IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0455

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JACOB WILLIAM ABEL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Dan Foley, Presiding

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STATEMENT OF THE ISSUE

Has Appellant met his burden to demonstrate an error occurred when the district court followed existing precedent and accepted defense counsel's representation, in Appellant's presence, that Appellant declined to testify?

STATEMENT OF THE CASE

In July 2018, the State charged Jacob William Abel (Abel) with felony partner family member assault (PFMA)—strangulation, and felony assault with a weapon. (D.C. Doc. 3.) In April 2019, a jury convicted Abel of felony PFMA-strangulation and acquitted Abel of the assault with a weapon after a two-day trial at which Abel did not testify. (D.C. Doc. 39, attached to Appellant's Br. as App. A.)

The State rested its case just before 5 p.m., on the first day of trial. (4/10/2019 Trial Tr. (Trial Tr.) at 358-59.) At a sidebar conference with all counsel and Abel present, the district court asked whether Abel was going to testify. (*Id*. at 359, attached as Appellant's App. B.) Defense counsel told the court that he was unsure. (*Id*.) The court remarked that Abel and his attorney could use the evening recess to discuss the matter, and scheduled a brief conference for the next morning. (*Id*. at 362.) The court advised the parties that if Abel reported the next morning that he was not going to testify and/or call witnesses, they would use the conference to settle jury instructions. (*Id*.)

At the conference the next morning, Abel did not immediately inform the court whether he was planning to testify. (*Id.* at 364.) When defense counsel asked Abel what he had decided, Abel mentioned the name of a person not listed as a witness and then asked if he could "say something." (*Id*.) Defense counsel then told Abel that the two of them needed to talk alone, as they were in open court and Abel would incriminate himself. (*Id*. at 365.) The court took a brief recess so Abel and his attorney could discuss the issue privately. (*Id*.) When Abel and his attorney returned, defense counsel reported that Abel wished to remain silent and the defense would not present any witness testimony. (*Id*.) Abel did not speak up or indicate he disagreed with his attorney's statements. (*Id*.)

At his sentencing hearing, Abel called two witnesses who testified that he was not a violent person and could not have committed the crime for which he was convicted. (6/13/2019 Sent. Hr'g Tr. (Hr'g Tr.) at 484-95.) Abel took the witness stand and testified to a version of events that contradicted the victim's trial testimony. (*Id.* at 497-511.) The court found Abel's testimony unpersuasive. (*Id*. at 526.) The court commented that the victim had been clearly disinterested in testifying and found her to be candid and honest. (*Id.* at 527.) The court concluded that Abel was properly convicted and proceeded to pronounce sentence. (*Id.)*

STATEMENT OF THE FACTS

I. Underlying facts of Abel's crime

In April 2018, Kayla Walton (Walton) called 911 to report that Abel, her live-in partner, "smacked me in the face" with a metal folding chair. (Trial Tr. at 226, 227-28.) Flathead County Sheriff's Deputy Tyeler Smith (Deputy Smith) responded to the call and traveled to Walton's and Abel's shared residence. (*Id.* at 233-34, 296.) Walton was "very emotional and hard to understand at times" but attempted to tell Deputy Smith what had occurred. (*Id.* at 298.) Deputy Smith observed that Walton was bleeding from the left side of her face, had a swollen left eye socket, and had a small laceration under her left eye. (*Id*. at 298.)

While taking photographs of Walton's bleeding cut beneath her eye, Deputy Smith saw bruising around Walton's throat and asked Walton about it. (*Id*. at 234, 299.) Walton told him that Abel caused her neck bruising two days earlier when he "threw me on the ground and choked me." (*Id*. at 236, 299.)

Deputy Smith explained that he did not enter or search Walton's house when he responded to Walton's 911 call because he was initially the only deputy on the scene. (*Id.* at 301.) Deputy Smith did not know Abel's location, so for safety purposes stayed outside the house with Walton and waited for medical personnel to arrive. (*Id.* at 301.) Deputy Smith did not observe the metal folding chair with which Abel allegedly struck Walton. (*Id*. at 305.) Once medical personnel arrived

and began to evaluate Walton's injuries, Deputy Smith unsuccessfully searched for Abel in the outbuildings near Walton's house. (*Id*. at 301.) Law enforcement officers were unable to locate Abel that evening. (*Id*. at 309.)

