

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0687

DOUGLAS P. PASQUINZO

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Fifth Judicial District Court,
Jefferson County, The Honorable Luke Berger, Presiding

APPEARANCES:

TIMOTHY C. FOX
Montana Attorney General
MARDELL PLOYHAR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
mployhar@mt.gov

DOUGLAS P. PASQUINZO
AO# 3019422
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

PRO-SE PETITIONER AND
APPELLANT

STEVEN C. HADDON
Jefferson County Attorney
P.O. Box H
Boulder, MT 59632

ATTORNEYS FOR RESPONDENT
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS2

I. Underlying criminal case.....2

II. Postconviction proceeding.....4

SUMMARY OF THE ARGUMENT5

ARGUMENT7

I. Pasquinzo has not demonstrated that his counsel was ineffective when she allowed him to plead no contest to a sexual offense pursuant to a plea agreement that reduced his charges and provided him with a favorable sentencing recommendation.....7

A. Standard of review and applicable law7

1. Standard of review7

2. Law applicable to claims of ineffective assistance of counsel ...7

3. Pleading requirements for petitions for postconviction relief ...9

B. Pasquinzo’s counsel was not ineffective when she negotiated a plea agreement that let him plead no contest and significantly reduced his sentencing risk10

III. *Hansen* should be overruled, and Pasquinzo’s claim that the court erred in accepting his no contest plea should be denied because he was not prejudiced12

CONCLUSION.....17

CERTIFICATE OF COMPLIANCE.....18

TABLE OF AUTHORITIES

Cases

<i>Baca v. State</i> , 2008 MT 371, 346 Mont. 474, 197 P.3d 948	7, 8
<i>Ellenburg v. Chase</i> , 2004 MT 66, 320 Mont. 315, 87 P.3d 473	8, 9
<i>Garza v. Idaho</i> , 139 S. Ct. 738 (2019)	12-13
<i>Hagan v. State</i> , 265 Mont. 31, 873 P.2d 1385 (1994)	15
<i>Hamilton v. State</i> , 2010 MT 25, 355 Mont. 133, 226 P.3d 588	9
<i>Hardin v. State</i> , 2006 MT 272, 334 Mont. 204, 146 P.3d 746	<i>passim</i>
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	8
<i>Heath v. State</i> , 2009 MT 7, 348 Mont. 361, 202 P.3d 118	7
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	8
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970)	13-14
<i>Pena v. State</i> , 2004 MT 293, 323 Mont. 347, 100 P.3d 154	14
<i>State v. Butler</i> , 272 Mont. 286, 900 P.2d 908 (1995)	16
<i>State v. Hansen</i> , 2017 MT 280, 389 Mont. 299, 405 P.3d 625	<i>passim</i>
<i>State v. Martinez</i> , 2003 MT 65, 314 Mont. 434, 67 P.3d 307	15

Strickland v. Washington,
466 U.S. 668 (1984) 7, 8, 10

Whitlow v. State,
2008 MT 140, 343 Mont. 90, 183 P.3d 861 8

Other Authorities

Montana Code Annotated

§ 45-5-502(3) 14
§ 45-5-503(4)(a) (2013) 2, 3, 4, 11
§ 46-12-204(4) 4, 10, 13
§ 46-20-104(2) 15
§ 46-20-701(1) 15, 16
§ 46-20-701(2) 15, 16
§ 46-21-104(1)(c) 9
§ 46-21-104(2) 9
§ 46-21-105(2) 12, 13, 16-17
§ 46-21-201(1)(a) 9

STATEMENT OF THE ISSUES

1. Whether Pasquinzo's attorney was ineffective when she allowed him to plead no contest to sexual assault pursuant to a plea agreement that resulted in the dismissal of two counts of sexual intercourse without consent, both of which carried mandatory minimum 100-year sentences.

2. Whether Pasquinzo's claim challenging the validity of his plea should be reviewed in postconviction, and if so, whether his convictions should be reversed?

STATEMENT OF THE CASE

Pasquinzo pleaded no contest to two counts of sexual assault pursuant to a plea agreement in which two counts of sexual intercourse without consent were dismissed. (D.C. Doc. 4, attached Acknowledgement of Rights and Plea Agreement (Plea Agreement) and attached Change of Plea Tr. (Tr.) at 9.) He later filed a Petition for Postconviction Relief raising numerous claims, including the claim that his counsel was ineffective when she allowed him to enter a no contest plea to sexual offenses, the court erred in accepting his no contest plea, and his counsel was ineffective when she failed to file a notice of appeal. (D.C. Doc. 2.) The court denied his Petition. (D.C. Doc. 12.) On appeal, he argues that his

counsel was ineffective for allowing him to enter no contest pleas and that the court erred in accepting his invalid plea.

