COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED August 19, 2025 1:45 PM
Arapahoe County District Court Honorable Eric B. White, Judge Case No. 09CR1113	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. COREY ALBAT, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 24CA714
PHILIP J. WEISER, Attorney General ALEJANDRO SORG GONZALEZ, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-580-6000 E-Mail: AG.Appellate@coag.gov Registration Number: 53843 *Counsel of Record	

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

> It contains **6,116** words, including what are contained in the footnotes.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Alejandro Sorg Gonzalez
Signature of attorney or party

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

TABLE OF AUTHORITIES

PAGE

RULES

OTHER AUTHORITIES

INTRODUCTION

Corey Albat appeals a postconviction court's order that refused to vacate his conviction of first-degree murder under Crim. P. 35(c) after a hearing on remand. (OB, p 8). The hearing concerned a single claim of ineffective assistance of counsel, where Albat claimed his trial defense team's failure to further investigate and present a viable voluntary intoxication defense before trial constituted deficient performance that likely prevented him from being convicted on a lesser-included offense at trial. (CF, p 908). Because the record refutes this claim, this Court should affirm the order.

STATEMENT OF THE CASE AND FACTS

I. Crime, Investigation, and Charge

Late one night, police officers responded to a shooting. (TR 4/20/2010, pp 115-16). When they arrived at the scene, they found a passenger in a car yelling about the driver, the victim, having been shot. (TR 4/20/2010, pp 125-27). The victim was unresponsive and suffering from several gunshot wounds. (TR 4/20/2010, pp 38-39). The

victim later died at the hospital. (TR 4/20/2010, pp 98:2-12; 4/26/2010, pp 12-13).

The passenger told detectives that he and the victim drove to the scene because the victim was collecting money from a friend. (TR 4/20/2010, pp 151-52). He had never met the victim's friend before, and he didn't get a good look at him because it was dark outside, but he was able to describe his clothing and demeanor that suggested he was either "drunk or high or both" during both of their two encounters with him that night. (TR 4/20/2010, pp 152-75).

Specifically, the passenger described how, during their first encounter, the friend sat in the victim's backseat and told the victim that he didn't have his money. (TR 4/20/2010, pp 157-61). The victim briefly argued with the friend, who was slurring and mumbling his speech, and the friend told the victim that he would go get the money quickly. (TR 4/20/2010, p 161:13-18). As the friend walked away, the victim threatened him by saying he better not come "back strapped because [he was] strapped," meaning that he had a gun, but he didn't. (TR 4/20/2010, pp 161-62). However, as they waited for the friend to

return, the passenger told the victim to leave because the friend was "obviously on something and acting strange and [it was] a bad situation," so they drove off. (TR 4/20/2010, p 163:12-21). A few minutes later, the friend called the victim and told him to drive back because he now had the money. (TR 4/20/2010, pp 165-66).

During their second encounter, the friend approached the victim's car again, but the victim locked his doors, told the friend that he couldn't get back in, and asked for the money while reaching his left hand out of his driver's side window. (TR 4/20/2010, pp 167-70). Just then, a random car drove by, which spooked the friend. (TR 4/20/2010, pp 170-71). When the car drove out of sight, the friend shot the victim three times and ran away. (TR 4/20/2010, pp 171-72).

At no point did the passenger ever see the victim make any threatening gestures towards the friend, and he denied that they were there to sell drugs to the friend. (TR 4/20/2010, pp 172-75).

The detectives then searched the victim's cellphone records and learned the last number in contact with the victim belonged to Albat.

(TR 4/22/2010, pp 104-06). So, they contacted Albat's parents, who lived near the area of the shooting. (TR 4/22/2010, pp 7-9).

Albat's mother told the detectives that she had seen Albat hanging out with the victim earlier that day when Albat came by her home to take his daily dosage of prescribed medication. (TR 4/21/2010, pp 60-61). Albat had been prescribed oxycontin after a recent car accident left him with severe spinal injuries and a traumatic brain injury. (TR 4/21/2010, pp 66-67). He had also long been prescribed oxycontin for his anxiety issues. (TR 4/21/2021, p 67:11-13). She also said that she saw Albat and the victim take one sip from a whiskey bottle and that she assumed that they would be drinking the rest of the day. (TR 4/21/2010, pp 62-63, 69:5-15). Then, the next time she saw Albat was later that night when he returned home after getting picked up by his stepfather. (TR 4/21/2010, pp 65-66). She didn't' interact with him that night, but she assumed that he had asked to be picked up because he was drunk. (TR 4/21/2010, pp 72-73).