A few days later, a concerned citizen called law enforcement to request a welfare check for a woman with a black eye pushing a baby stroller down the street. (*Id*. at 337.) Deputy Jesse Olsen (Deputy Olsen) responded to the report and located Walton near a gas station. (*Id*. at 338.) Deputy Olsen spoke with Walton and observed she had a black eye, several stitches near her left eye, and bruising around her neck. (*Id*. at 339.) Walton explained to Deputy Olsen that her injuries were a result of Abel assaulting her and that she had already reported it to law enforcement. (*Id*. at 339-40.) Deputy Olsen photographed Walton's injuries. (*Id*. at 340-41.) Walton told Deputy Olsen that Walton saw Abel's truck parked at the Montana Club. (*Id*. at 350.) Deputy Olsen searched and found Abel's alleged vehicle at the Montana Club but did not locate Abel. (*Id*. at 343-45.)

Detective Commander Brandy Hinzman (Detective Hinzman) called Walton approximately two weeks after Walton's April 24, 2018 911 call to conduct a follow-up investigation. (*Id*. at 282-83.) Walton told Detective Hinzman that she was not welcoming law enforcement into her home for further investigation or interviews and that Walton did not want to pursue any punishment against Abel. (*Id*. at 283.)

On July 19, 2018, Walton again called 911. (*Id*. at 253.) When law enforcement responded to Walton's residence, Abel was in his truck in Walton's driveway. (*Id*. at 254.) When officers pulled into Walton's driveway, Abel "took off [on foot] and hid." (*Id*.) Law enforcement officers found Abel hiding in a shed located in Walton's backyard. (*Id*. at 255.) Walton was standing outside nearby as officers contacted Abel in the backyard. (*Id.*) Abel told her that he had given his keys to a friend and was not going to drive his truck and offered Walton the $600 cash in his wallet. (*Id*.)

The State charged Abel by Information with felony partner family member assault—strangulation and felony assault with a weapon. (D.C. Doc. 3.) Two days before his trial, Abel pulled up to Walton's apartment complex. (Trial Tr. at 256.) Abel told Walton that she "shouldn't go to court . . . [she] didn't need to go." (*Id*.) The State was forced to send officers to enforce Walton's subpoena, but Walton did appear at Abel's trial and testified as a witness for the State. (*Id*. at 222-88.)

II. Abel's decision not to testify

At Abel's trial Walton, Deputy Smith, and Deputy Olsen all testified on behalf of the State. On the first day of trial, the State rested its case shortly before 5 p.m. (*Id*. at 358-59.) The court immediately conducted a sidebar conference with

the prosecutor, defense counsel, and Abel to determine whether Abel planned to testify:

> [DISTRICT COURT]: Mr. Abel is present. Is your client going to testify?
>
> [Defense counsel]: I don't know as I stand here, I need to discuss it…

(*Id*. at 359.)

> [DISTRICT COURT]: . . . I assume that over the evening recess, (defense counsel) you'll have time to discuss with your client whether he'd like to testify.
>
> [Defense counsel]: Yes.
>
> [DISTRICT COURT]: If he decides not to testify, will you be calling any witnesses in your case in chief?
>
> [Defense counsel]: No, Your Honor.

(*Id*. at 363.)

The next morning the court again met with the prosecutors, defense counsel, and Abel outside the presence of the jury. (*Id*. at 364.) Defense counsel immediately asked Abel what he wanted to do, and Abel responded by naming a person he apparently wanted to call as a witness. (*Id*.) Defense counsel responded by telling Abel the defense had not listed that person as a witness and again asked Abel if he planned to testify. (*Id*.)

The court offered to give the defense more time to discuss the issue, but defense counsel declined, explaining that he and Abel had spent plenty of time. (*Id*.) Abel asked if he could say something, to which his attorney responded, "We

need to talk alone, then. You can't say it in open court or you will incriminate yourself. This is a courtroom." (*Id.* at 365.) The court then took a short recess to allow Abel to talk to his attorney privately. (*Id*.)

When Abel and his attorney returned, defense counsel advised that Abel "wishes to remain silent, Your Honor. We won't be presenting any witness testimony." (*Id*. at 365.) The jury ultimately found Abel guilty of strangulation of a partner or family member and not guilty of assault with a weapon. (*Id*. at 469.)

III. Sentencing

At the sentencing hearing, Abel called two character witnesses. (Hr'g Tr. at 484-95.) Abel then testified so he could "tell the court exactly what happened [regarding the strangulation incident]." (*Id.* at 500.) The district court pointed out, "You [Abel] didn't testify at trial." (*Id*.) Abel responded, "I did not. I wanted to. I was talked out of it at the last moment. Really didn't get to make a decision." (*Id.* at 501.)