STATEMENT OF THE FACTS

I. Underlying criminal case

Pasquinzo was charged with two counts of sexual intercourse without consent. (D.C. Doc. 4, Plea Agreement.) The victim was his seven-year-old granddaughter. Because the victim was under the age of 12, both charges carried mandatory minimum sentences of 100 years, 25 years of which could not be suspended, and a minimum 25-year parole eligibility restriction. Mont. Code Ann. § 45-5-503(4)(a) (2013); (D.C. Doc. 4, Plea Agreement).

Pasquinzo and the State entered into a plea agreement in which the State agreed to dismiss both counts of sexual intercourse without consent in exchange for Pasquinzo pleading no contest to two counts of sexual assault. The parties agreed to recommend that Pasquinzo be sentenced to the Department of Corrections for a term of 20 years, with 15 of those years suspended, on both counts, with the sentences running concurrently. (*Id.* at 4.)

At the change of plea hearing, the prosecutor explained that the State entered into the plea agreement because it wanted to avoid making the seven-year-old victim testify against her grandfather at a trial. (D.C. Doc. 4, Tr. at 13.)

Pasquinzo's counsel also stated that Pasquinzo "did not want the child to have to go through any further trauma." (*Id.* at 15-16.) Before accepting Pasquinzo's plea, the court advised him of his rights and confirmed that Pasquinzo was knowingly and voluntarily waiving his rights. (*Id.* at 7-9.) After being advised of the rights he was giving up, Pasquinzo pleaded no contest to each count. (*Id.* at 9.) The prosecutor provided a thorough offer of proof, explaining that after the seven-year-old victim spent the summer at the house of her grandfather, Pasquinzo, she reported that he sexually abused her. (*Id.* at 10-12.) Pasquinzo confirmed at the hearing that the State would be able to prove the allegations in the offer of proof beyond a reasonable doubt. (*Id.* at 12.)

A psychosexual evaluation was admitted, which labeled Pasquinzo as a tier two sexual offender. (*Id.* at 16.) The evaluation contained statements from Pasquinzo that suggested he did not regret his actions, he did not believe his conduct harmed the victim, and he shifted blame to the victim. (*Id.* at 28-29.) Before his sentence was imposed, Pasquinzo asked God for forgiveness and stated, "I am sorry." (*Id.* at 25.) The Court sentenced Pasquinzo on each count to fifteen years in prison with five years suspended, with both sentences running concurrently. (*Id.* at 30; D.C. Doc. 2, attached Judgment.)

II. Postconviction proceeding

In October 2017, Pasquinzo filed a Petition for Postconviction Relief that raised several claims, including the claim that the district court erred in accepting his no contest plea to sexual assault, that counsel was ineffective when she allowed Pasquinzo to plead no contest to sexual offenses in violation of Mont. Code Ann. § 46-12-204(4), and that his counsel was ineffective when she failed to file a direct appeal as he requested. (D.C. Doc. 2.)

At the request of the court, the State filed a response. (D.C. Doc. 4.) The State argued that Pasquinzo waived his argument that the court did not have the power to accept the plea when Pasquinzo entered his plea and failed to raise that argument on direct appeal. (*Id.* at 3.) The State argued that Pasquinzo's claim that his counsel was ineffective for allowing him to enter a no contest plea failed because he did not demonstrate that he was prejudiced. (*Id.* at 3-4.) The State noted that Pasquinzo faced a mandatory sentence of 100 years on both counts, and by entering the no contest plea, he was able to obtain a reduction in charges and a recommendation that he be sentenced to the Department of Corrections for 20 years with 5 years suspended. (*Id.* at 4.) The State attached a transcript of the change of plea and sentencing hearing and the plea agreement. (D.C. Doc. 4.)

In Pasquinzo's reply, he argued that his conviction should be reversed based on *State v. Hansen*, 2017 MT 280, 389 Mont. 299, 405 P.3d 625, which held on

direct appeal that the defendant's sentence was illegal when he entered a no contest plea to a sexual offense. (D.C. Doc. 8.) As a remedy, Pasquinzo requested that the charges be dismissed "and his record expunged." (*Id.* at 6.)

