IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0685

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KALEB EDWARD DANIELS,

Defendant and Appellant.

# BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court, Lewis and Clark County, the Honorable Michael F. McMahon, Presiding

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"[T]he difference between the *almost right* word and the *right* word is really a large matter—'tis the difference between the lightning-bug and the lightning." – Mark Twain[1]

## STATEMENT OF THE ISSUES

I. Should this Court invoke plain error review and conclude that the District Court violated Daniels' rights to trial by jury and due process of law by instructing the jury on the verdict form that Daniels "may not be found 'not guilty'"?

II. Was there insufficient evidence to support Daniels' conviction for tampering with evidence when the State failed to produce evidence of an overt act by Daniels aimed at hindering the prosecution?

III. Did defense counsel's failure to object to the verdict form and move to dismiss the tampering with evidence charge for insufficient evidence constitute ineffective assistance of counsel?

## STATEMENT OF THE CASE AND FACTS

On January 17, 2017, the Defendant and Appellant, Kaleb Edward Daniels (hereafter "Daniels"), was charged by Information with Attempted Deliberate Homicide, a felony, in violation of § 45-4-103(1),

[1] George Bainton, *The Art of Authorship: Literary Reminiscences, Methods of Work, and Advice*, 87–88 (D. Appleton & Co. 1891).

MCA and § 45-5-102(1)(a), MCA, Aggravated Burglary, a felony, in violation of § 45-6-204(2), MCA, and Tampering With or Fabricating Physical Evidence, a felony, in violation of § 45-7-207(1)(a), MCA. (D.C. Doc. 4.) The State later amended the Information to include another charge, Accountability for Aggravated Burglary, a felony, in violation of § 45-2-301, MCA, § 45-2-302(3), MCA, and § 45-6-204(2), MCA. (D.C. Doc. 37.) Daniels pleaded not guilty to the offenses. (D.C. Doc. 16.)

The State proceeded to trial against Daniels on July 10–12, 2017. The State alleged that on December 28, 2016, Daniels and a co-defendant, Jory Strizich (hereafter "Strizich"), attempted to burglarize a cabin in Wolf Creek, Montana, belonging to Marshall and Sonja Buus. (D.C. Doc. 2.) Marshall Buus testified that he and his wife arrived at their cabin during the burglary and startled Daniels and Strizich into running away. (Trial Tr. at 290.) Before Daniels and Strizich left the property, however, Daniels allegedly fired a weapon at Marshall Buus, (Trial Tr. at 302–303), and Marshall Buus shot Strizich in the leg, (Trial Tr. at 304–305). Daniels and Strizich then fled the property, (Trial Tr. at 305–306), and were separately apprehended by law enforcement, (Trial Tr. at 406, 450–451). When Daniels was arrested,

he was not in possession of a firearm. (Trial Tr. at 410.) The State speculated that Daniels discarded a pistol somewhere between the Buus cabin and the property down the road where he was arrested. (Trial Tr. at 634.) The pistol was never recovered. (Trial Tr. at 263–265.)

Daniels requested and received lesser included offense instructions for Burglary and Burglary by Accountability. (Trial Tr. at 366–69, 625–26; Jury Instruction Nos. 36–40.) At the close of the State's case, Daniels' counsel declined to move to dismiss the charges for insufficient evidence. (Trial Tr. at 622.) At the close of all the evidence and after conferring with counsel, (Trial Tr. at 624–26), the District Court instructed the jury and provided the jury with a verdict form formatted as follows:

**COUNT I:**

To the charge of **ATTEMPTED DELIBERATE HOMICIDE**:

_____ Guilty _____ Not Guilty

**COUNT II:**

To the charge of **AGGRAVATED BURGLARY**:

_____ Guilty _____ Not Guilty

**OR**

To the lesser included offense of **BURGLARY**:

_____ Guilty _____ Not Guilty

**OR**

**COUNT III:**

To the charge of **AGGRAVATED BURGLARY BY ACCOUNTABILITY**:

_____ Guilty _____ Not Guilty

**OR**

To the lesser included offense of **BURGLARY BY ACCOUNTABILITY**:

_____ Guilty _____ Not Guilty

**COUNT IV:**

To the charge of **TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE**:

_____ Guilty _____ Not Guilty

(D.C. Doc. 75.) However, between Counts III and IV, the verdict form included a note to the jury in bold typeface: "**Pursuant to the Court's instructions, the Defendant *may not be found 'not guilty'* of both alternatives or lesser included offenses or he may be found 'guilty' of one. He may not be found 'guilty' of both alternatives and lesser included offenses.**" (D.C. Doc. 75 (emphasis added).)

