IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0371

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICKEY RODNEY PAYNE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Donald Harris, Presiding

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1. Whether the district court violated Montana's attorney-client privilege statute when it allowed Payne's former defense attorney to testify as a State's rebuttal witness.

2. Whether Payne's constitutional right to effective assistance of counsel was violated when his former attorney did not file a motion to continue in his underlying cases and testified at his bail-jumping trial.

STATEMENT OF THE CASE

On July 19, 2016, Yellowstone County charged Appellant Mickey Rodney Payne (Payne) with two counts of bail-jumping under Mont. Code Ann. § 45-7-308. (Doc. 2.) Payne was charged after he failed to appear without lawful excuse at two trials set for the same day. (*Id.)* These proceedings included a trial in Cause No. DC 15-517, where Payne was charged with multiple counts of criminal mischief, and a trial in Cause No. DC 16-170, where he was charged with felony partner family member assault (PFMA). (*See* 8/29/18 Tr. at 24-25; Doc. 41.)

Payne proceeded to a bench trial. (Docs. 17, 18.) After Payne testified in his defense, the State called his former defense attorney in the criminal mischief and PFMA cases as a rebuttal witness. (Tr. at 57-58.) The Montana Thirteenth Judicial District Court (district court) convicted Payne under the first charge of

bail-jumping, but dismissed the second charge after ruling it involved the "same transaction" as the first. (Doc. 31 at 3-4 (citing Mont. Code Ann. 46-1-202(23)(b)).)

STATEMENT OF THE FACTS

Pretrial proceedings

Prior to the underlying charges in this case, Payne was involved with multiple court cases in Yellowstone County. In Cause No. DC 15-517, Yellowstone County charged Payne with two counts of felony criminal mischief, two counts of misdemeanor criminal mischief, and one count of assault. (Doc. 41.) Per his conditions of release in that case, Payne was ordered to appear at all court dates, including trial. (Docs. 1, 2.) Likewise, in Cause No. DC 16-170, Payne was charged with PFMA, released on his own recognizance, and ordered to appear at all court dates. (Doc. 2; Tr. at 24-25; State's Trial Ex. 5.) In both cases, Payne was ordered not to leave the State of Montana. (Tr. at 48, 88.)

At some point following his release, Payne absconded to California. (Tr. at 41; *see also* Tr. at 48-49.) The district court scheduled both of Payne's trials to take place on July 19, 2016. (Tr. at 19, 22-23.) Payne failed to appear, and the State charged Payne with two counts of bail-jumping. (*See* Doc. 2; Tr. at 13, 47.) In May of 2018, Payne was brought back to Montana, and the district court set a bench trial for August 29, 2018. (Docs. 4, 18.)

On August 28, 2018, Layne Scheveck (Scheveck) moved to quash a subpoena by the State to testify at Payne's trial. (Doc. 24.) Scheveck had been Payne's public defender in the criminal mischief and PFMA cases at the time Payne was charged with bail-jumping. (Tr. at 62.) Scheveck requested that his subpoena be quashed pursuant to Mont. Code Ann. § 26-1-803(1) and *Sweeney v. Mont. Third Judicial Dist. Court*, 2018 MT 95, ¶ 17, 391 Mont. 224, 416 P.3d 187. (Doc. 24 at 1-2.)

Bench trial

At the bench trial, the prosecution discussed Scheveck's motion and stated that the State did not intend to call Scheveck in its case-in-chief unless Payne testified. (*See* Tr. at 4-5.) Defense counsel replied that Payne would be objecting to "Scheveck's testimony regardless of any rebuttal witness categorization. Mr. Payne is the one that holds the privilege, and he does not waive that privilege." (Tr. at 5.) The district court reserved ruling on the motion to see if the State called Scheveck as a witness. (Tr. at 5.)

In its case-in-chief, the State called two witnesses: Yellowstone County Deputy Clerk of Court Audrey Degele (Degele) and Yellowstone County Deputy County Attorney Robert Spoja (Spoja). (Tr. at 7-8, 23.) Degele testified regarding various documents certified by the clerk of court and filed in Cause Nos. DC 15-517 and DC 16-170. (Tr. at 8-14.) Importantly, Degele testified that although the trials

for these matters were set for July 19, 2016, Payne failed to appear, and no reason was provided for his non-appearance. (Tr. at 10, 12-14, 19, 22.)

Spoja testified that he was the prosecutor in Cause Nos. DC 15-517 and DC 16-170. (Tr. at 24-25.) Spoja testified that Payne had called his office prior to the July 2016 trial. (*See* Tr. at 26.) Spoja stated that Payne had called about the trial and had asked him if there was any way to make his case "go away." (Tr. at 27-28, 37-38.) Spoja testified that he told Payne that Payne needed to contact his attorney and show up for trial. (Tr. at 28.) Spoja testified that he was "sure" that he told Payne the specific date and time of his trials. (Tr. at 28.) Spoja stated that it was clear from the conversation that Payne knew when his trials were scheduled to go forward and was indicating to Spoja that he would not be there. (Tr. at 28-29.)