The detectives found clothing that matched the passenger's descriptions of the shooter's clothing at the parent's home and the

murder weapon hidden underneath their back patio. (TR 4/20/2010, p 158:15-21; 4/21/2010, pp 179-85). Albat's parents also told them that Albat had left Colorado that morning and was on a Greyhound bus to Nebraska. (TR 4/21/2010, pp 58-59). The bus ticket was purchased before the shooting. (TR 4/21/2010, p 71:8-20).

Fifteen hours after the shooting, Albat was arrested in Kansas, and the detectives interviewed him there. (TR 4/22/2010, pp 74-76; 4/26/2010, p 142:19-24).

During his interview, Albat initially said that he was smoking marijuana and drinking whiskey with the victim earlier that day but denied seeing him later that night. (DVD 4:1:14-8:19).[1] But when

[1] Upon obtaining the record in this case, undersigned counsel discovered that the disc containing Albat's recorded interview that was admitted into evidence as Exhibit 29 during trial was broken. There was a post it note affixed to the disc that read: "Redacted CD Damaged Upon Return 12/18." It's unclear when or how the disc was broken. The record and counsel's communication with the DA, who handled the postconviction proceedings, confirm that DVD 4, which wasn't damaged, was the disc used and admitted during the Crim. P. 35(c) hearings. (TR 1/9/2024, pp 112-13). As a result, counsel believes this Court could resolve this appeal without reconstructing the record with a new version of the broken disc. However, should this Court wish to order reconstruction of the broken disc pursuant to C.A.R. 10, the People have no objection.

confronted with the above-mentioned evidence, he changed his story and admitted to shooting the victim but claimed he did so in self-defense. (DVD 4:21:14-53:50).

Specifically, Albat claimed he had met the victim that night to buy more marijuana. (DVD 4:31:25-1:11:15). During their first encounter, he questioned the quality of the marijuana, which made the victim angry. (DVD 4:31:25-1:11:15). He then became angry at the victim because of the way the victim was treating him and because of the victim's threat. (DVD 4:31:56-:33:33). But the threat also scared him, so he grabbed a gun before their second encounter. (DVD 4:37:20-1:06:06). He then shot the victim because he believed the victim was going to shoot him during what appeared to him to be an attempted robbery considering that the area was dark, the victim's prior threat, the locked car doors, the random car driving by, and the victim allegedly moved his right hand away from his waistband while saying "here you go motherfucker" when he asked for the marijuana. (DVD 4:38:30-44:45).

Albat also denied being belligerent drunk, confirmed that he was fully aware of his surroundings, claimed that he was just feeling mellow

from the drugs earlier that day, and said that "he has to be more fucked up to not remember stuff." (DVD 4:45:50-1:01:52).

A small amount of marijuana was found inside the victim's car. (TR 4/21/2010, pp 265-66).

The prosecution charged Albat with first-degree murder after deliberation. (CF, p 65).

II. Pretrial Proceedings, Jury Trial, Sentencing, and Direct Appeal

Before trial, Albat's trial defense team endorsed self-defense and voluntary intoxication as possible theories of defenses at trial. (CF, p 190). They were also unsuccessful in suppressing Albat's interview statements. (CF, p 17).

During opening statements at trial, both parties told the jury that this case was solely about the credibility and reasonableness of Albat's self-defense claim. (TR 4/20/2010, pp 75-99).

During trial, however, the jury also heard evidence about the passenger believing that Albot was "drunk or high or both," (TR 4/20/2010, pp 159-60), Albat's mother seeing Albat take his daily dosage

of prescribed medications and one sip from a whiskey bottle, (TR 4/21/2010, pp 60-65), Albat's mother assuming Albat was drunk that night, (TR 4/20/2010, pp 68-69), and Albat's mother estimating Albat would take about ten oxycodone pills and between six to eight Xanax pills per day. (TR 4/21/2010, pp 76-80).