Daniels' trial counsel did not object to this verdict form. (Trial Tr. at 625.) Daniels was convicted of Count I, Attempted Deliberate Homicide, Count II, Aggravated Burglary, and Count IV, Tampering With or Fabricating Physical Evidence. (D.C. Doc. 75.)

At sentencing, the District Court designated Daniels a Persistent Felony Offender within the meaning of § 46-1-202(18), MCA. Accordingly, Daniels was sentenced to 60 years with no time suspended in the Montana State Prison for the crime of Attempted Deliberate Homicide, 40 years with no time suspended for the crime of Aggravated Burglary, and 20 years with no time suspended for the crime of Tampering With or Fabricating Physical Evidence. The sentences were imposed consecutively, pursuant to § 46-18-502(4), MCA. (Sentencing Tr. at 48–49; D.C. Doc. 89.) Daniels timely appealed from the Judgment and Commitment entered on September 26, 2017. (D.C. Docs. 89, 111.)

## STANDARD OF REVIEW

Under normal circumstances, this Court "will not consider issues raised for the first time on appeal when the appellant had the opportunity to make an objection at trial." *State v. Weaver*, 1998 MT

167, ¶ 24, 290 Mont. 58, 964 P.2d 713. Indeed, "[f]ailure to make a timely objection during trial constitutes a waiver of the objection." Section 46-20-104, MCA. A narrow exception to this rule exists for a convicted person "alleging an error affecting jurisdictional or constitutional rights" who

> establishes that the error was prejudicial as to the convicted person's guilt or punishment and that: (a) the right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application; (b) the prosecutor, the judge, or a law enforcement agency suppressed evidence from the convicted person or the convicted person's attorney that prevented the claim from being raised and disposed of; or (c) material and controlling facts upon which the claim is predicated were not known to the convicted person or the convicted person's attorney and could not have been ascertained by the exercise of reasonable diligence.

Section 46-20-701(2), MCA.

While this Court has in the past "acknowledged the constraints of § 46-20-701(2), MCA," it has also recognized its own "inherent power and paramount obligation to interpret Montana's Constitution and to protect the various rights set forth in that document." *Weaver*, ¶ 25 (quoting *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996) *overruled in part on other grounds*, *State v. Gallagher*, 2001 MT 39,

¶ 21, 304 Mont. 215, 19 P.3d 817). To that end, this Court may sparingly and on a case-by-case basis,

> discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the § 46-20-701(2), MCA, criteria, where failing to review the claimed error at issue may: (1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process.

*Weaver*, ¶ 25 (citing *Finley*, 276 Mont. at 137, 915 P.2d at 215). This Court always retains its inherent common law power of plain error review, *Weaver*, ¶ 25; *Finley*, 276 Mont. at 134–35, 915 P.2d at 213–14, and should exercise it in this singular case.

This Court "review[s] de novo whether sufficient evidence supports a conviction." *State v. Polak*, 2018 MT 174, ¶ 14, 392 Mont. 90, 422 P.3d 112. There is sufficient evidence to support a conviction if "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Polak*, ¶ 34.

Ineffective assistance of counsel claims are mixed questions of law and fact, which this Court reviews de novo. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

## SUMMARY OF THE ARGUMENT

The District Court's note to the jury on the verdict form that Daniels "may not be found 'not guilty'" amounts to a directed verdict in a criminal case, in violation of Daniels' constitutional rights to trial by jury and due process of law. Although no contemporaneous objection was made at trial, this Court should invoke its power of plain error review to correct this error, because failure to do so would undermine the fundamental fairness of Daniels' trial.