Following the State's case-in-chief, Payne testified in his own defense. (Tr. at 41.) Prior to his testimony, however, the district court excused the prosecution from the courtroom and addressed Payne and his defense team directly. (Tr. at 38-40.) The district court discussed the topic of attorney-client privilege and asked Payne,

> [I]n this case, there's a distinct possibility that you will waive the attorney-client privilege, and what I want you to understand is, is that on the attorney/client privilege, you can't just open that door a little bit; if you open that door a little bit, you open it the whole way as to the topic that the privilege applies so I just want to make sure that you had adequate opportunity to discuss these ramifications with your counsel; have you, sir?

(Tr. at 40.) Payne replied that he was aware of these ramifications and had discussed them with his attorney several times. (Tr. at 40.) The court also addressed Payne's defense counsel and she responded affirmatively that Payne understood the risks in testifying. (Tr. at 40.)

Payne testified that he was in California in July 2016. (Tr. at 41.) Payne testified that he had returned to California, in violation of his Montana orders of release, to address criminal issues in that state and attend court dates. (*See* Tr. at 42-43, 48-49.) Payne stated that he had been represented by various attorneys in his Montana cases, including Abby Houle (Houle) in the spring of 2016, followed by Scheveck. (*See* Tr. at 43, 52, 56-57 (Payne did not dispute that Houle was his attorney from March through May 2016, and Scheveck represented him after).)

Payne first testified that he had spoken with Scheveck "several times" by phone. (Tr. at 43-44.) However, when asked if he had spoken to Scheveck prior to July 19, 2016, Payne stated that Scheveck called him about a week before, or possibly that week, told him that he was his new attorney and that Payne "had a court date coming up later that week." (Tr. at 44.) Payne testified that he told Scheveck he was in California and asked him "to see if he could get a continuance for the court date." (Tr. at 44.) Payne also stated that he had called Spoja to see if the court date could be "reset" because he knew he "couldn't make it with such short notice." (Tr. at 45-46.) Payne testified that he intended to appear in court for

his Montana cases, but he could not afford to pay for a plane ticket to return and he did not have a car. (Tr. at 46-47.)

On cross-examination, Payne admitted that he had been in California for multiple months prior to July 2016, as he had appeared in court proceedings in that state in March 2016, April 2016, May 2016, and June 2016. (Tr. at 47-48.) Payne did not dispute that he was not in custody in California, but claimed that he had sought permission to return to Montana. (Tr. at 49.) When pressed by the prosecution on whether he had ever filed a motion with the California court to return to Montana and had it denied, Payne clarified that he had brought it up with his California attorneys and they advised him to stay and deal with his California cases first, despite his outstanding Montana warrants. (Tr. at 49-50.)

The prosecution also questioned Payne about his contact with his Montana attorneys. (Tr. at 50-53.) Payne testified that he provided his attorneys with his phone number, his mother's phone number, and his email address as contact information. (Tr. at 52.) Payne testified that between March and July 2016, he tried to get in contact with his attorneys several times but was unsuccessful. (Tr. at 50-51.) Contradicting his earlier statement, Payne then testified that he was in contact with his attorneys, but he only spoke with Scheveck a couple times. (Tr. at 51.)

Payne did not dispute that in Cause No. DC 15-517, the motion continuing his trial to July 2016 was granted on May 3, 2016. (Tr. at 10, 19, 56-57.) This motion was filed by Houle. (Appellant's App. C.) Payne could not recall if Houle had informed him of the July trial date at the time the motion was granted. (Tr. at 52.) Nevertheless, Payne agreed that in Cause No. DC 15-517, his July 2016 trial had been set for nearly two and half months. (Tr. at 57.) Payne also agreed that Spoja had told him he needed to appear in court and had reminded him of the court date. (Tr. at 53.)

The State called Scheveck as a rebuttal witness. (Tr. at 57-58.) The State argued that Payne's testimony had called Scheveck's effective assistance of counsel into question by testifying that Scheveck failed to notify him of the trial date. (Tr. at 58.) To preserve Scheveck against disciplinary or malpractice claims that could follow his testimony, the State moved for an order pursuant to *In re Gillham*, 216 Mont. 279, 704 P.2d 1019 (1985), and *Marble v. State*, 2007 MT 98, 337 Mont. 99, 169 P.3d 1148, to immunize Scheveck against any civil liability. (Tr. at 58; *see also* Docs. 23.001 at 6, 30 at 1.) The State told the court that its intention was not to question Scheveck about his full representation of Payne or the facts of his cases, only about the facts surrounding Scheveck's contacts with Payne and the work he did to notify Payne of his trial, "because Mr. Payne has said he provided insufficient notice of trial." (Tr. at 58.)

When the district court asked for Payne's response to the State's motion to shield Scheveck against any civil liability resulting from his testimony, defense counsel replied, "No objection, Your Honor." (Tr. at 58.) The district court granted the motion and Scheveck took the stand. (Tr. at 58-59.) On the stand, the State questioned Scheveck about his motion to quash his subpoena. (Tr. at 59.) The State asked him if the court's order immunizing him against civil liability allowed him to withdraw his motion and Scheveck replied, "It sure looks like it." (Tr. at 59.) The district court addressed defense counsel and asked, "Well, also I want to make clear for the record that the Defense is not objecting to Mr. Scheveck's testimony at this time; is that correct?" (Tr. at 59.) Defense counsel replied, "That's correct, Your Honor." (Tr. at 59.)

