IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0571

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENNETH WAYNE JONES,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Rod E. Souza, Presiding

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STATEMENT OF THE ISSUE

It was constitutionally ineffective for Kenneth Jones's attorney to disclose Jones's defense trial strategy. Jones was prejudiced by this deficient performance when, at the last minute, the prosecutor secured a leading expert on child sexual abuse to testify at trial.

STATEMENT OF THE CASE

Kenneth Jones was charged with incest and tampering related to allegations made by his daughter, E.. Information District Court Information, District Court Document (Doc. 3.) He pled not guilty and was assigned a public defender. Little activity occurred in Jones's case[1] until his attorney revealed the defense strategy ten days before trial. With this new knowledge, the State responded by filing notice of its intent to call national sexual abuse expert Dr. Wendy Dutton, Ph.D. (Doc. 26 attached as Appendix A.) The State then asked for and received permission for Dr. Dutton to testify at the trial by video. Doc. 28 *and* Doc. 31.2. It was assumed that Jones's attorney would move to exclude Dr. Dutton's testimony based on the late expert disclosure.

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[1]His attorney filed a boiler plate discovery motion (Doc. 6) and two motions to continue the trial. (Doc. 10 and Doc. 19)

2/8/17 Status Hearing Transcript (Status Tr.) at 3-4. However, Jones's attorney ended up not objecting to the late disclosure. Instead, he simply moved to limit Dr. Dutton from testifying about E.'s credibility. *Compare*, Doc. 32 *with* Doc. 33. The State agreed to this nominal limit on Dr. Dutton's testimony.

Despite this being the second time E.'s accusations of sexual abuse had been formally investigated by law enforcement, Jones's attorney did not call any witnesses from the prior investigation to testify in Jones's defense. A jury found Jones guilty of both counts. Doc. 44 *and* Doc. 45.

On June 29, 2017, the Honorable Rod E. Souza sentenced Jones to life in the Montana State Prison for the incest charge and ten years in the Montana State Prison for the tampering charge. Judge Souza ordered the charges to run concurrently. 6/29/17 Sentencing Transcript (Sent. Tr.) at 25-26 and Doc. 60 (Written Judgment attached as Appendix B). Jones filed a timely notice of appeal. Doc. 62.

STATEMENT OF THE FACTS

Kenneth Jones wanted to go to trial. He denied sexually abusing his daughter. Status Tr. at 19-20. He had been through an extensive investigation before in Arkansas and wanted the chance to once again

clear his name and re-establish his relationship with his family. Status Tr. at 12. Trial was going to be extremely challenging. In addition to the direct reports from E. of ongoing sexual contact (Tr. at 303-06, 313, 319), and her sister M. saying she witnessed sexual activity (Tr. at 379), the State presented evidence implying Jones was the source of E.'s Type I herpes outbreak that triggered the criminal investigation. 2/13/17-2/15/17 Trial Transcript (Tr.) at 255-56.

Jones's attorney did not file any substantive pre-trial motions, but he did tell the prosecutor how he planned to defend Jones at trial. In a meeting on February 2, 2017, (ten days before trial), Jones's attorney told the prosecutor he was going to question and argue E.'s conduct did not match with an expected victim of incest. Next, he told the prosecutor he would cross-examine E. and her sister about similar sexual assault allegations and then subsequent recantations to authorities years earlier in Arkansas. Doc. 26 at 2. When the prosecutor got this information she immediately filed notice of the State's intent to call Dr. Dutton. While acknowledging the untimeliness of the expert disclosure, the prosecutor explained Dr. Dutton was necessary to counter every one of Jones's defenses, including: E.'s

behavior, E.'s prior recantation of abuse, E. choosing to travel, live and work with Jones and E.'s delayed disclosure. Doc. 26 at 2.

At the final status conference, the Wednesday before the Monday scheduled trial date, Jones's attorney expressed confusion about what personal knowledge Dr. Dutton had that would be relevant to Jones's case. Status Tr. at 2. The district court explained Dr. Dutton would be testifying as a "blind expert" about behavior in child sex abuse cases – a common practice in the court's experience. The court noted the expert notice was given in direct response to the disclosure of Jones's defense arguments. Status Tr. at 3. Jones's attorney admitted that he was preoccupied with his other public defender duties, so he had not interviewed Dr. Dutton or discussed Dr. Dutton's expert testimony with Jones. Status Tr. at 5-6. However, his attorney would not delay the proceedings to prepare for Dr. Dutton's testimony even when the district court offered a new trial date two weeks later, because he was already scheduled to be the defense attorney in another trial. He said he was looking at three months down the road before he could be available again if Jones's trial date was moved. Status Tr. at 10.