The team had objected to the admission of some of that evidence. (TR 4/20/2010, pp 159-61; 4/21/2010, pp 60-70, 76-80). When the passenger testified that he believed Albat was "drunk or high or both," the team objected on the basis that the passenger lacked the expertise to offer such an opinion. (TR 4/20/2010, pp 159-61). The trial court sustained their objection but then allowed the passenger to testify about his observations of Albat's slurred and mumbled speech. (TR 4/20/2010, pp 159-61).

The team also elicited some of that evidence. (TR 4/21/2021, pp 60-65). The team was questioning Albat's mother about Albat's friendship with the victim when she testified that she assumed they were friends because the victim was with Albat earlier that day when he took his

daily dosage of prescribed medication and the one sip from the whiskey bottle. (TR 4/21/2010, p 60-65).

The team further sought to minimize the prejudicial effect of some of that evidence. (TR 4/20/2010, pp 65-70, 76-80). To undermine Albat's mother's assumption that Albat was drunk that night, they questioned her about her own intoxication that night and the lack of direct interaction that she had with him that night. (TR 4/20/2010, pp 65-70). And when a juror asked Albat's mother about the amount of pills Albat would take per day, they questioned her about how her estimations were still within the prescribed limits. (TR 4/21/2010, pp 76-80).

However, because this evidence was still presented to the jury, the prosecution proposed a jury instruction on voluntary intoxication after the close of evidence. (TR 4/26/2010, pp 82-83). The team agreed that the scintilla-of-the-evidence standard had been met. (TR 4/26/2010, pp 82-83).

Therefore, the trial court instructed the jury on voluntary intoxication and explained that it only negated the culpable mental states for first-degree murder after deliberation. (CF, pp 226-27; TR

4/26/2010, p 83:4-5). It also instructed the jury on self-defense, (CF, p 231), and the lesser-included offenses of second-degree murder, reckless manslaughter, and negligent homicide. (CF, pp 224-25).

During closing arguments, the prosecution briefly mentioned the voluntary intoxication instruction but only to argue that this case wasn't about voluntary intoxication but about whether Albat's claim of self-defense was credible given the passenger's testimony and Albat's interview statements, including his admission to being angry at the victim and his change of story once the detectives confronted him with the evidence against him. (TR 4/26/2010, p 131:3-11).

The team never mentioned the voluntary intoxication instruction; instead, they sought acquittal by focusing on discrediting the passenger's perspective of the shooting, alleging that Albat lacked any motive to murder his friend, and explaining how Albat's claim of self-defense was reasonable in light of his perspective of the circumstances surrounding the shooting. (TR 4/26/2010, pp 147-78).

The jury convicted Albat as charged, and the trial court sentenced him to life without the possibility of parole. (CF, pp 261, 272).

Albat appealed his conviction. (CF, p 274). One of the claims he asserted was that there was insufficient evidence to support his conviction because his intoxication made him unable to form the culpable mental states. (CF, p 316). An appellate division rejected this claim on the basis that the jury could've reasonably inferred that he harbored those culpable mental states because he had grabbed a gun before calling the victim back and shot the victim three times. (CF, pp 310-18).

III. Crim. P. 35(c) Pleadings

Albat timely filed a pro se Crim. P. 35(c) motion, alleging, among other things, that he received ineffective assistance of counsel because his trial defense team had failed to investigate an assertion that he made during one of their pretrial meetings about him overdosing on Xanax that night because the results of such an investigation could've uncovered the viability of an involuntary intoxication defense, which could've been used as leverage to secure a more favorable plea deal. (CF, pp 344-65).

A postconviction court appointed Alternate Defense Counsel ("ADC") to represent Albat, and ADC filed a supplemental motion. (CF, pp 369, 397-419).

In that motion, ADC claimed that the team performed deficiently by failing to consult with forensic experts about the viability of a voluntary intoxication defense at trial based on the witnesses' statements to the detectives, Albat's drug problems, and Albat's overdose on Xanax that night. (CF, pp 397-408).

To support this argument, ADC presented the opinions of three forensic experts – a psychologist, a pharmacogeneticist,[2] and a toxicologist – who claimed that Albat couldn't have formed the culpable mental states of first-degree murder that night because:

- each of the prescribed medications that he was taking had the potential of causing aggressive and paranoid behavior;

[2] Pharmacogenetics is the study of how a person's genetic structure can make them more susceptible to a medication's side effects. (TR 7/13/2023, p 17:14-22).