Scheveck agreed with the State that he took over Payne's representation from Houle on June 1, 2016. (Tr. at 60.) Scheveck confirmed that after being assigned as Payne's attorney, he filed a motion to continue the trial in Cause No. DC 16-170. (Tr. at 60.) Scheveck testified that he did not have a speedy trial waiver from Payne at the time he filed the motion but believed the district court would grant it because the court generally granted motions to continue without a waiver under these circumstances, i.e., when a new attorney is assigned to a case shortly before trial. (*See* Tr. at 60-61.)

Scheveck testified that he became aware that Payne was in California after being assigned to the case. (Tr. at 61.) Scheveck stated that he had "sparse" contact with Payne because contact was difficult, and he had only spoken with Payne "a handful of times." (Tr. at 61-62.) Scheveck stated that he had better contact with Payne's mother and relayed information about Payne's case through her. (Tr. at 61-62.) Scheveck testified that he would call Payne's mother, leave a message, and Payne would call back a few days to a few weeks later. (Tr. at 64, 66.)

Regarding the July 19, 2016 court date, Scheveck recalled having a conversation with Payne's mother about this date and telling her to have Payne call him so they could discuss filing a speedy trial waiver. (Tr. at 64-66.) Scheveck could neither remember nor confirm whether he directly spoke with Payne about this date. (Tr. at 65, 74-76.)[1] Scheveck stated his intention was to email Payne a speedy trial waiver once Payne called him back and, when the waiver was returned, he would file a motion to continue. (*See* Tr. at 74-75.) However, because Scheveck did not have a waiver from Payne, he did not file a motion because he

[1] Scheveck's testimony concerning whether he made phone contact with Payne in July 2016 was far from clear. (*See* Tr. at 70 (Scheveck stating, "Correct," to defense counsel's question asking if he had a conversation with Payne in July 2016), Tr. at 75 (Scheveck stating, "No," to defense counsel's question asking if he had a conversation with Payne about the date and time of his hearing), Tr. at 76 (Scheveck stating that he knew that Payne would not be at the July 2016 court date because he had either spoken with Payne or his mother).)

knew that the motion would be opposed by the prosecutor and denied by the court because Payne was in violation of his release conditions. (Tr. 80-82.)

Scheveck also stated that he did not file a motion to continue because the Office of the Public Defender's policy for approaching these types of situations—i.e., when an attorney has some contact with the client, and knows the client will not be in court, in violation of his conditions or release—had recently been changed. (Tr. at 79-81.) Scheveck stated that he had discussed the policy change with another attorney in his office and it was unclear to them how to approach the situation. (Tr. at 80.)

Following the presentation of evidence, the district court issued findings of fact, conclusions of law, and an order finding Payne guilty of bail-jumping. (Doc. 31 at 4.) The district court found that Payne had been aware that he was required to be in court on July 19, 2016, and he purposely failed to appear. (Doc. 31 at 2.) The district court found Payne had no lawful excuse for his failure to appear because he violated the conditions of his release when he went to California and remained there for months without permission of the court. (*Id*. at 2.) The court held that just because Payne ran into financial difficulty in returning to Montana, that did not provide a legal justification excusing his failure to appear. (*Id*.) Rather, the district court found that "Mr. Payne should never have gone to California in the first place. By violating the conditions of his release, Mr. Payne

created the financial difficulty that he now claims caused his failure to appear." (*Id*. at 2-3.)

SUMMARY OF THE ARGUMENT

As a threshold issue, the Court should decline to review the claim that Scheveck's testimony violated Montana's attorney-client privilege statute because Payne failed to raise an objection to this testimony at trial. Although Payne initially stated he would object to this testimony, he withdrew this objection and expressly told the Court that he would not be objecting prior to Scheveck's rebuttal testimony. Payne has waived this issue on appeal.

If the Court reviews Payne's argument on the merits, it should find that attorney-client privilege was not violated for multiple reasons. First, by stating that he would not be objecting to the testimony, Payne impliedly consented to Scheveck being examined about their alleged communications. Second, Payne waived any attorney-client privilege under the Rules of Evidence when he testified about his communications with his former attorney. Third, under the common law doctrine of implied waiver and the principles discussed in *Gillham* and *Marble*, Payne waived any attorney-client privilege when he testified about his communications with Scheveck and placed the effectiveness of his former attorney's representation into issue by arguing that his former attorney failed to

timely notify him of his trial date. Payne has thus waived this issue for multiple independent reasons.

Scheveck's testimony also did not violate his duty of loyalty to Payne. Under Montana's Rules of Professional Conduct, an attorney is permitted to reveal information relating to the representation of a client in order to respond to allegations regarding that attorney's representation. When Payne testified, and blamed his former attorney for missing court, he placed Scheveck's representation into issue in the case. Consequently, Scheveck was permitted to respond to those allegations without violating his duty of loyalty.