The court issued an Order on Petition for Postconviction Relief in which it denied Pasquinzo's Petition. (D.C. Doc. 12.) The court noted that this Court rejected a claim in *Hardin v. State*, 2006 MT 272, that counsel was ineffective for allowing a defendant to plead no contest to a sexual offense. (D.C. Doc. 12 at 5.) The court explained that this Court determined that *Hardin* was not prejudiced, and was instead benefited, when he was able to receive the benefit of a favorable plea agreement and was only required to plead no contest. (*Id.*) The court noted that Pasquinzo relied on *Hansen* in his reply, but the court stated that Pasquinzo's case was not analogous to *Hansen* because that case was a direct appeal and Pasquinzo was in a postconviction proceeding, which was more similar to *Hardin*. (D.C. Doc. 12 at 5.) The court concluded that defense counsel was not deficient when she failed to file an appeal because Pasquinzo waived the right to appeal all nonjurisdictional defects when he entered his plea. (D.C. Doc. 12 at 5-6.)

SUMMARY OF THE ARGUMENT

Although Pasquinzo makes several assertions in his opening brief about the voluntariness of his plea and counsel's failure to file a direct appeal, he does not

directly raise a claim about those issues. Because he is not raising those claims, the State does not address them on appeal.

On appeal, Pasquinzo argues that his counsel was ineffective when she allowed him to enter a no contest plea to a sexual offense and that his convictions should be reversed because they are void and unenforceable under *State v. Hansen*, 2017 MT 280, 389 Mont. 299, 405 P.3d 625. Pasquinzo did not receive ineffective assistance of counsel because, like the defendant in *Hardin*, Pasquinzo received a substantial benefit from his plea agreement and was not prejudiced by being able to receive that benefit by pleading no contest, rather than being required to plead guilty.

Pasquinzo's claim challenging the validity of his plea and sentence is waived because he failed to object in the trial court and waived his right to appeal nonjurisdictional defects when he pleaded no contest. If he did not waive this claim, this Court should conclude that his claim does not demonstrate that the Court committed reversible error because he was not prejudiced by being able to obtain the benefit of a plea agreement without having to expressly acknowledge guilt. If this Court rejects that argument and applies *Hansen*, this case should be remanded to the district court for evidentiary development to determine whether Pasquinzo directed his counsel to file an appeal.

ARGUMENT

I. Pasquinzo has not demonstrated that his counsel was ineffective when she allowed him to plead no contest to a sexual offense pursuant to a plea agreement that reduced his charges and provided him with a favorable sentencing recommendation.

A. Standard of review and applicable law

1. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. Discretionary rulings made by the district court in a postconviction relief proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath*, ¶ 13. Mixed questions of law and fact presented by ineffective assistance of counsel claims are reviewed de novo. *Id.* A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on ineffective assistance of counsel claims. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

2. Law applicable to claims of ineffective assistance of counsel

This Court reviews ineffective assistance of counsel claims applying the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petitioner has the burden to

demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca*, ¶ 16; *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. There is a strong presumption that counsel's actions were within the broad range of reasonable professional assistance. *Baca*, ¶ 17.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). To demonstrate prejudice in a case where the defendant pleaded guilty or no contest, the defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty or no contest and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Hardin*, ¶ 18.

3. Pleading requirements for petitions for postconviction relief

The postconviction statutes are demanding in their pleading requirements. *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473. A petition for postconviction relief must “identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.” Mont. Code Ann. § 46-21-104(1)(c). The petition must also “be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities.” Mont. Code Ann. § 46-21-104(2).

A district court may dismiss a petition for postconviction relief without holding an evidentiary hearing if the petition fails to satisfy the procedural threshold set forth in Mont. Code Ann. § 46-21-104(1)(c). *Hamilton v. State*, 2010 MT 25, ¶ 10, 355 Mont. 133, 226 P.3d 588. Additionally, a district court may dismiss a petition for postconviction relief without ordering a response if the petition, files, and records “conclusively show that the petitioner is not entitled to relief.” Mont. Code Ann. § 46-21-201(1)(a). Alternatively, the court may order a response and, after reviewing the response, “dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue.” Mont. Code Ann. § 46-21-201(1)(a); *Hamilton*, ¶ 12.

B. Pasquinzo’s counsel was not ineffective when she negotiated a plea agreement that let him plead no contest and significantly reduced his sentencing risk.

To prevail on an ineffective assistance of counsel claim, Pasquinzo must demonstrate both that his counsel was deficient and that he was prejudiced. *Strickland*, 466 U.S. at 687. He has failed to demonstrate either prong of the *Strickland* test.