- his genetic structure and young kidneys prevented him from fully metabolizing the drugs he was taking that day by the time of the shooting;
- his recent statements during their interviews with him, where he alleged that he was now unable to remember certain details of the shooting and that he experienced the shooting as an out-of-body experience, were consistent with what could happen if somebody overdosed on the prescribed medications that he was taking; and
- Albat's interview statements with the detectives reflected a person trying to make sense of what could've caused him to commit an unmotivated crime.

(CF, pp 409-19).

In light of those opinions, ADC argued that "just because there was evidence of self-defense … [that didn't] mean [] [his] [] [defense team] was hamstrung into pursuing [self-defense] …." (CF, p 475).

Lastly, ADC claimed that there was a reasonable probability that the team's lack of investigation prejudiced Albat because presenting

such opinions at trial could've persuaded the jury to convict him on a lesser-included offense. (CF, p 401-03, 417).

The postconviction court summarily denied the motion without a hearing by finding that the claim failed both *Strickland*[3] prongs. (CF, p 521-32).

With respect to the first prong, the court found that Albat had failed to overcome the strong presumption that the trial defense team's decision to solely pursue a self-defense theory at trial was reasonably strategic in light of the facts that: (a) Albat had been adamant since the time of his arrest about acting in self-defense; (b) the prosecution never challenged the fact that the victim had threatened Albat before the shooting; (c) Albat had never described the shooting as an out-of-body experience before these postconviction proceedings; and (d) Albat's friendship with the victim supported a reasonable inference that he lacked a motive to commit the murder. (CF, pp 528-29).

[3] *Strickland v. Washington*, 466 U.S. 668 (1984)

With respect to the second prong, the court simply wrote: "[defense team's] strategy in pursuing a self-defense argument over a voluntary intoxication defense [didn't] prejudice [Albat]." (CF, p 529).

On appeal, however, a division reversed this order because "there [was] no record … demonstrating whether Albat's [team had] investigated an intoxicated defense, chose not to raise the defense (and why), or even considered it as a possible defense at all." *People v. Albat*, 2022 WL 22928942, ¶ 29 (Colo. App. No., Oct. 20, 2022) (not published pursuant to C.A.R. 35(e)). So, it remanded the case back to the court for an evidentiary hearing to address whether their decision to solely pursue a self-defense theory was strategic. *Id.* at ¶¶ 30-31.

IV. Crim. P. 35(c) Hearings

The evidentiary hearing spanned four days, in which Albat presented his three forensic experts to explain how they reached their opinions. (TR 7/13/2023, pp 8-40; 8/23/2023, pp 5-27, 53-72; 8/24/2023, pp 5-40). But while doing so, they also explained that:

- each of them had relied on each other's reports to form their opinions, (TR 8/23/2023, p 15:12-17; TR 8/23/2023, p 59:6-12; TR 1/9/2024, pp 85-86);
- none of them knew precisely how much drugs and alcohol Albat had consumed that day because Albat never underwent toxicology testing, so they relied on the trial testimony offered by Albat's mother, the victim's toxicology report, and the notes taken by the trial defense team, (TR 7/13/2023, pp 32-34, 51-52; 8/23/2023, pp 37-43; 8/24/2023, pp 31-33, 42-56);
- one of them hadn't actually reviewed the entirety of Albat's interrogation video, so he didn't know that Albat had shot the victim only after the random car drove out of sight, that Albat had hidden the gun underneath his parent's back patio, or the extent of what Albat had shared with his team about his drug use, (TR 8/23/2023, pp 33-45, 77-78, 87-88); and

- the science of pharmacogenetics wasn't well known at the time of this trial.

(TR 7/13/2023, pp 12-17, 62-64).

ADC also presented a criminal defense expert who opined that the defense team performed deficiently by failing to consult with forensic experts on the viability of a voluntary intoxication defense based on the witnesses' statements to the detectives, the probability that Albat's traumatic brain injury could've intensified the side effects of his prescribed medications, and the American Bar Association ("ABA") Defense Standards informing defense attorneys that they aren't bound by a defendant's pretrial statements while forming their trial strategies. (TR 1/9/2024, pp 49-78). The expert also opined that there was a reasonable probability that their lack of investigation prejudiced Albat because a juror had asked Albat's mother about his daily dosage of prescribed medications. (TR 1/9/2024, pp 81-82).