The State's speculation that Daniels tampered with evidence is based on the facts that Daniels was alleged to have a firearm during a burglary, but he was arrested without a firearm and the firearm was never recovered. Such speculation is insufficient to sustain a conviction for tampering with evidence because the State did not prove that Daniels actively concealed evidence for the purpose of impairing a prosecution. Accordingly, Daniels' conviction for tampering with

evidence must be reversed, and a judgment of acquittal must be entered on that count.

Daniels received ineffective assistance of counsel because his counsel failed to object to the verdict form and move to dismiss the tampering with evidence charge for insufficient evidence. These deficiencies cannot be considered tactical or strategic decisions, and Daniels suffered prejudice as a result of his counsel's deficient performance, so this Court should reverse and remand for a new trial.

## ARGUMENT

### I. This Court should invoke plain error review and conclude that the District Court violated Daniels' rights to trial by jury and due process of law by instructing the jury on the verdict form that Daniels "may not be found 'not guilty.'"

The right of trial by jury is guaranteed under both the Montana Constitution and the United States Constitution: "The right of trial by jury is secured to all and shall remain inviolate," Mont. Const. art. II, § 26, and "[i]n all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury. . . ," Mont. Const. art. II, § 24. *See also Woirhaye v. Montana Fourth Judicial Dist. Court*, 1998 MT 320, ¶ 10, 292 Mont. 185, 972 P.2d 800 (citing U.S. Const. art. III, § 2, cl. 3; U.S. Const. amd. VI; U.S. Const. amd. XIV). This right is

a foundational "part of the Anglo-American concept of justice." *Woirhaye*, ¶ 9. Another explicit and fundamental constitutional right is the right to due process of law. Mont. Const. art. II, § 17 ("No person shall be deprived of life, liberty, or property without due process of law."); U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). The right to due process of law necessarily encompasses the right to a fair trial, the right to have the State prove every element of a charged offense beyond a reasonable doubt, and the presumption of innocence. *State v. Newman*, 2005 MT 348, ¶19, 330 Mont. 160, 127 P.3d 374 (citing *Estelle v. Williams*, 425 U.S. 501, 503 (1976)) (Nelson, J., concurring). In Montana, the presumption of innocence is also codified: "A defendant in a criminal action is presumed to be innocent until the contrary is proved. . . ." Section 46-16-204, MCA.

### A. The District Court violated Daniels' rights to trial by jury and due process of law by instructing the jury on the verdict form that Daniels "may not be found 'not guilty.'"

The District Court violated all of these fundamental constitutional rights in Daniels' case when it instructed the jury that ". . . the Defendant *may not be found 'not guilty'* of both alternatives or lesser

included offenses. . .". (D.C. Doc. 75) (emphasis added). The District Court literally directed a verdict of guilty in a criminal case, in violation of the rights to trial by jury and due process of law.

Both the Montana Supreme Court and the United States Supreme Court have explained that "an accused is entitled to have each of the facts substantiating an element of the crime tried before a jury," and that a court is not empowered to issue its judgment until sentencing. *State v. Betterman*, 2015 MT 39, ¶ 18, 378 Mont. 182, 342 P.3d 971 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)). The court's function during trial is "to instruct the jury on every issue or theory finding support in the evidence, and . . . accurately and correctly state the law applicable in a case." *State v. King*, 2016 MT 323, ¶ 10, 385 Mont. 483, 385 P.3d 561 (internal quotations omitted). Because no one other than the jurors themselves is entitled to participate in or observe a jury's deliberations, "American jurisprudence depends on a jury's ability to follow instructions and juries are presumed to follow the law that courts provide." *State v. Sanchez*, 2008 MT 27, ¶ 57, 341 Mont. 240, 177 P.3d 444 (citing *State v. Turner*, 262 Mont. 39, 55, 864 P.2d 235, 245 (1993); *Opper v. U.S.*, 348 U.S. 84, 95 (1954)).

This Court must therefore presume that the jury understood and followed the District Court's instructions in this case, including its note on the verdict form that ". . . the Defendant *may not be found 'not guilty'* of both alternatives or lesser included offenses. . .". (D.C. Doc. 75) (emphasis added). The verdict form used in Daniels' case violated his rights to trial by jury and due process of law because the verdict form indicated to the jury that its services were not needed, that the State did not need to prove Daniels' guilt, that Daniels was not presumed innocent, and that Daniels was not entitled to have a jury of his peers find the facts in his case. The verdict form literally instructed the jury that Daniels "may not be found 'not guilty.'" (D.C. Doc. 75.) If this Court presumes that the jury heeded the District Court's instruction—and we must so presume, *Sanchez*, ¶ 57—then it is axiomatic that Daniels was deprived of his rights to trial by jury and due process of law.