The State acknowledges that Mont. Code Ann. § 46-12-204(4) prohibits a court from accepting a no contest plea to a sexual offense. But counsel was not deficient for allowing Pasquinzo to enter no contest pleas when that allowed him to obtain the benefit of the plea agreement without having to state that he was “guilty,” and there would have been no benefit to pleading guilty instead of no contest. *Hardin*, ¶ 20. This Court stated in *Hardin* that the “court, in accepting Hardin’s nolo contendere plea, did not prejudice him. Rather, Hardin gained the benefits of the plea agreement without an express acknowledgement of his guilt.” *Hardin*, ¶ 20. Similar to *Hardin*, Pasquinzo received the benefit of the plea agreement and the benefit of not having to expressly acknowledge his guilt. His counsel was not deficient in allowing him to do that.

Indeed, Pasquinzo’s counsel negotiated an extremely favorable plea agreement. If he had proceeded to trial and had been convicted of both counts of sexual intercourse without consent, he faced a mandatory minimum sentence on

each count of 100 years, of which no more than 25 years could be suspended, and he could not be paroled in less than 25 years. Mont. Code Ann. § 45-5-503(4)(a) (2013). Both sentences could have been run consecutively for a 200 year sentence. Pasquinzo was instead able to plead to lesser charges, and he obtained a recommendation from the State that he only be committed to the Department of Corrections for 20 years with 15 years suspended. (D.C. Doc. 4, Plea Agreement at 4.) Pasquinzo has failed to demonstrate that his counsel was deficient when she obtained and allowed him to enter into an extremely beneficial plea agreement that did not require him to expressly acknowledge his guilt.

For the same reasons, Pasquinzo has failed to demonstrate that he was prejudiced by his counsel allowing him to enter a no contest plea. This Court explicitly held in *Hardin* that a defendant is not prejudiced when he gains the benefits of a plea agreement without an express acknowledgment of guilt to a sexual offense. Therefore, the district court correctly rejected Pasquinzo's ineffective assistance of counsel claim.

III. *Hansen* should be overruled and Pasquinzo’s claim that the court erred in accepting his no contest plea should be denied because he was not prejudiced.

Pasquinzo relies on *Hansen* to argue that his plea was invalid.¹ Unlike *Hansen*, Pasquinzo did not file a direct appeal arguing that his plea was invalid. The claim Pasquinzo raises alleging that his plea was invalid would normally be barred from postconviction because it is a claim that can be raised on direct appeal. *Hardin*, ¶¶ 13-16; Mont. Code Ann. § 46-21-105(2). Montana Code Annotated § 46-21-105(2) provides that “When a petitioner has been afforded the opportunity for a direct appeal of the petitioner’s conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter.”

Pasquinzo argues, however, that his counsel was ineffective because he directed her to file a direct appeal, and she failed to do so. (Appellant’s Br. at 5.) It appears that Pasquinzo is not raising a stand-alone claim that his counsel was ineffective for failing to file an appeal, but is instead arguing that his claim that the court erred in accepting his plea should be reviewed in the postconviction proceeding because of his counsel’s failure to file an appeal. The State acknowledges that an attorney is ineffective if she fails to file a notice of appeal

¹ It is difficult to discern whether Pasquinzo made this argument in his Petition for Postconviction Relief, but the State has concluded that he did make the argument, even though it was made in the section on ineffective assistance of counsel.

after a defendant requests that she do so, even if the defendant has entered a guilty plea and agreed to waive his right to an appeal. *Garza v. Idaho*, 139 S. Ct. 738 (2019). And if Pasquinzo directed his counsel to file a notice of appeal and she failed to do so, the procedural bar in Mont. Code Ann. § 46-21-105(2) should not be applied to Pasquinzo.

But rather than determine whether Pasquinzo directed his counsel to file a notice of appeal, this Court should overrule *Hansen*. The State acknowledges that Mont. Code Ann. § 46-12-204(4) prohibits a court from accepting a no contest plea in a case involving a sexual offense. Even so, the State disagrees with this Court's conclusion that a no contest plea renders the sentence invalid or that it is a ground for reversal.

Whether a defendant enters a plea of no contest or guilty has no impact on the sentence imposed. A defendant's claim that the court lacked the statutory authority to accept a no contest plea, rather than a guilty plea, should be construed as a claim that the plea is invalid, not as a claim that the sentence is illegal. This Court stated in *Hardin*, ¶ 15, that Hardin's claim that the court "lacked jurisdiction to accept the plea and impose the sentence he received is 'more accurately characterized as a claim that his sentence was illegal as exceeding statutory authority.'" Relying on *Hardin*, this Court held in *Hansen* that the defendant's sentence was illegal because it was imposed upon his no contest plea that was