Lastly, ADC presented one member of the defense team who testified that they:

- suspected Albat was likely intoxicated at the time of the shooting based on interview statements about consuming alcohol, marijuana, and prescribed medications that day, but they knew they would be unable to support their suspicion in a reliable fashion without a toxicology report, (TR 1/9/2024, pp 5-11, 20-26);
- because there was no toxicology report, they believed that presenting a voluntary intoxication defense at trial would've required them to present speculative estimations from Albot's mother or by having Albat testify about his intoxication that night, which would open the door for the prosecution to impeach him with his continuously changing story about what led up the shooting, (TR 1/9/2024, pp 20-29, 32-34);
- hence, while they understood that they weren't "married" to Albat's interview statements and that this case wasn't the perfect self-defense case because Albat had grabbed a gun before calling the victim back, they still believed that their

best course of action was to solely pursue a self-defense theory at trial because Albat had always been adamant about acting in self-defense, had only wanted to pursue an affirmative defense, and had always claimed to remember all of the circumstances surrounding the shooting, (TR 1/9/2024, pp 9-10, 22-25, 33-36);

- so, instead of further investigating the viability of a voluntary intoxication defense at trial, they focused their efforts on developing a strong self-defense case and on strategizing how to best weaken any evidence that suggested Albat was intoxicated at the time of the shooting because such evidence would undermine the reasonableness of Albat's belief in the need to act in self-defense.

(TR 1/9/2024, pp 9-10, 24-25).

After the hearings, the postconviction court denied Albat's motion for two reasons. (CF, pp 925-27).

First, the court found that the defense team's decision not to further investigate the viability of a voluntary intoxication defense for trial was reasonable because:

- there was no scientific proof of Albat's intoxication that night;
- Albat had always been adamant about acting in self-defense;
- Albat had told his team that he only wanted to pursue an affirmative defense;
- any argument in support of a voluntary intoxication defense would've undermined the reasonableness of their self-defense claim;
- any argument in support of a voluntary intoxication defense would've cause them to lose credibility with the jury; and
- a self-defense theory offered more benefits to Albat.

(CF, pp 925-26). Consequently, Albat had failed to meet his burden of proving the first *Strickland* prong by a preponderance of the evidence. (CF, pp 925-26).

Second, even if Albat had met his burden with respect to the first *Strickland* prong, the court found that he didn't prove the second prong because there was no reasonable probability that any investigation into the defense wouldn't have uncovered new substantial evidence that could've changed the result of the trial, such as:

- new eyewitnesses to Albat's actions or demeanor that day;
- a toxicology report on Albat's intoxication levels that night; or
- an expert in pharmacogenetics because that field wasn't well-known at the time of this trial.

(CF, pp 926-27).

Aragon now appeals that remand order.

SUMMARY OF THE ARGUMENT

Albat failed to prove either prong of *Strickland*. The record produced from the Crim. P. 35(c) hearing shows that his trial defense team made a reasonably strategic decision to forego further investigation into the viability of a voluntary intoxication defense at trial because the evidence uncovered from such an investigation would've been unreliable, speculative, and damaging to Albat's credibility and his self-defense claim. And even if it wasn't reasonably strategic, Albat still wasn't prejudiced by it because of the unreliable results from such an investigation and because there was other evidence presented at trial that strongly refuted the assertion that Albat was intoxicated at the time of the shooting.

ARGUMENT

I. The decision not to further investigate the viability of a voluntary intoxication defense at trial was reasonably strategic, but, even if not, Albat wasn't prejudiced by it.

A. Preservation and Standard of Review

This issue is preserved.

Appellate courts review claims of ineffective assistance of counsel as mixed questions of fact and law. *People v. Huggins*, 2019 COA 116, ¶ 29 (citing *Dunlap v. People*, 173 P.3d 1054, 1063 (Colo. 2007)). They (1) defer to the postconviction court's findings of fact if they are supported by the record and (2) review its legal conclusions from those facts de novo. *Id.*

B. Law and Application

During a Crim. P. 35(c) proceeding, a defendant's conviction is presumed to be valid, and the defendant bears the burden of proving his entitlement to postconviction relief by a preponderance of the evidence. *Dunlap*, 173 P.3d at 1061. Under Crim. P. 35(c)(2)(I), a defendant is entitled to postconviction relief if he proves his conviction was obtained

"in violation of the Constitution or law of the United States or the constitution or laws of [Colorado]."