The Court should also find that Payne's right to effective assistance of counsel was not violated. Even if this claim is appropriate for review, considering that Scheveck did not represent Payne in the bail-jumping proceeding, the Court should find that Payne has not meet his burden under any legal standard put forward. First, Payne cannot show that Scheveck had a conflict of interest that adversely affected his trial performance. Not only does Payne fail to allege an actual conflict of interest, as opposed to a mere possibility of a conflict, Scheveck was not serving as trial counsel during the bail-jumping trial and, thus, his "trial performance" is not at issue in this case.

Additionally, Payne fails to show that Scheveck provided ineffective assistance by not filing a motion to continue his trials. Even if this claim is

appropriate for review, Payne fails to show that there was no plausible reason for Scheveck not to file the motion. Despite Payne's speculative and self-serving arguments, there is no doubt that the prosecution would have objected to this motion and the district court would have denied it. A defense attorney is under no obligation to file frivolous motions, and any motion filed would have lacked good cause, as Payne left the state in violation of his orders of release.

ARGUMENT

I. Standard of review

"Questions of statutory interpretation are reviewed de novo." *Sartain v. State*, 2017 MT 216, ¶ 9, 388 Mont. 421, 401 P.3d 701; *Sweeney*, ¶ 6; *see also State v. Pope*, 2017 MT 12, 386 Mont. 194, 387 P.3d 870 ("Statutory interpretation is a question of law that we review to determine whether a district court is correct.").

This Court reviews a district court's evidentiary rulings to determine whether the court abused its discretion, keeping in mind that the district court's discretion regarding whether evidence is relevant and admissible is broad. *State v. Gooding*, 1999 MT 249, ¶ 11, 296 Mont. 234, 989 P.2d 304.

"Only record-based ineffective assistance of counsel claims are considered on direct appeal." *State v. Aker*, 2013 MT 253, ¶ 22, 371 Mont. 491, 310 P.3d 506;

State v. Howard, 2011 MT 246, ¶ 18, 362 Mont. 196, 265 P.3d 606. "To the extent such claims are reviewable, 'they present mixed questions of law and fact that we review de novo.'" *Aker*, ¶ 22 (quoting *Howard*, ¶ 18).

II. The district court correctly permitted Scheveck to testify at Payne's trial.

A. Payne failed to make a timely objection at trial to Scheveck's testimony and therefore waived any objection on appeal.

"In a direct appeal, the defendant is limited to those issues that were properly preserved in the district court and to allegations that the sentence is illegal or exceeds statutory mandates." *State v. Davis*, 2003 MT 341, ¶ 18, 318 Mont. 459, 81 P.3d 484 (citation and internal quotation marks omitted). Pursuant to statute, failure to make a timely objection during trial constitutes a waiver of the objection except for a limited number of situations.[2] Mont. Code Ann. § 46-20-104(2). Consequently, a defendant waives an objection and may not seek appellate review when he fails to make a contemporaneous objection to an alleged error in the trial court. *State v. Olsen*, 2004 MT 158, ¶ 10, 322 Mont. 1, 92 P.3d 1204.

Here, Payne expressly and knowingly waived any objection to Scheveck's rebuttal testimony at trial. (Tr. at 59.) Indeed, after the district court granted the

[2] These exceptions are found at Mont. Code Ann. § 46-20-701(2)(a)-(c). Payne does not argue that the exceptions contained in this provision apply in this case.

State's motion pursuant to *Gillham* and *Marble* to immunize Scheveck against any claims of civil liability resulting from his testimony, the court asked Scheveck if he was withdrawing his motion to quash his subpoena, and he replied in the affirmative. (*See id.)* Thus, the record shows that Scheveck withdrew his motion before the district court could rule on it. Accordingly, Scheveck's motion is not at issue in this case and the Court should decline to address any arguments contained within it.

Furthermore, after the motion was withdrawn, the district court addressed Payne "to make clear for the record that the Defense is not objecting to Mr. Scheveck's testimony," and Payne's defense counsel replied, "That's correct, Your Honor." (Tr. at 59.) The record is thus clear that Payne expressly did not object to Scheveck's testimony and knowingly declined to raise any objection to it. Payne has waived any objection to this testimony on appeal. *Olsen*, ¶ 10.

Importantly, because Scheveck's motion was withdrawn, and Payne explicitly declined to object to the testimony, the district court was not provided an opportunity to address any possible error in allowing the rebuttal testimony. This Court has consistently refused to address unobjected issues on appeal under the principle that it "will not put a trial court in error where that court has not been given the opportunity to rule on the admissibility of evidence and to correct itself." *State v. Vukasin*, 2003 MT 230, ¶ 29, 317 Mont. 204, 75 P.3d 1284. This Court

should thus decline to address Payne's arguments regarding a violation of attorney-client privilege. Because Payne fails to raise any other theory for review of this unobjected issue, such as plain error review, the Court should find that he has waived the issue under Mont. Code Ann. § 46-20-104(2).

B. Scheveck's testimony did not violate Montana's attorney-client privilege statute.

Payne argues that Scheveck's testimony violated Mont. Code Ann. § 26-1-803(1), Montana's attorney-client privilege statute. This provision states that "[a]n attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment." Mont. Code Ann. § 26-1-803(1).