Abel claimed that on the April 2018 night of Walton's 911 call, Walton was "freaking out" when he returned to their shared home. (*Id*. at 502.) Abel said that Walton was throwing objects at him, breaking glass, and was "so intoxicated drunk that she was just out of control, literally out of control." (*Id*. at 502-03.) Abel said he hugged Walton because he wanted to calm her down. (*Id*. at 503.) Abel

explained that Walton started hitting herself in her chest a couple of times and when he again tried to hug her and calm her down, she started to kick and bit his arm, making Abel bleed. (*Id*.) Abel said he then "literally ran out the door and left and slept in my truck." (*Id*.)

The district court did not find Abel's testimony "persuasive in any respect." (*Id*. at 526.) The court found that despite her many challenges, Walton was a candid and believable witness who "did not appear to me that she came to court and testified at the trial with the proverbial axe to grind against Mr. Abel." (*Id*. at 527.) The court concluded Abel's conviction was proper and pronounced sentence. (*Id*.)

SUMMARY OF THE ARGUMENT

This Court should affirm Abel's conviction because Abel fails to meet his threshold burden to establish that the district court erred. The district court followed this Court's longstanding precedent that a trial court should not question the defendant directly about his choice to testify on the record. The court properly communicated with defense counsel, in Abel's presence, to determine whether Abel waived his right to testify. There is no error and therefore no basis for this Court to conduct either harmless error review or plain error review.

Abel asks this Court to reverse *State v. Hamm*, 250 Mont. 123, 818 P.2d 830 (1991), but does not and cannot show that *Hamm* is manifestly wrong. Abel resurrects Hamm's failed argument that a trial court should conduct a colloquy with a criminal defendant and obtain an on-the-record waiver of defendant's right to testify. This issue has been long settled by *Hamm*'s adoption of the Ninth Circuit's careful reasoning in *United States v. Martinez*.

The Ninth Circuit, in a split with other circuit courts, continues to apply the *Martinez* analysis and hold that a court should *not* require an on-the-record colloquy to obtain a valid waiver. The Ninth Circuit's rationale maintains the defendant himself retains the ultimate decision about whether to testify. It provides a defendant the best opportunity to make an informed choice about whether to testify. The defendant's attorney is the only person with whom a defendant can share all relevant facts that impact the crucial decision about whether the defendant testifies and where defendant can understand the legal ramifications of waiving his arguably more fragile right to remain silent.

The United States Supreme Court has never imposed a duty upon trial courts to advise defendants of their right to testify and to obtain an on-the-record waiver. The Supreme Court has let stand at least one state court's decision that expressly declined to impose that duty. There is a split between circuit and state courts as to whether trial courts have such a duty. Abel urges this Court to adopt the holdings

from circuit and state courts who have rejected *Martinez*'s rationale. The *Martinez* position remains the better approach as it best protects constitutional rights.

Abel cites factually distinguishable Montana cases, *Bird* and *Finley*, to erroneously assert this Court must overrule its holding in *Hamm*. As *Hamm* is based upon sound reasoning and not manifestly wrong, there is no basis for this Court to depart from stare decisis.

By implication, Abel has asserted that his counsel provided constitutionally ineffective assistance regarding his waiver. If Abel believes his counsel provided ineffective assistance in the advice provided to Abel concerning his decision not to testify, he can raise that claim in a state postconviction proceeding. There is no reason for this Court to invoke its sparingly used plain error review to reverse his conviction where the record does not establish that any error occurred; thus, there is nothing for this Court to review. To the extent Abel asks this Court to review the trial court's inquiry into his decision not to testify for insufficiency, the trial court had no requirement to make the record that Abel now claims was constitutionally required.

This Court should affirm Abel's conviction.

ARGUMENT

I. Standard of review

This Court's review of preserved constitutional errors is plenary. *State v. Stock*, 2011 MT 131, ¶ 16, 361 Mont. 1, 256 P.3d 899 (internal citation omitted). However, this Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g.,* S*tate v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. "Failure to make a timely objection during trial constitutes a waiver of the objection" for purposes of appeal. Mont. Code Ann. § 46-20-104(2). *See also* Mont. Code Ann. § 46-20-701(2).

This Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine. The "purpose of plain error review is to correct an otherwise objectionable error not objected to at trial that impacts the "fairness, integrity, and public reputation of judicial proceedings." *State v. Mercier*, 2021 MT 12, ¶ 35, ___ Mont. ___, 479 P.3d 967. (internal citation omitted). This Court "invokes[s] plain error review sparingly, on a case-by-case basis, and only 'in situations that implicate a defendant's fundamental constitutional rights when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.'" *Id.* "In so doing, we reemphasize the necessity for

contemporaneous objections to claimed error, and we caution counsel that, except in the class of cases mentioned, the provisions of § 46-20-701, MCA, will be applied in the absence of contemporaneous objection." *Finley*, 276 Mont. at 137-38, 915 P.2d at 216.

II. This Court should not use plain error review to overrule precedent that is not manifestly wrong.

To support his appeal, Abel "bears the burden to establish error by a district court…[and] must establish such error with legal authority." *State v. Giddings*, 2009 MT 61, ¶ 69, 349 Mont. 347, 208 P.3d 363. This Court has statutory authority to review alleged errors that involve the merits of a case; failure to make a timely objection during trial constitutes a waiver of the objection except as provided in Mont. Code Ann. § 46-20-701(2). Mont. Code Ann. § 46-20-104. The "general rule is that an objection concerning constitutional matters must be raised before the trial court, and if the objection is not made, it will not be reviewed on appeal." *State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880.

This Court has long recognized that "criminal defendants have a constitutional right to testify under Art. II, § 24, Mont. Const. (1972)." *State v. Hamm*, 250 Mont. 123, 128, 818 P.2d 830, 833 (1991) *overruled on other grounds by State v. Running Wolf*, 2020 MT 24, 398 Mont. 403, 457 P.3d 218. The right to testify also "stems from several provisions of the Constitution, including

the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's privilege against self-incrimination. *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987). For a waiver to be effective, a defendant must waive a known right knowingly, intelligently, and voluntarily. *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶¶ 16-18, 396 Mont. 57, 443 P.3d 504.

A. Abel fails to meet his burden of demonstrating the district court erred.

The district court followed longstanding Montana law when it addressed defense counsel to determine if Abel waived his right to testify. This Court has determined that a district court has no duty to advise the defendant of his right to testify, nor is the court required to ensure that a defendant waives that right on the record. *Hamm*, 250 Mont. at 129, 818 P.2d at 833, adopting *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989) *vacated on other grounds by United States v. Martinez*, 928 F.2d 1470 (9th Cir. 1991). In Montana, "[w]aiver of this right is presumed from the defendant's failure to testify or notify the court of his desire to do so." *Hamm*, 250 Mont. at 128, 818 P.2d at 833.

In *Hamm*, the defendant argued that "this Court should require the trial court to inform defendants on-the-record of their right to testify." *Id.*, 250 Mont. at 127, 818 P.2d at 832. The State argued the court should instead adopt the majority position of *Martinez* and not impose that duty upon trial courts. *Id.*, 250 Mont.

at 128, 818 P.2d at 833. To support his argument, Hamm relied in part on *Boyd v. United States*, 586 A.2d 670, (D.C. App. 1991), a case that criticized the *Martinez* decision. *Id.* at 129, 818 P.2d at 833. This Court agreed with the State and adopted the majority position of the Ninth Circuit in *Martinez*. *Id.*, 250 Mont. at 128. In this case, the district court followed this Court's longstanding precedent; the court committed no error by communicating with Abel's counsel and accepting counsel's representations, made in Abel's presence, as Abel's valid waiver of his right to testify.

The district court was entitled to presume Abel's knowing and intelligent waiver by Abel "failing to testify and failing to notify the court that he wished to testify." *Id.*, 250 Mont. at 129. Following this Court's long-settled precedent, the district court did not interfere with defense strategy by engaging with Abel directly. The court allowed Abel and his attorney multiple opportunities to discuss which right to waive (the right to testify or the right to remain silent) within the protections of attorney-client privilege.

The record suggests that Abel was conflicted about whether to testify, but there is no evidence that Abel did not make the choice himself. Abel's complaint that he was "talked out of" testifying merely underscores that Abel and his attorney had a substantial conversation concerning his rights, after which Abel decided not to testify. Under *Hamm*'s longstanding holding, Abel was required to speak up if

he wanted to testify over his counsel's better judgment. Instead, he sat quietly while his attorney advised the court Abel would not testify and that the defense would call no witnesses. In hindsight, Abel may be dissatisfied with his decision, but he was not deprived of his fundamental right to testify.