The district court gave a break in the hearing so Jones and his

attorney could talk privately. When they returned Jones's attorney now said the problems were not "insurmountable" and withdrew any oral objection the defense had to the late disclosure of Dr. Dutton. He told the court that they would go ahead with trial on Monday. Status Tr. at 10. Rather than personally interviewing Dr. Dutton, the attorney said he would rely on previous interviews she had done with the public defender office.

When questioned directly by the district court, Jones admitted that the prospect of going to trial rather than continuing the trial date to prepare for Dr. Dutton's testimony would "make it scarier" but thought going to trial on Monday was in his best interest. Status Tr. at 12. His repeated response to the court focused on his insistence that he could not say "I did something I didn't do." Status Tr. at 19-20. Without referencing his conflicting trial schedule, Jones's attorney thought they were making the "proper choice" to not delay trial given the circumstances. Status Tr. at 13.

Dr. Dutton testified on the last day of trial. She told the jury she had been conducting forensic interviews since 1992, had personally completed more than 9,000 interviews, and testified as an expert in the

field of child sexual assault more than 500 times. Tr. at 551-52. She explained to the jury that she had not reviewed the facts of this case or done any preparation for her testimony. Tr. at 553.

However, her testimony matched every point Jones tried to raise in his defense at trial. Dr. Dutton told the jury that, based on the numerous forensic interviews she had done, it was "quite common" to see sexual abuse victims exhibit a flat or almost emotionless demeanor such as E. showed in the forensic interview and on the stand. Tr. at 564. E. did not come forward with allegations of sexual abuse until she was sitting with her mother at the hospital awaiting treatment. Tr. at 426-27. Dr. Dutton opined delays in disclosure have no bearing on the truthfulness of the allegation. Tr. at 557. Dr. Dutton specifically referenced that sometimes children do not disclose abuse even when they contract a sexually transmitted disease from their abuser. Tr. at 557-58.

E. described physical abuse when she tried to stop the sexual touching. Tr. at 320. Dr. Dutton told the jury power and physical control are key components of sexual abuse, especially if the abuser is the child's caretaker. Tr. at 568. E. testified it was hard on her mother

and siblings when the previous abuse allegations in Arkansas were investigated and claimed Jones had chastised her for trying to tear their family apart. Tr. at 311-312. Dr. Dutton told the jury fear of what will happen to a family is one of the primary reasons for delayed disclosures. Tr. at 574.

E. admitted she chose to return to Arkansas to work with Jones instead of staying with her mother and sisters in Montana even though this was right in the middle of her claims of being sexually abused by Jones. Tr. at 346-47. Countering the voluntary nature of choosing to travel with her father, Dr. Dutton testified children become complicit with sexual abuse as a coping strategy. Tr. at 577-78.

Most importantly, Dr. Dutton testified about the concept of recantations. E. and her sister told their mother, family service investigators and law enforcement in Arkansas they were lying when they said Jones had sexually abused E. in Arkansas. Tr. at 369, 422. Dr. Dutton redefined the term "recant" from the common meaning of disavowing a statement to a more limited meaning only addressing when a child takes back a valid report of abuse. Tr. at 562. Dr. Dutton then told the jury that when a child's report of sexual abuse is not

supported by a caregiver, the child will often take back a valid report of abuse. She further explained valid abuse recantations happen more often when the child is separated from the abuser. Tr. at 563.

The prosecutor took this information to tell the jury not to believe Jones's defense about the prior allegations of abuse being false. Despite the prior investigation in Arkansas lasting for more than a year (Tr. at 469), the prosecutor relied on Dr. Dutton's expert testimony to urge the jury to disregard the lack of abuse findings from the Arkansas investigation. The prosecutor told the jury that Dr. Dutton's testimony proved that when E. recanted her prior claim of sexual abuse it fit with her being actually abused. Tr. at 726. Thus, the prosecutor urged the jury to convict Jones based, in a substantial part, on all the expert evidence provided by Dr. Dutton: "Everything that Dr. Dutton described happened to E." Tr. at 728.

SUMMARY OF THE ARGUMENT

Kenneth Jones's attorney did not reveal Jones's trial strategy to help out Jones. Jones was adamant about going to trial and he had already rejected several plea offers, so there was no sense to disclose confidential trial strategy to try to obtain a plea deal in the waning

moments before trial. His attorney's actions fell below the standard of care established by criminal defense obligations and ethical duties to maintain confidentiality about all information related to the representation. If the prosecutor had purposely tried to find out confidential defense trial strategy, prejudice would have been presumed. However, the presumption of prejudice is not necessary here because the disclosure directly led to one of the nation's leading experts on child sexual abuse decimating Jones's haphazardly proffered defense. Although caused by his trial strategy disclosure, Jones's attorney was not prepared for the late disclosure of this expert and did nothing to counter her testimony. Thus, there was a reasonable probability the jury adopted the expert's explanations for E.'s recantations, late disclosures and continued voluntary contact to convict Jones.