A defendant has a constitutional right under the Sixth Amendment to receive effective assistance of counsel. *Strickland,* 466 U.S. at 686. To establish ineffective assistance, the defendant must show: (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Id.* at 687-88. He must satisfy both prongs to receive postconviction relief. *Id. at* 697; *see also Dunlap*, 173 P.3d at 1063.

1. The decision not to further investigate the viability of a voluntary intoxication defense was reasonably strategic.

To satisfy the first *Strickland* prong, a defendant must overcome the "strong presumption that [his] counsel's conduct f[ell] 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.'" *Davis v.*

People, 871 P.2d 769, 773 (Colo. 1994) (citing *Strickland*, 466 U.S. at 689).

Because a challenged action might be considered sound trial strategy under the circumstances of a particular case, judicial scrutiny of defense counsel's performance must be highly deferential and evaluated from the counsel's perspective at the time. *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003) (citing *Strickland*, 466 U.S. at 698); *see also People v. Gandiaga*, 70 P.3d 523, 525 (Colo. App. 2002) ("The constitutional right to effective assistance of counsel 'is[n't] 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.'").

Indeed, this inquiry imposes a "highly demanding" standard on a defendant to demonstrate "gross incompetence," *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986), "an appalling absence of professional competence," *Miles v. Dorsey*, 61 F.3d 1459, 1478 (10th Cir. 1995), actions that were "completely unreasonable, not merely wrong," *Moore v. Gibson*, 195 F.3d 1152, 1178 (10th Cir. 1999), or that "no

competent counsel would['ve] taken the action that his counsel [took]." *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1298 (11th Cir. 2014).

An unreasonable failure to investigate can constitute grounds for ineffective assistance of counsel. *Dunlap,* 173 P.3d at 1065. In this context, defense counsel acts reasonably by either performing a reasonable investigation or by making a reasonable decision that such an investigation is unnecessary. *Id.*; *see also People v. Dillard*, 680 P.2d 243, 245-46 (Colo. App. 1984) ("Failure to investigate and develop a defense constitutes ineffective assistance when counsel's omissions result in 'withdrawal of a potentially meritorious defense,' and the failure to raise the defense cannot be explained on tactical grounds.") (citation omitted).

The holding in *People v. Terry*, 2019 COA 9, ¶ 28 (overruled in part on other grounds by *People v. Segura*, 2024 CO 70, ¶ 38) is instructive. There, the division held that defense counsel's decision to not pursue a voluntary intoxication defense at trial was reasonably strategic for several reasons, including because the defense didn't apply to the defendant's other general intent crimes, because juries typically

don't respond well to such defenses, and because of the low probability that a jury would be persuaded by such a defense when the defendant had driven his truck into police officers and engaged in high speed chases to avoid arrest. *Terry*, ¶ 28.

Similarly, in *People v. Garner*, 2015 COA 174, ¶¶ 66-67, the division held that defense counsel's decision to not pursue a voluntary intoxication defense at trial was reasonably strategic because it would've been inconsistent with the defendant's theory that he didn't commit the murder and because juries typically don't respond well to such defenses.

Lastly, in *People v. Villareal*, 231 P.3d 29, 35-36 (Colo. App. 2009) (abrogated on other grounds by *Hagos v. People*, 2012 CO 63), the division acknowledged that defense counsel's decision to not request a voluntary intoxication jury instruction at trial would be reasonably strategic when a defendant consistently denied committing the murder since the time of her arrest because presenting such an instruction, regardless of the jury not knowing which party had requested it, would

still encourage the jury "to [] imagine the defendant in proximity to the victim" during their deliberations.

Here, Albat argues that his trial defense team's decision to not investigate the viability of a voluntary intoxication defense at trial was unreasonable because of the evidence that he presented at the Crim. P. 35(c) hearing. (OB, pp 10-12). This argument fails because the one member of his team who testified at that hearing provided tactical reasons for that decision. *Dillard*, 680 P.2d at 245-46.