In *Sweeney*, the Court took the extraordinary step of issuing a writ of supervisory control under this statute when it reversed a court order compelling a defense attorney to testify via subpoena at her client's bail jumping trial. *Sweeney*, ¶¶ 3-5, 17. The Court found that Mont. Code Ann. § 26-1-803(1) prohibited the district court from compelling a defense attorney to testify about communications made with her client without his consent when her testimony would prove the elements of a new charge against the client. *Sweeney*, ¶ 15. The Court expressly limited its holding in *Sweeney* to its facts. *Sweeney*, ¶ 15 ("We expressly limit this holding to the unique facts and circumstances of this case."). Here, under the facts and circumstances of *this* case, not only did Payne waive any claim of privilege by

testifying at trial about his communications with his attorney, but he also consented to this disclosure when his trial attorney stated that Payne was not objecting to Scheveck's testimony.

1. Payne impliedly consented to Scheveck's testimony under Mont. Code Ann. § 26-1-803(1) when he did not object to its introduction at trial.

This Court "construe[s] the attorney-client privilege narrowly because it obstructs the truth-finding process." *Nelson v. City of Billings*, 2018 MT 36, ¶ 31, 390 Mont. 290, 304, 412 P.3d 1058 (citing *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶ 10, 364 Mont. 299, 280 P.3d 240); *see also* Mont. R. Evid. 501 (providing that "[e]xcept as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing."). Pursuant to this narrow interpretation of the privilege, Montana's attorney-client statute allows an attorney to be examined as to any communication made by the client to the attorney or the advice given to the client "with[] the consent of the client." Mont. Code Ann. § 26-1-803(1).

Under Mont. Code Ann. § 26-1-803(1), even if the Court were to find that Scheveck's testimony contained privileged communications,[3] Payne impliedly consented to his former attorney's testimony. Although Payne did not sign a document explicitly consenting to Scheveck's testimony, and even initially indicated that he would oppose it, Payne, via his attorney, unequivocally stated to the district court that he would not be objecting to the testimony at the actual time of its introduction. (Tr. at 5, 59). This is implied consent under Mont. Code Ann. § 26-1-803(1). *See Black's Law Dictionary* 368 (Bryan A. Garner ed., 10th ed., West 2014) (defining "implied consent" as "Consent inferred from one's conduct rather than one's direct expression."); *see also State v. Ahmed*, 278 Mont. 200, 215, 924 P.2d 679, 688 (1996) (district court did not abuse its discretion in allowing third party testimony under Mont. Code Ann. § 26-1-803(1) regarding a conversation between attorney and third party because the client impliedly consented to the conversation). Interpreting Payne's lack of objection at trial as anything other than indicating his consent to Scheveck's testimony ignores the

[3] The State notes that it does not concede that Scheveck's testimony actually included privileged attorney-client communications under Mont. Code Ann. § 26-1-803(1), particularly given that Scheveck could not even remember if he had spoken with Payne on the phone about the July 2016 court date. However, the State acknowledges that *Sweeney* appears to consider this testimony as "legal advice" under the statute when it found that "advising a client of a hearing date, the disregard of which could result in additional criminal liability, is inseparably intertwined with the concept of legal advice." *Sweeney*, ¶ 13. Notwithstanding this point, the Court does not need to rule on this issue, as Payne waived it on appeal.

factual circumstances of this case. Thus, even if the Court finds that he has preserved this issue for review, due to Payne's inaction in the face of this testimony, it should find that the district court did not abuse its discretion in allowing this testimony because he impliedly consented to its introduction.

2. Payne waived any privilege concerning his communications with Scheveck under Montana Rule of Evidence 503(a).

A claim of attorney-client privilege, like any statutory claim of evidentiary privilege, can be waived. *See In re Perry*, 2013 MT 6, ¶¶ 38-39, 368 Mont. 211, 293 P.3d 170 (Court finding that appellant waived claim of attorney-client privilege under Mont. R. Evid. 503(a) and doctrine of implied waiver). The principle of waiver in this context "reflects the notion that the attorney-client privilege 'was intended as a shield, not a sword."' *In re Perry*, ¶ 39 (quoting *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 295 (D. Mont. 1998)). "The burden of establishing waiver of the privilege is on the party seeking to overcome the privilege." *State v. Statczar*, 228 Mont. 446, 452, 743 P.2d 606 (1987) (citation omitted).

"Waiver is defined as the intentional or voluntary relinquishment of a known right or conduct which implies relinquishment of a known right." *Statczar*, 228 at 452; *Pacificorp v. Dep't of Revenue*, 254 Mont. 387, 396, 838 P.2d 914, 919 (1992) (stating that this definition is consistent with the commission comments to

Mont. R. Evid. 503, "which provide that subjective intent is not the only factor for determining waiver—conduct can also constitute waiver").