### B. Failure to review the error on the verdict form would call into question the fundamental fairness of Daniels' trial.

Daniels' trial counsel did not make a contemporaneous objection to the verdict form proposed by the District Court, and the § 46-20-701(2),

MCA, criteria are inapplicable in this case. Accordingly, this Court may exercise its inherent common law power of plain error review only if the error claimed implicates Daniels' fundamental constitutional rights and if "failing to review the claimed error at issue may: (1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process." *Weaver*, ¶ 25 (citing *Finley*, 276 Mont. at 137, 915 P.2d at 215). Here, the error on the verdict form unquestionably implicates Daniels' fundamental constitutional rights to trial by jury and due process, and failing to review the error would leave unsettled the question of the fundamental fairness of the trial.

A right is considered "fundamental" if it explicitly appears in the Declaration of Rights in Montana's Constitution. *Weaver*, ¶ 26. As outlined above, the right to trial by jury and the right to due process of law are both explicitly guaranteed by the Montana and the United States constitutions. Mont. Const. art. II, §§ 17, 24, 26; U.S. Const. amends. VI, XIV. And the right to due process necessarily encompasses the right to a fair trial, the right to have the State prove every element of a charged offense beyond a reasonable doubt, and the presumption of

innocence. *Newman*, ¶19 (citing *Estelle*, 425 U.S. at 503) (Nelson, J., concurring). These rights are therefore "fundamental" for purposes of plain error review. *Weaver*, ¶ 26.

Failure to review an error of this magnitude would leave unsettled the question of the fundamental fairness of Daniels' trial. *Weaver*, ¶ 25. This Court grants plain error review "sparingly," *Weaver*, ¶ 25, and for good reason: "it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider," *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207. However, on occasion, this Court encounters errors not objected to below that are so egregious that failing to correct them would undermine the fundamental fairness of the trial.

For example, the defendant in *State v. Weaver* was charged with four counts of sexual assault involving four different victims. *Weaver*, ¶ 7. At trial, Weaver's attorney did not propose and the district court did not offer a unanimity instruction. Weaver was convicted of two of the four counts. *Weaver*, ¶ 19. On appeal, Weaver asked this Court to invoke plain error review and reverse his convictions to remedy the violation of his constitutional right to a unanimous verdict. *Weaver*,

¶ 26. This Court agreed to exercise plain error review because the error at issue implicated an explicit constitutional right, and because "[u]ncertainty about the nature of the verdict in this case–i.e., whether the jurors were unanimous in their verdict, certainly brings into question the fundamental fairness of Weaver's trial." *Weaver*, ¶ 27. Weaver's convictions were reversed and remanded for a new trial. *Weaver*, ¶ 40.

In the seminal plain error case, *State v. Finley*, the defendant was charged with burglary and sexual intercourse without consent, and he testified in his own defense at trial. *Finley*, 276 Mont. at 130, 915 P.2d at 211. On cross examination, the prosecutor asked Finley if he had given any prior statements and if this testimony was the first time Finley had told his version of events. *Finley*, 276 Mont. at 131, 915 P.2d at 211. During closing argument, the prosecutor commented that Finley chose to remain silent before and after being arrested, but chose to give an exculpatory statement at trial, after he had heard all the other witness testimony. *Finley*, 276 Mont. at 131, 915 P.2d at 211. Defense counsel did not object to the prosecutor's questions during cross examination or to his statements during closing argument. *Finley*, 276

Mont. at 131, 915 P.2d at 212. On appeal, this Court exercised plain error review to address the question whether the prosecutor violated Finley's right to due process and privilege against self-incrimination by commenting on his post-arrest silence. *Finley*, 276 Mont. at 132, 915 P.2d at 212. After a lengthy analysis of the facts and applicable case law, this Court determined that Finley's right to due process and privilege against self-incrimination were not violated. *Finley*, 276 Mont. at 139–40, 915 P.2d at 217–18. In that case, it was "the importance of the legal issue raised," and not the likelihood of Finley's success on the merits, that caused this Court to invoke plain error review. *Finley*, 276 Mont. at 138, 915 P.2d at 216.