Unlike the forensic expert who testified at the Crim. P. 35(c) hearing, the one member of Albat's defense team explained that they had reviewed the entirety of his recorded interview with the detectives where, after being unsuccessful in convincing them that he wasn't involved in the murder, Albat changed his story to claim that he shot the victim in self-defense. The member also explained that Albat had never wavered from that claim at any point during their pretrial preparations and that he understood the benefits of an affirmative defense. *See People v. Miller*, 113 P.3d 743, 750-51 (Colo. 2005) (affirmative defenses are complete defenses to specific-intent crimes like

first-degree murder, whereas voluntary intoxication still exposes a defendant to criminal liability on its lesser-included offenses). Such circumstances support the tactical reasonableness of the team's decision like it did in *Terry*, *Garner*, and *Villareal*.

True, as Albat asserts, defense counsel stands as "captain of the ship" when forming trial strategies, *Villareal*, 231 P.3d at 35 (citation omitted), and ABA Defense Standards 4-4.1 and 4-5.2 inform defense counsels that they aren't "hamstrung" to a defendant's pretrial statements when an investigation into another defense would be more meritorious. (CF, p 475). But the record shows that the team had followed those principles when deciding to forego further investigation into a voluntary intoxication defense and solely pursue a self-defense theory at trial.

Moreover, because there were no toxicology results to show that Albat was intoxicated at the time of the shooting, it was reasonable for the defense team to believe that the only way of effectively presenting a voluntary intoxication defense at trial would be by eliciting testimony from Albat's mother or from Albat himself.

But as shown by her trial testimony, Albat's mother could only offer speculative evidence about whether Albat was intoxicated that night. She only suspected that he was drunk based on his earlier actions in the day of carrying around a whiskey bottle earlier, taking one sip from that bottle, and then asking for a ride later that night. She never interacted with him that night to confirm her suspicions, and she only assumed that he was drunk that night because she had speculated that he would be drinking from that bottle for the rest of the day. *See People v. Donald*, 2020 CO 24, ¶ 30 (warning against unlimited inference stacking when the chain of inferences between underlying facts and ultimate conclusions become so attenuated that they amount to speculation). She also couldn't have relied on Albat's consumption of prescribed medications and marijuana to form an opinion on his intoxication that night because she would only provide his medication within the prescribed amount and because she wasn't around him earlier that day when he was smoking marijuana.

Presenting the defense through Albat also had serious drawbacks. Having Albat testify at trial that he was intoxicated during the shooting

would've only further damaged his credibility with jury when he had already changed his story at least once before when he told the detectives in a recorded interview that he wasn't belligerent drunk, that he was fully aware of his surroundings, that he was just feeling mellow from his consumption of drugs earlier that day, and that he "ha[d] to be more fucked up to not remember stuff." (DVD 4:45:50-1:01:52). Thus, to provide another explanation of what occurred during the shooting would've only made the jury even less susceptible to the defense if it had been presented. *Terry*, ¶ 28; *see also Garner*, ¶¶ 66-67.

The juror's question and forensic expert's testimony at the 35(c) hearing about Albat's interview statements reflecting a person trying to make sense of an unmotivated crime doesn't change this outcome for two reasons.

First, it was obvious that any attempt by the team to focus on the amount of prescribed medication Albat was taking on a daily basis would've been rebutted by subsequent questioning of Albat's mother about his normal daily dosage of prescribed medications and the lack of any history of violent outbursts from him while he was taking those

amounts. Hence, it was reasonably strategic for them to use such evidence instead to their advantage to support the reasonableness of Albat's self-defense claim.

Second, the forensic expert's opinion was based on Albat's most recent statements about not remembering all of the circumstances surrounding the shooting and experiencing the shooting as an out-of-body experience, which contradicted Albat's prior statements and would've risked further damaging the credibility of his self-defense claim. *See* CRE 705 (an expert may be required to disclose the underlying facts that form the basis of his opinion).

Finally, relying on the passenger's opinions about Albat's intoxication that night would've also had similar drawbacks due to his limited observations of Albat during their two encounters and his lack of familiarity with Albat and the manner in which he spoke. It also would've had the defense team asking the jury to believe the parts of the passenger's testimony that they liked (that Albat appeared to be intoxicated) but reject the rest of his testimony that wasn't favorable to their defense.

But even if the team had ignored such drawbacks and consulted with forensic experts to investigate the viability of a voluntary intoxication defense, they still wouldn't have received reliable opinions from those experts because of the lack of any toxicology report or precise information on the amount of drugs and alcohol Albat had consumed that day.