There is no basis for harmless error or plain error review because Abel was not deprived of his right to testify. Deprivation of the right to testify is a constitutional error excluded from a "very limited class of cases" subject to automatic reversal. *State v. LaMere*, 2000 MT 45, ¶ 23, 298 Mont. 358, 2 P.3d 204. As trial error, deprivation of the right to testify is subject to harmless error review in which the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *State v. Mercier* 2021 MT 12, ¶¶ 30-31, 403 Mont. 34, 479 P.3d 967. However, Abel fails to demonstrate that the district court erred when it followed the law. Thus, this Court is not prompted to conduct review and should affirm Abel's conviction.

Even assuming that this Court were to conclude the district court erred, Abel failed to make the requisite record for this Court to conduct harmless error review. "Trial error… can be reviewed qualitatively for prejudice relative to other evidence introduced during trial and, therefore, is not automatically reversible. *State v. Garding*, 2013 MT 355, ¶ 28, 373 Mont. 16, 315 P.3d 912. Abel argues that "there is some indication of what the testimony would have been, because the defendant gave a

summary version of his testimony at the sentencing hearing." (Appellant's Br. at 14.) Though Abel did not preserve his objection for appeal, the trial court's opinion of Abel's sentencing testimony is telling. The court did not find Abel's testimony persuasive and found the victim's testimony credible. Therefore, when compared to trial evidence, Abel's hearing testimony does not establish he suffered prejudice. Abel's argument does not trigger harmless error review and the State bears no burden to prove an error was harmless beyond a reasonable doubt. This Court should decline to engage in harmless error review and affirm Abel's conviction.

B. This Court should affirm Abel's conviction because Abel fails to demonstrate that *Hamm* is manifestly wrong.

This Court should not overrule *Hamm* because Abel has not demonstrated that its decision in *Hamm* is manifestly wrong. This Court may overrule precedent that is manifestly wrong but doing so must be a clear exception to the rule of stare decisis. *Formicove, Inc., v. Burlington N.*, 207 Mont. 189, 194-95, 673 P.2d 469, 472 (1983). *Hamm*'s sound rationale is reflected in a series of subsequent Ninth Circuit cases, which continue to use the reasoning of *Martinez*. The *Martinez* court highlighted the nuanced considerations involved with the fundamental right to testify. "The right to testify in one's own behalf is a [constitutional] right . . . essential to due process of law in a fair adversary process." *Martinez*, 883 F.2d at 754. *Hamm* restated the Ninth Circuit's important reasons in declining to impose a

duty for courts to advise defendants of their right to testify and obtain an on-the-record waiver:

> At least seven reasons have been given for this conclusion: First, the right to testify is seen as the kind of right that must be asserted in order to be recognized. Second, it is important that the decision to testify be made at the time of trial and that the failure to testify not be raised as an afterthought after conviction. Third, by advising the defendant of his right to testify, the court could influence the defendant to waive his right not to testify, "thus threatening the exercise of this other, converse, constitutionally explicit and more fragile right." Fourth, a court so advising a defendant might improperly intrude on the attorney-client relation, protected by the Sixth Amendment. Fifth, there is danger that the judge's admonition would introduce error into the trial. Sixth, it is hard to say when the judge should appropriately advise the defendant --- the judge does not know the defendant is not testifying until the defense rests, not an opportune moment to conduct a colloquy. Seventh, the judge should not interfere with defense strategy.

Hamm, 250 Mont. at 128-29.

The Ninth Circuit pointed out the incongruity of requiring a trial court to advise the defendant of his right to testify when it had no corresponding duty to advise the defendant of his right *not* to testify, so by taking the stand a defendant waives the right to remain silent "even though the record gives no explicit assurance that this waiver was knowing and intelligent." *Martinez*, 883 F.2d at 756-57. A defendant faces a difficult choice whether to preserve his constitutional right to complete silence or to testify and "put on what may be his only defense and thereby open himself to cross-examination." *Id.*, 883 F.2d at 756-57.

The Ninth Circuit therefore concluded

> it is primarily the responsibility of counsel, not the judge, to advise a defendant on whether or not to testify, and the tactical advantages and disadvantages of each choice. For the court to discuss the choice with the defendant would intrude into the attorney-client relationship protected by the sixth amendment.

Id.