Pursuant to Mont. R. of Evid. 503(a), as a general rule, "[a] person upon whom these rules confer a privilege against disclosure waives the privilege if the person . . . voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged." *In re Perry*, ¶ 38 (quoting Mont. R. Evid. 503(a)). Consequently, under Rule 503(a), "[t]he attorney-client privilege is held by the client and can be waived by the client through voluntary disclosure." *State v. Tadewaldt*, 2010 MT 177, ¶ 17, 357 Mont. 208, 237 P.3d 1273 (citing Mont. Code Ann. § 26-1-803(1); Mont. R. Evid. 503(a); *St. Peter & Warren, P.C. v. Purdom*, 2006 MT 172, ¶ 23, 333 Mont. 9, 140 P.3d 478 (citing *Statczar*, 228 Mont. at 452-53)).

Furthermore, when reviewing a claim of attorney-client privilege, this Court has found that two elements must be considered: "(1) the element of a client's implied intention and (2) the element of fairness and consistency." *Statczar*, 228 Mont. at 453 (citing 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2327, 636 (John T. McNaughton ed., 1961); *State v. Balkin*, 48 Wash. App. 1, 737 P.2d 1035, 1037 (1987)). "An implied waiver must be supported by evidence showing that defendant, by words or by conduct, has

impliedly forsaken his privilege of confidentiality with respect to the communication in question." *Statczar*, 228 Mont. at 453.

Under the first element of the *Statczar* waiver test, which considers the intent of the privilege holder, Payne's conduct shows that he impliedly waived any claim of attorney-client privilege under Mont. Code Ann. § 26-1-803(1) when he testified at trial and voluntarily disclosed his alleged communications with Scheveck. Payne's disclosure satisfies the exception to the attorney-client privilege statute pursuant to Rule 503(a). *See Tadewaldt*, ¶ 17 (Court discussing how a defendant waived attorney-client privilege regarding potentially privileged communications under Rule 503(a) when he voluntarily testified about the communications at trial).

In *Statczar*, the Court reversed a defendant's conviction after his attorney revealed confidential attorney-client communications during a competency hearing and then later testified about the communications at the defendant's criminal trial. *Statczar*, 228 Mont. at 451-53. There, the Court found that there was no evidence that the defendant consented to his attorney's disclosure[4] or otherwise waived the

[4] As discussed, Payne also impliedly consented to Scheveck's testimony when he chose not to object to this testimony at trial. Thus, in addition to satisfying the consent exception under Mont. Code Ann. § 26-1-803(1), the evidence in this case also satisfies Rule 503(a)'s waiver via consent. Mont. R. Evid. 503(a) ("A person upon whom these rules confer a privilege against disclosure waives the privilege if the person . . . *consents* to disclosure of any significant part of the privileged matter.") (emphasis added).

privilege by testifying about the communications. *Statczar*, 228 Mont. at 452-53. In contrast, in this case, Payne testified at his trial and his testimony directly addressed the communications he now claims are privileged. The facts of this case are distinguishable and satisfy the first prong of the *Statczar* test.

Under the second prong, the Court applies the principles of fairness and consistency when considering whether there was an implied waiver. *Statczar*, 228 Mont. at 453. To this endeavor, the Court may consider the defendant's mental capacity, the defendant's familiarity with the legal system, and whether the defendant was represented by non-testifying counsel at the time of the disclosure. *See Statczar*, 228 Mont. at 453.

In this case, there was no evidence that Payne's mental capacity was impaired. Payne's testimony also indicated that, in addition to his legal troubles in Montana, Payne was involved with legal matters in California. (Tr. at 42-43, 48-49.) Thus, Payne cannot argue that he was naive to the legal system. Furthermore, Payne was represented by counsel at the time of his testimony and expressly stated to the district court that he was aware that his testimony could waive attorney-client privilege and that he had discussed the ramifications of his testimony with his defense counsel. (Tr. at 40 ("Yes, Your Honor, I'm aware and we have discussed this several times.").)

Likewise, under the second prong, the factual circumstances in this case are distinguishable from *Statczar*. In *Statczar*, the defendant's psychiatric examiners testified that he "was suffering from organic personality syndrome, that he had an IQ of 75, and that he was functioning at a 'borderline level.'" *Statczar,* 228 Mont. at 451. Additionally, "[w]hen asked what a judge's role is at trial, Statczar responded, 'The judge is to wear a black robe and sit in front of the courtroom.'" *Statczar*, 228 Mont. at 451. Given Statczar's mental capacity and unfamiliarity with courtroom procedure, the Court held that it would be "inherently unfair to require the defendant, under the specific facts before us, to object to his attorney's testimony at the competency hearing in order to prevent his confidential statements from being used against him at trial." *Statczar*, 228 Mont. at 453. The Court also noted that Statczar's newly appointed counsel strenuously objected to his former attorney's testimony at trial. *Statczar*, 228 Mont. at 453.

The facts of *Statczar* represented a blatant violation of the attorney-client privilege and are manifestly distinguishable from this case. The Court's finding that attorney-client privilege was not waived in that case highlights the extreme factual differences from the case at bar. A finding that Payne's testimony waived attorney-client privilege is fair under the facts and circumstances of this case and is consistent with this Court's prior interpretation of waiver. *Statczar*, 228 Mont. at

452-53. Accordingly, the Court should find that the second element of the *Statczar* test has been satisfied and Payne waived any claim of attorney-client privilege.