improperly entered to a sexual offense. *Hansen*, ¶¶ 9-10. But this Court's characterization of Hardin's and Hansen's claim as a claim that the sentence is illegal is manifestly wrong and should be overruled. See *North Carolina v. Alford*, 400 U.S. 25 (1970) (reviewing whether the plea was valid, not whether the sentence was legal). Their claims were instead a claim about whether their pleas were valid, which is a claim challenging the conviction. In *Hardin*, this Court cited *Pena v. State*, 2004 MT 293, ¶ 24, 323 Mont. 347, 100 P.3d 154, in which a defendant tried to characterize a claim about the length of his sentence as an issue of jurisdiction. This Court correctly concluded that Pena's claim was more accurately characterized as a claim that his sentence was illegal. *Pena*, ¶ 24. But unlike *Pena*, *Hardin* and *Hansen* did not involve claims about the length of the sentence. *Pena* should not have been applied to the claim raised in *Hardin* and *Hansen*, which is a claim challenging the underlying conviction based on the type of plea that was entered. Regardless of the plea Pasquinzo entered, his sentence is well within the legal range for a sexual assault of a seven-year-old, which can be punished by up to 100 years in prison. Mont. Code Ann. § 45-5-502(3). It is therefore a legal sentence.

The characterization of the claim matters because this Court will always review a sentence for legality. But Pasquinzo waived his challenge to the form of his plea when he failed to object at the change of plea hearing and entered the plea

waiving his right to appeal nonjurisdictional defects. “The rule is well established that this Court will not address an issue raised for the first time on appeal. A party may not raise new arguments or change its legal theory on appeal. The reason for the rule is that 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 307 (citations omitted); *see also* Mont. Code Ann. § 46-20-104(2) (“Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).”). And “a plea of guilty which is voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses, including claims of constitutional violations which occurred prior to the plea. Thereafter, the defendant may only attack the voluntary and intelligent character of his plea.” *Hagan v. State*, 265 Mont. 31, 35, 873 P.2d 1385, 1387 (1994); *Hardin*, ¶ 23. By entering a no contest plea, Pasquinzo waived his right to appeal any nonjurisdictional defect, including his claim that the form of his plea was improper.

Even if Pasquinzo did not waive his claim that his plea was invalid, he has failed to demonstrate reversible error. Montana Code Annotated § 46-20-701(1) provides “A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.” And “Any error, defect, irregularity, or variance that does not affect

substantial rights must be disregarded.” Mont. Code Ann. § 46-20-701(2). This Court correctly concluded in *Hardin* that the “court, in accepting Hardin’s nolo contendere plea, did not prejudice him. Rather, Hardin gained the benefits of the plea agreement without an express acknowledgment of his guilt.” *Hardin*, ¶ 20. The same is true in this case. Pasquinzo received the benefit of a very favorable plea agreement that reduced his charges and required the State to recommend a lenient Department of Corrections sentence. And he was able to receive that benefit without being required to expressly acknowledge his guilt. Rather than having been prejudiced, Pasquinzo received an extra benefit of not having to plead guilty.

Because Pasquinzo was in no way prejudiced by the court accepting his plea of no contest, rather than guilty, Mont. Code Ann. § 46-20-701(1), (2) prohibits reversal of his conviction. To hold otherwise would be contrary to this Court’s statement that it “will not lend our assistance to a person accused of a crime in escaping the obligations of a plea bargain agreement after accepting its benefits.” *State v. Butler*, 272 Mont. 286, 900 P.2d 908 (1995). To the extent *Hansen* holds otherwise, it should be overruled.

In the alternative, if this Court declines to overrule *Hansen*, this Court should remand this case to the district court for evidentiary development to determine whether Pasquinzo directed his attorney to file an appeal. If he did not,

his claim should be rejected because he failed to use his opportunity for a direct appeal and his claim is barred by Mont. Code Ann. § 46-21-105(2).

CONCLUSION

The State respectfully requests this Court affirm the district court's denial of Pasquinzo's Petition for Postconviction Relief and affirm his convictions and sentences.

Respectfully submitted this 11th day of July, 2019.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ *Mardell Ployhar*
MARDELL PLOYHAR
Assistant Attorney General

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 Times New Roman 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 3,824 words, excluding certificate of service and certificate of compliance.

/s/Mardell Ployhar
MARDELL PLOYHAR
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-11-2019:

Steven C. Haddon (Prosecutor)
P.O. Box H
Boulder MT 59632
Representing: State of Montana
Service Method: eService

Douglas P. Pasquinzo (Appellant)
AO# 3019422
Montana State Prison
700 Conley Lake Road
Deer Lodge MT 59722
Service Method: Conventional

Electronically signed by Dawn Lane on behalf of Mardell Lynn Ployhar
Dated: 07-11-2019