As *Weaver* and *Finley* illustrate, this Court will exercise its discretionary power of plain error review when the claimed error implicates a constitutional right and calls into question the fundamental fairness of a criminal trial. Those questions are distinct from whether the claimed error was egregious enough to warrant reversal and remand. The error in this case—a judge's instruction to the jury that a not guilty verdict is not allowed—is precisely the kind of error that caused this Court to grant plain error review in *Weaver*:

"[u]ncertainty about the nature of the verdict." *Weaver*, ¶ 27. Because the nature of the verdict itself is at issue, the absence of a contemporaneous objection from trial counsel is all the more reason for this Court to grant plain error review.

As this Court acknowledged in *Finley*, "[a]ppellate courts have the inherent duty to interpret the constitution and to protect individual rights set forth in the constitution." *Finley*, 276 Mont. at 134, 915 P.2d at 213. Although the policy of declining to review errors not objected to below serves the important functions of promoting judicial efficiency and allowing trial courts to correct errors in the first instance, those procedural values should never be elevated over enforcement of parties' constitutional rights. *Finley*, 276 Mont. at 137, 915 P.2d at 215. Indeed, the common law power of plain error review exists precisely because "appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court," even when no objection was made to the trial court. *Finley*, 276 Mont. at 135, 915 P.2d at 213. In this case, Daniels was denied substantial justice by the trial court, and because his counsel did not object to the

instruction on the verdict form, the only way to ensure the fundamental fairness of his trial is for this Court to review his claim of plain error.

This Court should invoke common law plain error review in this case and determine that the district court's instruction to the jury on the verdict form violated Daniels' rights to trial by jury and due process of law.

## II. There was insufficient evidence to support Daniels' conviction for tampering with evidence because the State failed to produce evidence of an overt act by Daniels aimed at hindering the prosecution.

Daniels was charged with and convicted of Tampering With or Fabricating Physical Evidence, a felony, in violation of § 45-7-207(1)(a), MCA. (D.C. Doc. 4.) Like most criminal laws, tampering with evidence circumscribes an overt act committed with a particular mental state. *See State v. Daffin*, 2017 MT 76, ¶ 21, 387 Mont. 154, 392 P.3d 150 (explaining that most prosecutions must prove three things: an actus reus, a mens rea, and the identity of the perpetrator). A person commits tampering if, "believing that an official proceeding or investigation is pending or about to be instituted," the person "alters, destroys, conceals, or removes any record, document, or thing with

purpose to impair its veracity or availability in the proceeding or investigation." Section 45-7-207(1)(a), MCA. Thus,

> [t]he State must prove beyond a reasonable doubt that: (1) the defendant had knowledge of or believed an official proceeding or investigation was pending or imminent; (2) the defendant took action to conceal physical evidence pertinent to the proceeding or investigation; and (3) the defendant had the intent to purposely impair the availability of physical evidence.

*Polak*, ¶ 36.

In this case, the State failed to produce evidence of an overt act by Daniels aimed at hindering the prosecution. The State simply speculated that Daniels disposed of a firearm to purposely impair the prosecution because (1) Marshall Buus testified that Daniels had a firearm in his possession at the Buus cabin, (Trial Tr. at 302–306), (2) Daniels did not have a firearm in his possession when he was later arrested, (Trial Tr. at 410), and (3) the firearm Daniels was accused of using was never recovered, (Trial Tr. 190–192, 263–265, 483). During opening statements, the prosecutor told the jury,

> And then, finally, we're going to ask you to find [Daniels] guilty of Count 4, which is tampering with or fabricating physical evidence. And that is for ditching the .25-caliber pistol. Deputy Stoltz and Detective Pandis will tell you that Mr. Daniels no longer had the .25-caliber pistol when he was arrested. He ditched that sometime between leaving the

> Buuses' cabin, running down the road, and the two hours when he was arrested in Wolf Creek.