3. Payne is precluded from raising a claim of attorney-client privilege under the common law doctrine of implied waiver.

In addition to Payne's waiver under Mont. R. of Evid. 503(a), he also waived any claim of attorney-client privilege under the doctrine of implied waiver. Courts have applied the doctrine of implied waiver in the face of an asserted privilege "where a party makes assertions in the litigation or 'asserts a claim that in fairness requires examination of the protected communications.'" *In re Perry*, ¶ 38 (quoting *Dion*, 185 F.R.D. at 294). "An implied waiver of the attorney[-]client privilege occurs when (1) the party asserts the privilege as a result of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party puts the privileged information at issue; and (3) allowing the privilege would deny the opposing party access to information vital to its defense." *Id*.

This doctrine, although not cited in its holdings, is consistent with the Court's decisions in *Gillham* and *Marble*, which found when postconviction petitioners alleged claims of ineffective assistance of counsel, "the integrity of the fact-finding system requires that his counsel assist the court in the administration of justice by admitting, denying or qualifying the allegations of fact made by the

petitioner." *Marble*, ¶ 2 (citing *Gillham*, 704 P.2d at 1020). By challenging defense counsel's effectiveness, the petitioner '"has opened the gate to those portions of his revelations to his attorney that affect his claims in his petition for post-conviction relief,' and is not in a position to object on the grounds of privilege." *Marble*, ¶ 2 (quoting *Gillham*, 704 P.2d at 1020). These principles are applicable to this case.

Here, pursuant to this common law doctrine, Payne impliedly waived the privilege when he testified about his communications with Scheveck and placed the effectiveness of his former attorney's representation into issue by arguing that Scheveck failed to timely notify him of his trial date and failed to file a motion to continue his trials. By testifying and asserting the defense that his former counsel's conduct placed him into legal jeopardy, Payne committed an affirmative act, which placed the effectiveness of his counsel's legal assistance into issue. *See In re Perry*, ¶ 39 (Court finding that even if attorney-client relationship existed, appellant's claims put communications into issue and waived any attorney-client privilege). If the district court had not allowed the State to call Scheveck as a rebuttal witness, the prosecution would have been prevented from presenting evidence to rebut Payne's defense. *Id*. (Court finding that allowing invocation of attorney-client privilege would eliminate "access to information vital" to appellee's defense and prevent the lower court from properly analyzing the claim). The facts of this case satisfy the elements of the doctrine of implied waiver.

Furthermore, although this case is not in the context of a postconviction proceeding, the principles cited in *Gillham* and *Marble* for supporting the allowance of a former attorney's testimony are applicable in this case. Importantly, allowing Scheveck's testimony furthered the integrity of the fact-finding process and assisted the district court in the administration of justice. Pursuant to the rationale discussed in *Gillham* and *Marble* for allowing the disclosure of confidential attorney-client information, the Court should also find that disclosure was appropriate in this case because Payne's testimony placed the effectiveness of Scheveck's representation into issue.

4. Scheveck's testimony was properly confined to the scope of Payne's voluntary disclosure.

Payne also argues that even if his decision to testify about his communications with his former attorney waived attorney-client privilege, the waiver was limited and Scheveck's testimony exceeded the scope of this waiver. (Appellant's Br. at 13-18.) Specifically, Payne argues that Scheveck's testimony

inappropriately covered topics of "legal advice" and "legal reasoning,"[5] including why Scheveck did not file a motion for a continuance. (Appellant's Br. at 14-15.)

Disregarding that Payne failed to object to this specific testimony at trial and has now waived his objection on appeal, Scheveck's testimony about why he did and did not take certain legal actions during his representation of Payne is not prohibited by Mont. Code Ann. § 26-1-803(1). This statute is only applicable to "communication[s] made by the client to the attorney or the advice given to the client in the course of professional employment." Mont. Code Ann. § 26-1-803(1). Thus, unless an attorney's thoughts and opinions about a case are communicated to the client through "advice," Montana's attorney-client privilege statute is not applicable. *See Sweeney*, ¶¶ 13-15.

Furthermore, Scheveck's testimony concerning the topic of a motion for a continuance was a topic first breeched by Payne during his testimony. (Tr. at 44 (Payne stating that he asked Scheveck "to see if he could get a continuance for the court date").) Payne cannot now argue that it was inappropriate for the State to

[5] The State notes that Payne fails to argue that Scheveck's testimony inappropriately included mental impressions protected as attorney work product. *See generally Am. Zurich Ins. Co.*, ¶¶ 23-25 (discussing the differences between attorney-client privilege and the work product doctrine). Because Payne fails to specifically argue this issue on appeal, the Court should decline to address it. *In re Perry*, ¶ 42, 368 Mont. 211, 293 P.3d 170 (Court "is under no obligation to locate authorities or formulate arguments for a party in support of positions taken on appeal"); Mont. R. App. P. 12(1)(g).

question Scheveck about these alleged communications and the reasons why he did not seek a continuance. *State v. Guill*, 2010 MT 69, ¶ 39, 355 Mont. 490, 228 P.3d 1152 ("When one party opens the door, or broaches a certain topic that would otherwise be off limits, 'the opposing party has the right to offer evidence in rebuttal . . . .'") (quoting *State v. Veis*, 1998 MT 162, ¶ 18, 289 Mont. 450, 962 P.2d 1153). This is particularly true given that Payne accused Scheveck of providing inadequate notice of the trial date. (Tr. at 47 ("Q. Do you think you were given enough notice to get here on time? A. No."). Denying the State the ability to test Payne's defense and question Scheveck would hinder the fact-finding process and frustrate justice.