Here, Abel enjoyed the benefit of the Sixth Amendment right to assistance of counsel and was represented by an attorney at trial. Attorney-client privilege prevents this Court from knowing exactly why Abel did not testify and how his attorney advised him on the matter. The record does establish that the court accepted Abel's waiver only after he had met with his attorney several times. The court did not interfere with the attorney-client relationship and allowed Abel to make his choice after multiple consultations with his counsel. As *Martinez* explained, and *Hamm* recognized, the decision whether to testify is a choice best left to discussion between a defendant and his attorney. *See Martinez*, 883 F.2d at 757 and *Hamm*, 250 Mont. at 128-29. 818 P.2d at 833.

Abel asks this Court to reverse itself based upon cases that represent only one faction of state and circuit courts on the issue of waiver of right to testify. Abel cites *Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001), which is the first time the Second Circuit ruled on whether a "defendant contending that his trial counsel has prevented him from testifying must object at trial or be deemed to have

forfeited the claim." The Second Circuit recognized "[o]ther circuits that have addressed this question have not reached uniform results." *Id*., 250 F.3d at 83. The Second Circuit highlighted that the Eighth and Fourth Circuits followed the Ninth Circuit while the DC, Seventh, and Eleventh Circuits "held that a defendant need not object at trial to preserve a claim that counsel prevented such testimony." *Id*. The Ninth Circuit has maintained its reliance on the *Martinez* reasoning to subsequently hold that a trial court has no duty to advise a defendant on the record about his right to testify.

For example, in *United States v. Edwards*, 897 F.2d 445, 446-47 (9th Cir. 1990) (internal citations omitted), the Ninth Circuit applied *Martinez*, holding "Edwards' silence at trial effectively waived his right to testify on his own behalf . . . [and] he is presumed to assent to his attorney's tactical decision not to have him testify." In *United States v. Joelson*, 7 F.3d 174, 178 (9th Cir. 1993), the Ninth Circuit affirmed the *Martinez* reasoning, finding

> [t]he trial court has no duty to advise the defendant of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred. Rather, if the defendant wants to testify, he can reject his attorney's tactical decision by insisting on testifying, speaking to the court, or discharging his lawyer. The court held that waiver of the right to testify…is presumed from the defendant's failure to testify or notify the court of his desire to do so. [internal citations omitted]

Id., 7 F.3d at 177.

More recently, in *United States v. Kowalczyk*, 805 F.3d 847, 859 (9th Cir. 2015), the Ninth Circuit stated "[w]aiver of the right to testify may be inferred from the defendant's conduct and is presumed from the defendant's failure to testify or notify the court of his desire to do so." *See also United States v. Contreras Orozco*, 764 F.3d 997, 1001 (9th Cir. 2014) (Defendant does not have a right to testify after prosecution's final argument), *United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999) ("[W]hile waiver of the right to testify must be knowing and voluntary, it need not be explicit; the court may presume a defendant is following his attorney's tactical decision not to have him testify;" the "district court has no duty to affirmatively inform defendants of their right to testify, or to inquire whether they wish to exercise that right.").

Abel characterizes a Hawaii Supreme Court case (*Tachibana*) as "the leading case on the subject" (Appellant's Br. at 10), but many jurisdictions have not followed its precedent. In *Tachibana v. State*, 900 P.2d 1293 (Haw. 1995), the Hawaii Supreme Court expressly declined to adopt the Ninth Circuit's "demand rule" for evaluating a defendant's claim that their attorney deprived them of the right to testify. However, the Hawaii Supreme Court conceded that "the majority of jurisdictions have declined to adopt a colloquy requirement." *Id.*, 900 P.2d at 1303.

The Illinois Supreme Court expressly declined to follow *Tachibana* in *People v. Smith*, 680 N.E.2d 291 (Ill. 1997). Defendant argued that he was "entitled to a new sentencing hearing because the record does not reflect that he waived his right to testify." *Id.*, 680 N.E.2d at 302. The defendant never indicated during his hearing that he wished to testify on his own behalf, nor did he raise the issue in a post-sentencing motion. *Id.*

On appeal, defendant relied on *Tachibana* to urge the Supreme Court to "adopt the holding of a small minority of jurisdictions which have required a defendant's waiver of the right to testify to be on the record." *Id.*, 680 N.E.2d at 234. The Supreme Court recognized that "a majority of jurisdictions, and our own appellate court, have found that a trial court has no duty to advise a defendant, represented by counsel, of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred. *Id*., 680 N.E.2d at 302. Noting that defendant did not assert that his counsel was ineffective for advising him to refrain from testifying, the Supreme Court found

> the decision whether to take the witness stand and testify in one's own behalf ultimately belongs to the defendant (internal citations omitted), but it should be made with the advice of counsel . . . and must be viewed as strategy with which he agreed . . . defendant waived his right to testify because he did not contemporaneously assert his right to do so and that the trial court did not err by failing to advise defendant of his right to testify . . . or by failing to require that defendant's waiver of the right to be incorporated in the record.