STANDARD OF REVIEW

This Court reviews *de novo* the mixed questions of law and fact presented by claims of ineffective assistance of counsel. *McGarvey v. State*, 2014 MT 189, ¶ 14, 375 Mont. 495, 329 P.3d 576. Tactical decisions made by defense counsel are afforded deference only if they

are based on “reasonable" or "sound" professional judgment. *See*, *Massaro v. United States*, 538 U.S. 500, 505, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003), *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997) ("Even if [counsel's] decision could be considered one of strategy, that does not render it immune from attack--it must be a reasonable strategy.").

ARGUMENT

Kenneth Jones lawyer betrayed Jones's confidence in revealing the defense trial strategy and was unprepared when the State responded by calling Dr. Wendy Dutton in response to his disclosure. A criminal defendant is denied effective assistance of counsel if: (1) his counsel's conduct falls short of the range reasonably demanded in light of the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution; and (2) counsel's failure is prejudicial. *State v. Jefferson*, 2003 MT 90, ¶ 43, 315 Mont. 146, 69 P.3d 641, *citing Strickland*.

I. Jones's lawyer made the professionally unreasonable decision to provide Jones's trial strategy to the prosecutor.

The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), (*quoting Strickland*, 466 U.S. at 688). The United States Supreme Court has noted published professional attorney standards can serve as guides for determining what is reasonable under professional norms. *Strickland*, 466 U.S. at 689 (*citing* ABA Standards for Criminal Justice, Defense Function (2ed. 1980)).

When Jones's counsel revealed the defense trial strategy a mere ten days before the jury was selected he violated ethical and criminal defense function norms. Maintaining confidentiality of trial strategy ensures a fair adversarial trial because the prosecution otherwise gains an advantage about how to structure its presentation of the evidence. "In an adversarial system of justice, a defendant's ability to keep privileged communications with counsel insulated from the prosecution also protects the defendant's Sixth Amendment right to effective assistance of counsel. Many federal and state courts have recognized

that "the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel." *State v. Bain*, 292 Neb. 398, 405–06, 872 N.W.2d 777, 783 (2016).

Confidentiality protections are enshrined in Rule 1.6 of the Montana Rules of Professional Conduct. Two relevant provisions of Rule 1.6 apply to the defense trial disclosure here: "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . . ." Obviously, there is no record of Jones consenting to disclose his confidential defense trial strategy just a short time before trial. So, the next question is whether the disclosure was "impliedly authorized" to meet some undisclosed goal for representing Jones? The only plausible reason would be to negotiate a plea agreement based upon the strength of the perceived defense strategy. However, Jones made it abundantly clear he was not going to admit guilt for something he did not do. Status Tr. at 19-20. No plausible justification can exist when the record on appeal shows that the goals of representation are completely counter the actions taken by

defense counsel. *See*, *State v. Weber*, 2016 MT 138, ¶ 24, 383 Mont. 506, 373 P.3d 26.

The confidentiality rule applies not merely to matters communicated in confidence by the client but also to ***"all information relating to the representation, whatever its source."*** Comments [5] ABA Model Rules of Professional Conduct (emphasis added). Similarly, the Defense Functions provide that a primary duty of defense counsel is to maintain confidential client information during all stages of the criminal representation. Defense Function Standard 4.13(a). Thus, a trial lawyer's decision to betray client confidences to the prosecutor would normally fall below an objective standard of reasonableness under prevailing professional norms. M.R.Prof.C. Rule 1.6. Trial was an inevitability and Jones's position should not have been compromised by a disclosure which he did not directly or impliedly authorize.

Trial strategy is so important because it also incorporates the legal work product of an attorney. The work product doctrine is an evidentiary privilege which reflects the actualities of an adversarial system through protection of the attorney's efforts on behalf of a client. *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

"'At its core, the work product doctrine shelters the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case.' *United States v. Nobles*, 422 U.S. 225, 238, 95 S. Ct. 2160, 2170, 45 L. Ed. 2d 141, 154 (1975)." *State v. Miller*, 231 Mont. 497, 513, 757 P.2d 1275, 1285 (1988).

In *St. Germain v. State*, 2012 MT 86, ¶ 15, 364 Mont. 494, 276 P.3d 886, the defendant's trial attorney turned over confidential defense investigator notes. The trial attorney could not call the investigator as a witness to testify about the credibility of other witnesses, so she was under no obligation to reveal the investigator's notes. *See, Nobles*, 422 U.S. at 228–27 *and* Mont. Code Ann. § 46-15-323. The district court found that this disclosure of confidential defense investigative materials before trial constituted deficient performance under *Strickland* because it fell below an objective standard of reasonableness. *St. Germain*, ¶ 15.

