunity to do so.

For all these reasons, the state has not rebutted the conclusion that Mr. Albat's trial counsel's failure to consult any experts regarding a potential intoxication defense was unreasonable under *Strickland* and its progeny.

B. Trial counsel's deficiencies undermine confidence in the outcome of the trial and therefore were prejudicial.

The state does not dispute that to demonstrate prejudice under *Strickland*, a defendant must show a reasonable probability that, absent counsel's deficient performance, the result of the proceeding would have been different, and that a reasonable probability is one sufficient to undermine confidence in the outcome of the trial. 466 U.S. at 694. Importantly, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

"The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors." *Id.* at 695. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*

During the postconviction evidentiary hearing, the defense presented testimony from four experts who could have testified at trial as well as one of Mr. Albat's trial counsel and the defense criminal-defense expert, Ms. Baker. All of these expert opinions and testimony was unrebutted; the prosecution presented no witnesses at the Rule 35(c) hearing. (Tr. 01/09/24 at p 113:11-14.)

As Ms. Baker noted:

> [T]here were clear signs during the trial that the defense was beginning to realize that their self-defense claim was not as strong as they'd hoped, and they were moving more towards intoxication. And I believe that was because the jurors showed some interest in intoxication, and there was quite a bit of testimony about the intoxication, including the eyewitness. I mean, it cannot be said enough how adamant he was about Mr. Albat being frankly messed up.

(Tr. 01/09/24 at p 82:4-12.)

Again, this case is analogous to *Miller*, where in granting an ineffectiveness-claim, the court reasoned that "the facts of the case demonstrate that a perfect self-defense theory [what trial counsel sought to argue instead of the available intoxication defense] would be very difficult to establish." *Miller*, 510 F. Supp. 2d at 502. The same is true here. For Mr. Albat to be legally justified in his use of deadly force as an act of self-defense, he must have had reasonable grounds to believe he was in imminent danger of being killed or of receiving great bodily

injury from the decedent. (CF, p 233.) But the decedent was unarmed. Mr. Albat did not testify. The sole eyewitness to the shooting did not observe the decedent making any aggressive motions towards Mr. Abat in the moments before Mr. Albat shot him. And Mr. Albat shot him three times in the torso at point-blank range.

Ms. Baker highlighted another key problem with the defense of self-defense in this case: the fact that after Mr. Albat was told (falsely) that the decedent was armed, Mr. Albat left and could have just stayed away, but instead went and got a gun and returned to the decedent in his car:

> The holes in the self-defense come more into the idea of him acting irrationally or not reasonably when it came to [the decedent] saying he was strapped and [Mr. Albat] believing that the appropriate response to that was to go and get a gun, where he also got the money, apparently, and coming back; and then believing that the single hand motion or the comment by [the decedent], whatever it was, was a reasonable -- well, reasonably believing that was a threat.
>
> So, you know, as Mr. Faye testified this morning, there were problems with the self-defense case, most notably that when someone says, "I have a gun," you don't go back, right? I mean, that may not be law, like written in jury instructions, but common sense tells you that that's not a good self-defense case, frankly.

(Tr. 01/09/24 at p 104:4-17.)

By contrast, the intoxication defense—supported by four unrebutted defense experts—would have given rise to a reasonable doubt about whether the

prosecution had proved the necessary mens rea for first-degree murder after deliberation. *See Miller*, 510 F. Supp. 2d at 506 ("Because petitioner's level of intoxication was clearly relevant to create reasonable doubt as to the mens rea element of the offense, confidence in the outcome is seriously undermined by trial counsel's failure to investigate and present that evidence."). The combination of factors underlying the intoxication defense in this case also make it similar to *Fitzgerald v. Trammell*, No. 03-CV-531-GKF-TLW, 2013 WL 5537387, at *43 (N.D. Okla. Oct. 7, 2013), where the court ruled:

> In this case, without the expert testimony, Petitioner's jury was left with an incomplete explanation for Petitioner's actions. The expert testimony and evidence of alcohol consumption may not have overcome, undermined, or rebutted the State's evidence supporting the aggravating circumstances. However, because the omitted evidence would have explained the interplay between Petitioner's alcohol consumption and his physical and mental conditions attributable to his diabetes and frontal lobe injury, it might well have influenced the jury's appraisal of Petitioner's moral culpability. In other words, the testimony might well have demonstrated to the jury that Petitioner's firing of the gun was a compulsive reaction attributable to a lack of impulse control rather than the product of cold-blooded premeditation. The expert testimony and other evidence serving to explain Petitioner's actions should have been introduced.

The state asks this Court to find no *Strickland* prejudice because the jury received an instruction on voluntary intoxication and convicted Mr. Albat of first-

degree murder anyway. (Answer Br. at 36-37.) But of course, due to trial counsel's deficient performance, the jury received none of the extensive expert opinions that were available at the time of trial, nor did they receive the vigorous argument from defense counsel on this topic that could have been made had defense counsel presented an intoxication defense.

Given the nature of the evidence here from both the trial and the postconviction evidentiary hearing, this Court's confidence in the outcome of the trial should be undermined. There is at least a reasonable probability that one or more jurors would have had a reasonable doubt as to Mr. Albat's guilt of first-degree murder had they received appropriate evidence (including expert opinions) and argument from counsel about the intoxication defense. The standard for *Strickland* prejudice has been met here.

CONCLUSION

For all the reasons stated in the Opening Brief, in this Reply Brief, and at any oral argument that may be held in this appeal, this Court should reverse the Order denying postconviction relief and remand this case with directions to the district court to grant the motion, vacate Mr. Albat's conviction for first-degree murder after deliberation, and hold a new trial.

Respectfully submitted this 3rd day of November 2025.

JOHNSON & KLEIN, PLLC

s/ Gail K. Johnson
Gail K. Johnson

Attorney for Corey Albat

CERTIFICATE OF SERVICE

I certify that on November 3, 2025, I electronically filed the foregoing **REPLY BRIEF** with the Clerk of the Court via the Colorado Courts E-Filing system, which will serve notification of such filing to all counsel of record.

s/ Gail K. Johnson
Gail K. Johnson