(Trial Tr. at 135–136.) Then, in closing argument, the prosecutor said,

> You know, the other piece of this, was there a gun involved? The State alleges that [Daniels] committed the offense of tampering or fabricating physical evidence by making that gun unavailable. He got rid of the gun. And so if you think there was a gun, and you think that he was the one that got rid of it, then that is tampering with or fabricating physical evidence.

(Trial Tr. at 634.) The prosecutor later concluded, "And the gun disappeared. That is tampering." (Trial Tr. at 644.) This was the extent of the State's evidence relating to the tampering charge.

This Court recently held in *State v. Polak* that "[t]he mere failure to locate evidence, without more, is insufficient for a conviction of evidence tampering." *Polak*, ¶ 37. This Court reversed Polak's conviction for tampering with evidence and remanded for a judgment of acquittal because the State in that case "presented no evidence that [the defendant] disposed of the handgun." *Polak*, ¶ 38. Instead, as was the case here, the State merely speculated that the defendant disposed of the firearm because "(1) [the defendant] had the firearm when he used it against [the victim], and (2) [the defendant] did not have the firearm when he was arrested two days later." *Polak*, ¶ 38. Because

the State in *Polak* "failed to produce evidence that [the defendant] committed an overt act or had the requisite mental state intending to impair or hinder the prosecution . . . [t]here was insufficient evidence for a reasonable jury to find the elements of evidence tampering, § 45-7-207(1)(a), MCA, beyond a reasonable doubt." *Polak*, ¶¶ 38–39.

Similarly, the only evidence linking Daniels to use or possession of a firearm in this case was Marshall Buus' testimony that Daniels fired a pistol at him while at the Buus cabin. (Trial Tr. at 302–303.) Daniels was not in possession of a pistol when he was given a ride down the road by a neighbor, (Trial Tr. at 361), or when he was arrested, (Trial Tr. at 410). Two detectives testified that they never recovered the .25-caliber pistol they suspected Daniels of using. (Trial Tr. 190–192, 263–265, 483). In fact, one of the detectives testified that it was clear from the tracks and debris in the snow leading away from the Buus cabin that Daniels fell and dropped several items. A metal detector revealed several items dropped in the snow, but no pistol. (Trial Tr. at 186.) The State produced absolutely no evidence that Daniels acted to conceal the pistol, or that he did so for the purpose of hindering this investigation. In the absence of such evidence, no "rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Polak*, ¶ 34.

Reversal and a judgment of acquittal were warranted in *Polak* because "[b]are suspicion from which inferences can be drawn is insufficient for a finding of beyond a reasonable doubt." *Polak*, ¶ 38. The proper remedy in this case too is reversal and a judgment of acquittal, rather than a new trial, because "[a] new trial cannot be granted where the evidence adduced at the first trial proves insufficient to support a conviction." *Polak*, ¶ 35.

## III. Defense counsel's failure to object to the verdict form and move to dismiss the tampering with evidence charge for insufficient evidence constituted ineffective assistance of counsel.

The Sixth and Fourteenth Amendments of the United States Constitution and Article II, § 24 of the Montana Constitution guarantee the right to effective assistance of counsel. This Court analyzes ineffective assistance of counsel claims using the two-pronged test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Kougl*, ¶ 11. To prevail on an ineffective assistance of counsel claim, a defendant must (1) demonstrate "counsel's performance was deficient or fell below an objective standard of reasonableness" and (2) "establish prejudice by

demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal citations omitted).

This Court will decline to review ineffective assistance of counsel claims on direct appeal when the claim is based on matters outside the record. *Kougl*, ¶ 14. In such cases, this Court will "allow the defendant to file a postconviction proceeding where he/she can develop a record as to 'why' counsel acted as alleged, thus allowing the court to determine whether counsel's performance was ineffective or merely a tactical decision." *Kougl*, ¶ 14. However, this Court recognizes that sometimes "it is unnecessary to ask 'why' in the first instance," because "there is 'no plausible justification' for what defense counsel did." *Kougl*, ¶ 15 (quoting *State v. Jefferson*, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641). In those cases, "[w]hether the reasons for defense counsel's actions are found in the record or not is irrelevant. What matters is that there could not be any legitimate reason for what counsel did." *Kougl*, ¶ 15.