Id., 680 N.E.2d at 235-36. The United States Supreme Court allowed the Illinois Supreme Court's *Smith* rationale to stand in more recent cases.

In denying certiorari, the United States Supreme Court in *Chatman v. Illinois*, 127 S. Ct. 1331 (U.S. 2007), let stand the appellate decision of *People v. Chatman*, 830 N.E.2d 21 (Ill. App. Ct. 2005). In *Chatman*, the defendant "contend[ed] that he was improperly denied his constitutional right to testify in his own defense and the trial court failed to obtain from defendant a voluntary waiver of that right." *Id.*, 830 N.E.2d at 29. The defendant argued that the court should adopt *Tachibana*, analogizing the right to testify to jury waivers and guilty pleas that require a clear record that a defendant knowingly and voluntarily entered into such decisions. *Id*., 830 N.E.2d at 30. The Appellate Court declined, recognizing that the Illinois Supreme Court had "explicitly declined to follow *Tachibana* . . . following the majority of jurisdictions in maintaining that a defendant's waiver of his right to testify is presumed where he fails to notify the court of his desire to do so. *Id*., 830 N.E.2d at 30, citing *People v. Smith*, 680 N.E.2d 291 (1997). The Appellate Court rejected defendant's invitation, found the trial court did not err, and "decline[d] to deviate from the holding of *Smith. Id*., 830 N.E.2d at 30. The Washington Supreme Court agrees with both the Illinois Supreme Court and this Court.

In *State v. Thomas*, 910 P.2d 475, 478 (Wash. 1996), the defendant claimed that the trial court must inform a defendant of the constitutional right to testify in one's own behalf to constitute a knowing, voluntary, and intelligent waiver. The Washington Supreme Court disagreed, noting that "the great majority of state courts to have reached this issue have . . . determined that the United States Constitution imposes no obligation on trial judges to inform defendants of this right." *Id*. Citing *Martinez,* the Washington Supreme Court stated:

> We believe that the right to testify belongs in the category of rights for which no on-the-record waiver is required. In *Martinez,* the Ninth Circuit likened the right to testify to the right to remain silent, the right to represent oneself, and the right to confront witnesses. *Martinez,* 883 F.2d at 756-59. The right to remain silent is waived by the act of taking the stand; the trial court has no duty to inquire as to whether the defendant knowingly and intelligently waived the right. *Id.* at 756-57. Likewise, a court is not obligated to obtain an on-the-record waiver of the right to self-representation when a defendant appears with counsel. *Id.* at 757; *State v. Garcia*, 92 Wn.2d 647, 654, 600 P.2d 1010 (1979) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). As with the right to self-representation, the right not to testify, and the right to confront witnesses, the judge may assume a knowing waiver of the right from the defendant's conduct. The conduct of not taking the stand may be interpreted as a valid waiver of the right to testify.

Id., 910 P.2d at 479. Heeding caution from the First and Seventh Circuits, the Washington Supreme Court cited the "[potential] undesirable effect of influencing the defendant's decision not to testify. *Id*., citing *United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir. 1985) and *Siciliano v. Vose*, 834 F.2d 29, 30-31 (1st Cir. 1987).

Counter to Abel's assertion, this Court should not overturn *Hamm* based upon its holding in *State v. Bird*, 2002 MT 2, 308 Mont. 75, 43 P.3d 266. There, the defendant was excluded from juror *voir dire* during trial without being informed by anyone—the court or by his own attorney—that he had a fundamental right to be present. *Id*., ¶ 37. This Court found that Bird's absence deprived him of the opportunity to witness a juror's possible bias and then direct his attorney to strike the juror with a preemptory challenge. *Id.*, ¶ 28. This Court reversed Bird's conviction because his exclusion from *voir dire* was structural error. *Id*., ¶ 40. In the instant case, both the fundamental right at issue and the result are different. Abel fully participated in his decision not to testify. He was not excluded from the decision; Abel's attorney advised the court of Abel's decision with Abel present and only after he had engaged in lengthy discussion with his client. Whereas Bird was not aware he had a choice to make, Abel was present when his counsel informed the court that the defense would not call any witnesses.