Trial strategy takes an even more important place than the type of fact investigation that was revealed in *St. Germain*. When the prosecution has full access to the defense trial strategy, as it did in Jones's case, it can then tailor its own prosecution trial strategy to counter anything the defense might present. Jones's attorney should

have protected Jones's private information rather than turning it over to the prosecution. His disclosure of defense trial strategy constitutes deficient performance, thus Jones has satisfied the first prong of *Strickland*.

II. After learning of Jones's trial strategy, the prosecution altered its own trial strategy to rely on an expert witness to convict Jones.

The prosecutor obtained a national sex abuse expert and tailored its presentation of evidence to counter Jones's disclosed trial strategy. Under the second prong of *Strickland*, Jones must prove that the result of the proceeding would have been different absent his attorneys unprofessional error in revealing trial strategy. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Soraich v. State*, 2002 MT 187, ¶ 15, 311 Mont. 90, 53 P.3d 878. The "evaluation of prejudice is not limited to a contemporaneous assessment, *i.e.*, viewing the facts at the time of counsel's conduct without the use of hindsight." *Bone v. State*, 284 Mont. 293, 308, 944 P.2d 734 (1997), *overruled by Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861.

In evaluating the prejudice caused by defense counsel's revelation of defense strategy in this case it is helpful to look at those cases where

the trial strategy was obtained by government intrusion. For the majority of courts, it is presumptively prejudicial when a defendant's confidential trial strategy ends up in the possession of the prosecution. *Bain*, 292 Neb. at 417.[2] That's because possession of trial strategy necessarily compromises the effectiveness of defense counsel's representation. When a prosecutor receives a defendant's confidential trial strategy, the probability of prejudice from a Sixth Amendment violation is much higher than with other types of state intrusions into the attorney-client relationship. *Bain*, 292 Neb. at 412. The goal then becomes to neutralize the taint of the trial strategy disclosure by tailoring the relief to assure the defendant the effective assistance of counsel and a fair trial. *State v. Robinson*, No. 232, 2018, 2019 WL 1612836, at *24 (Del. Apr. 16, 2019).

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[2]The *Bain* court cited: *United States v. Rosner*, 485 F.2d 1213, 1224 (2nd Cir.1973), *citing Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). *Accord, e.g., United States v. Dyer*, 821 F.2d 35 (1st Cir.1987); *United States v. Brugman*, 655 F.2d 540 (4th Cir.1981); *United States v. Levy*, 577 F.2d 200 (3rd Cir.1978); *People v. Knippenberg*, 66 Ill. 2d 276, 362 N.E.2d 681 (1977). *See, also, Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

Here, the State did not seek out Jones's trial strategy. Thus, rather than presuming prejudice, the *Strickland* prejudice standard should still control. However, the impact of this disclosure was obvious when the State immediately changed its trial strategy to rely on expert testimony to respond to and defeat the road map presented by Jones's attorney. When Jones argued that it was unusual for E. to go to Arkansas with her father when "you'd expect" someone in E.'s position would normally stay far away from her abuser (Tr. at 711-12), Dr. Dutton opined that victims become complicit with their abusers as a coping strategy. Tr. at 577-78. When Jones argued that you would expect E. to report the abuse to somebody at school while it was happening (Tr. at 712), Dr. Dutton told the jurors that delayed reporting is the norm and it has no bearing on truthfulness. Tr. at 557. When Jones argued that both M. and E. had recanted the reports of sexual abuse in Arkansas (Tr. at 713-14), Dr. Dutton countered by telling the jury about the prevalence of children taking back valid reports of abuse. Tr. at 562.

Kenneth Jones's right to counsel was compromised by his attorney's revelation of defense trial strategy. The prosecution

capitalized on this disclosure obtaining the testimony of Dr. Dutton, a national expert to testify at trial. Dr. Dutton was not on anybody's radar as even a potential witness until ten days before trial. After the disclosure of Jones's trial strategy, she became the primary witness to counter Jones's defense. Thus, Jones suffered actual prejudice caused by his attorney's deficient performance, thus Jones has satisfied both *Strickland* prongs.

CONCLUSION

The Sixth Amendment right to effective assistance of counsel is "indispensable to the fair administration of our adversarial system of criminal justice." It "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." *Maine v. Moulton*, 474 U.S. 159, 168, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). Here the adversarial process did not work because trial counsel gave up Jones's trial strategy. This Court should reverse and remand for a new trial with the effective assistance of counsel.

Respectfully submitted this 24th day of April, 2019.

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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 proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3632, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Chad Wright
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APPENDIX

CERTIFICATE OF SERVICE

I, Chad M. Wright, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-24-2019:

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