For example, in *State v. Jefferson*, this Court could not ascertain any legitimate reason for defense counsel's decision during closing

argument to admit his client's guilt to the charge of felony assault when the defendant had previously withdrawn a guilty plea in an attempt to seek a full acquittal at trial. *Jefferson*, ¶ 50. This Court concluded under the circumstances that Jefferson's counsel's admission could not "be considered a trial strategy or tactical decision," and that his conduct fell "below the reasonable range of professional conduct," thereby satisfying the first prong of the *Strickland* test. *Jefferson*, ¶¶ 50–51.

Similarly, in *State v. Rose*, defense counsel failed to ask for a jury instruction that an accomplice's testimony should be viewed with suspicion. 1998 MT 342, ¶¶ 18–20, 292 Mont. 350, 972 P.2d 321. The record contained no explanation for counsel's failure to request the instruction, and the State acknowledged that such an instruction would have been appropriate. *Rose*, ¶ 18. Because this Court could discern "no reasonable tactical or strategic reason for failing to provide an instruction on the jury's consideration of an accomplice's testimony," this Court concluded that counsel's performance was deficient, even in the absence of a record-based justification for counsel's failure. *Rose*, ¶ 18.

In this case, the record contains no explanation for defense counsel's failure to object to the verdict form proposed by the District Court. (Trial Tr. at 624–26). There is also no record-based justification for counsel's decision not to move to dismiss the tampering with evidence charge when it was clear at the close of the State's case that the State had not proved that Daniels acted to conceal evidence, or that he did so for the purpose of hindering an investigation. (Trial Tr. at 622.) However, there can be no tactical or strategic reason for these failures—they are objectively unreasonable.

It is unlikely that a defense lawyer would fail to object to a verdict form that literally says in bold typeface that the defendant "may not be found not guilty." (D.C. Doc. 75.) It is much more likely that counsel failed to notice the double negative and was simply deficient in his representation of Daniels for that reason. Moreover, § 46-16-403, MCA, empowers a District Court to dismiss a charge at the close of the State's evidence if "the evidence is insufficient to support a finding or verdict of guilty." This mechanism exists to protect defendants from being convicted by a jury of a charge the prosecution has legally failed to prove. There can be no tactical or strategic explanation for defense

counsel's failure to make such a motion in this case, when proof of two elements of the tampering with evidence charge—the overt act and the mental state—were so clearly absent from the State's case. Counsel's performance was deficient, and this Court should find the first prong of the *Strickland* test to be satisfied, even in the absence of a record-based justification for counsel's inaction. *Kougl*, ¶¶ 11, 15.

In addition to proving his trial counsel was ineffective, Daniels must also "establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11. The results of Daniels' trial may indeed have been different were it not for his counsel's inexplicable inaction. As explained above, "juries are presumed to follow the law that courts provide." *Sanchez*, ¶ 57. This Court must therefore presume that the jury heeded the District Court's instruction that Daniels "may not be found 'not guilty.'" (D.C. Doc. 75.) There is no way to know what verdict the jury would have returned absent such an instruction, but the existence of the instruction was fundamentally prejudicial to Daniels. And as this Court's decision in *State v. Polak* demonstrates, a motion to dismiss a tampering with

evidence charge should be successful when the State has failed to prove that a defendant acted to conceal evidence, or that he did so for the purpose of hindering an investigation. *Polak*, ¶¶ 37–38. There is therefore a reasonable probability that Daniels would have been acquitted of the tampering with evidence charge had his counsel moved to dismiss it.

Both prongs of the *Strickland* test are satisfied in this case. This Court should conclude that Daniels received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution, and reverse Daniels' conviction.

## CONCLUSION

In order to correct a fundamental error of constitutional magnitude in Daniels' trial, this Court should invoke its power of plain error review and reverse and remand for a new trial. Further, this Court should reverse Daniels' conviction for tampering with evidence and remand for a judgment of acquittal on that count. Alternatively, this Court should reverse Daniels' conviction and remand for a new trial because he received ineffective assistance of counsel.

Respectfully submitted this 19th day of December, 2018.

By: /s/ *Caitlin Boland Aarab*
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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 5,576 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed or electronically served to:

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## APPENDIX

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I, Caitlin Boland Aarab, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-19-2018:

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