In sum, Albat failed to prove that no competent counsel would've solely pursued a self-defense theory under those circumstances. *Taylor*, 760 F.3d at 1298. And the opinions offered by the criminal defense expert that state otherwise only demonstrates another example where "attorneys disagree[] about trial strategy, which is hardly surprising. After all, '[t]here are countless ways to provide effective assistance in any given case,' and '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" *Provenzano v. Singletary*, 148 F.3d 1327, 1331-32 (11th Cir. 1998) (quoting *Strickland*, 466 U.S. at 689).

2. If the decision wasn't reasonably strategic, Albat still wasn't prejudiced by it.

To establish the second *Strickland* prong, a defendant must show that, when the totality of the circumstances are considered, there is a reasonable probability that, but for his trial counsel's deficient performance, the outcome of the trial would've been different. *Strickland*, 466 U.S. at 694; *see also Dunlap*, 173 P.3d at 1062. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *People v. Dillon*, 739 P.2d 919, 921 (Colo. App. 1987) (citing *Strickland*, 466 U.S. at 694). In the context of claims involving a defense counsel's alleged failure to investigate for potential evidence in support of a defense, a defendant must show that such an investigation would've "discovered substantial evidence which, if introduced, might['ve] reasonably … led to a different conclusion …." *People v. Chambers*, 900 P.2d 1249, 1252 (Colo. App. 1994).

Here, Albat argues that, even if his team's decision was reasonably strategic, "[t]his is the rare type of case" where it would still be deficient because there is a reasonable probability that the jury

would've convicted him on a lesser-included offense if it had been presented with the evidence from the Crim. P. 35(c) hearing. (OB, pp 17-19). But not only does this argument ignore that both *Strickland* prongs must be proven by a preponderance of the evidence before a defendant can receive postconviction relief, *Dunlap*, 173 P.3d at 1063, it also fails for two other reasons.

First, as the postconviction court found, any investigation into a voluntary intoxication defense wouldn't have uncovered substantial evidence in support of it. *Chambers*, 900 P.2d 1249, 1252 (Colo. App. 1994). To the contrary, consulting with forensic experts wouldn't have produced reliable opinions for the reasons already explained above. *See Dillard*, 680 P.2d at 245-46 (the *Strickland* prejudice prong isn't established when an expert's opinion would've offered questionable benefits at trial). And there was nothing in the record to suggest, nor did Albat present any evidence at the Crim. P. 35(c) hearing to suggest that any investigation into the defense would've uncovered new eyewitnesses to his actions and demeanor that day, a toxicology report on his intoxication levels that night, or an expert in the field of

pharmacogenetics because that field was only emerging around the time of this trial.

Second, even if the evidence from the Crim. P. 35(c) hearing had been presented at trial, there's no reasonable probability that it would've affected the outcome of the trial. *Strickland*, 466 U.S. at 694; *see also Dunlap*, 173 P.3d at 1062. Again, the unreliability and speculative nature of the opinions offered by the forensic experts and eyewitnesses would've been reasonably obvious to the jury and emphasized by the prosecution. As a result, it wouldn't have outweighed the other evidence that proved Albat had acted with intent and after deliberation when shooting the victim. § 18-3-102(1)(a), C.R.S. (2025). As the appellate division noted in its remand order, that other evidence consisted of Albat being angry at the victim before grabbing a gun, calling the victim back, and shooting the victim three times once a random car had driven out of sight. Then, upon his arrest and when confronted with the evidence against him, Albat claimed self-defense and, in support of that claim, adamantly denied being intoxicated at the time. It's reasonable to assume that the jury relied on such evidence

when rejecting the voluntary intoxication defense instruction that it had already been provided after the close of evidence. *Villareal*, 231 P.3d at 35-36. Thus, even if the evidence had been presented during the trial, there's no reasonable probability that Albat would've been convicted on a lesser-included offense.

CONCLUSION

For these reasons, this Court should affirm the postconviction court's remand order.

PHILIP J. WEISER
Attorney General

/s/ Alejandro Sorg Gonzalez
ALEJANDRO SORG GONZALEZ,
53843*
Assistant Attorney General
Criminal Appeals Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **GAIL K. JOHNSON** and all parties herein via Colorado Courts E-filing System (CCES) on **August 19, 2025**.

/s/ Alejandro Sorg Gonzalez

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