This Court should also decline Abel's invitation to overrule *Hamm* based upon *Finley*, ¶ 9. There, "[a]t the outset [of the hearing], defense counsel informed the District Court that Finley had changed his mind and had decided to admit to the alleged probation violations." *Id*., ¶ 9. Without engaging in a colloquy with Finley, the court pronounced sentence. *Id*., ¶ 27. Finley then immediately asked to withdraw his guilty plea and the court denied his request. *Id.* On appeal, Finley

claimed the district court "denied him due process by finding him guilty of probationary violations on the sole basis of his attorney's representations." *Id.*, ¶ 25. This Court found that "Finley's constitutional due process rights were abrogated by the court's failure to insure that Finley knowingly, intelligently and voluntarily waived his right to a re-revocation hearing." *Id.*, ¶ 37. Unlike the court in *Finley*, the court here did not immediately accept counsel's representations. Additionally, Finley's waiver of a revocation hearing did not preserve a converse right. Finally, the district court failed to follow existing precedent about what the court must do before accepting admissions in a probation revocation. *See* Mont. Code Ann. § 46-18-203(4); *See also* requirements to accept a guilty plea, Mont. Code Ann. § 46-12-210. In this case, the district court properly followed precedent.

When Abel appeared undecided about testifying, the court immediately offered to recess so Abel and his attorney could continue their discussion. (Trial Tr. at 364.) The court did not directly address Abel because it is not allowed or required to do so under existing precedent. The court preserved Abel's rights by allowing him to discuss the complex decision privately with his attorney.

This Court's position in *Hamm* protects the fundamental role of defense counsel to assist defendants with the difficult decision about whether to testify. The Ninth Circuit's position allows defendants to discuss the decision with their attorney—the only person with whom they can be completely and safely

transparent. Because exercise of the right to testify waives the converse fundamental right to remain silent, it is a decision that requires all relevant information. By making that decision within the confines of the attorney-client privilege, a defendant can make a valid waiver of one of those two rights.

Because the district court did not err, plain error review is also inapplicable. Although the subject matter involves a constitutional right, Abel has not shown that failure to review his failure to testify would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise, the integrity of the judicial process. The compelling reasoning of the Ninth Circuit adopted by this Court in *Hamm* is not manifestly wrong.

III. To the extent Abel implicitly argues his attorney pressured him into remaining silent, Abel can raise an ineffective assistance of counsel claim in a postconviction proceeding.

If Abel wishes to assert that his counsel provided constitutionally ineffective assistance regarding Abel's decision not to testify, he may raise that claim in a state postconviction proceeding. *See State v. Hamilton*, 2007 MT 223, 339 Mont. 92, 167 P.3d 906. The Seventh Circuit recently held that an "ineffective assistance of counsel claim is the appropriate vehicle in which to allege that counsel violated a defendant's right to testify." *Hartsfield v. Dorethy*, 949 F.3d 307 (7th Cir. 2020).

The Seventh Circuit noted that its sister circuits agreed with that conclusion and found it was for good reason:

> It is primarily the responsibility of the defendant's counsel, not the trial judge, to advise the defendant on whether or not to testify and to explain the tactical advantages and disadvantages of doing so." *United States v. Campione*, 942 F.2d 429, 439 (7th Cir. 1991) (quoting *United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir. 1985)); *see also Teague*, 953 F.2d at 1534. Not to put too fine a point on it, but we have described " '[t]he decision not to place the defendant on the stand [as] a classic example' of a strategic trial decision." *Stuart*, 773 F.3d at 853 (quoting *United States v. Norwood*, 798 F.2d 1094, 1100 (7th Cir. 1986)) (additional citations omitted); *see also Stark*, 507 F.3d at 516 (calling it a "sensitive aspect of trial strategy") (quoting *United States v. Manjarrez*, 258 F.3d 618, 624 (7th Cir. 2001)).

Id., 949 F.3d at 313.

Abel may raise his ineffective assistance of counsel claim in a postconviction proceeding. In that proceeding, both parties would have the opportunity to make an adequate record about Abel's decision to exercise his constitutional right to remain silent at trial. This Court should not overturn Abel's conviction based upon Abel rethinking his decision not to testify with the benefit of hindsight.

CONCLUSION

This Court should affirm Abel's conviction.

Respectfully submitted this 27th day of April, 2021.

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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 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 6,722 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-27-2021:

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