C. Scheveck's testimony did not violate his duty of loyalty to Payne.

Payne contends that Scheveck's testimony violated his duty of loyalty to his client. Payne cites to *Sweeney* and *Krutzfeldt Ranch, Ltd. Liab. Co. v. Pinnacle Bank*, 2012 MT 15, ¶ 31, 363 Mont. 366, 272 P.3d 635. *Krutzfeldt Ranch* concerned an attorney's duty of loyalty in representing a client adverse to a former client and relied heavily on Montana's Rules of Professional Conduct for its reasoning. *Krutzfeldt Ranch*, ¶¶ 26-28, 32, 34-37.

"An attorney owes a duty of confidentiality to his or her clients." *State v. Jones*, 278 Mont. 121, 125, 923 P.2d 560 (1996) (citing Mont. R. Prof. Cond. 1.6). "The duty of confidentiality is correlative to an attorney's duty of loyalty." *Jones*,

278 Mont. at 125 (citation omitted). Accordingly, this Court has found that a defense attorney's disclosure of confidential information in violation of Rule 1.6, necessarily implicates the attorney's duty of loyalty. *Jones*, 278 Mont. at 125.

Montana Rule of Professional Conduct 1.6, "Confidentiality of Information," governs a lawyer's use of client information, and provides that, "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 or the disclosure is permitted by paragraph (b)." Mont. R. Prof. Cond. 1.6(a). Pursuant to subsection (b):

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . .
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or *to respond to allegations in any proceeding concerning the lawyer's representation of the client* . . . .

Mont. R. Prof. Cond. 1.6(b)(5) (emphasis added); *In re Perry*, ¶ 29.

Here, Scheveck's testimony was permitted under Rule 1.6(b)(5). Payne's testimony directly placed the blame for missing his trial on his former defense attorney. In light of these accusations impugning on his legal representation, Scheveck was permitted to testify. *See In re Perry*, ¶ 30 (Court finding that

attorney was permitted to testify about communications with alleged client under Rule 1.6(b)).

Importantly, Rule 1.6 does not limit the disclosure of this information to postconviction proceedings. Rather, Rule 1.6(b)(5) expressly allows for an attorney to provide information about the representation of a client "in any proceeding" where allegations are made about the lawyer's representation. Mont. R. Prof. Cond. 1.6(b)(5). Thus, even though this testimony took place during a criminal trial, this type of proceeding was not precluded under Rule 1.6(b)(5).

Furthermore, it cannot be emphasized enough how different the facts and circumstances of this case are from the facts and circumstances in *Sweeney*. There, the defendant's attorney was going to be called as the primary witness for the prosecution. *See Sweeney*, ¶¶ 4-5; *see also Uptain v. United States*, 692 F.2d 8, 8, 11 (5th Cir. 1982) (reversing habeas petitioner's bail-jumping conviction because government's sole witness in its case-in-chief was petitioner's current defense counsel). In this case, the State did not rely on Scheveck's testimony in its case-in-chief and only called him to the stand after Payne testified and placed his former counsel's legal representation directly into issue by arguing ineffective assistance as a defense. Additionally, Sweeney was still actively representing her client when subpoenaed, and her testimony at trial might have eroded their existing attorney-client relationship. In this matter, Scheveck was no longer representing

Payne and was no longer working for the Office of the Public Defender. Consequently, there was no existing attorney-client relationship to damage. This case simply lacks the exceptional circumstances present in *Sweeney* that justified the Court's finding that the attorney's testimony would violate the duty of loyalty.

III. Payne received effective assistance of counsel.

Payne argues that his constitutional right to effective assistance of counsel was violated and brings forth multiple arguments in support.

A. Right to effective assistance of counsel

The Sixth Amendment and article II, section 24 of the Montana Constitution guarantee criminal defendants the right to the effective assistance of counsel. The starting point for analyzing ineffective assistance claims is the two-part test described in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Wereman*, 273 Mont. 245, 248, 902 P.2d 1009 (1995). In order to obtain a reversal based on ineffective assistance, a defendant must generally prove: (1) that counsel's performance was deficient; and (2) that counsel's deficient performance prejudiced the defense. *Whitlow v. State*, 2008 MT 140, ¶¶ 10, 14, 343 Mont. 90, 183 P.3d 861 (citing *Strickland*, 466 U.S. at 687-88); *State v. Bekemans*, 2013 MT 11, ¶ 30, 368 Mont. 235, 293 P.3d 843 (same). "If the defendant makes an insufficient

showing on one prong, then there is no need to address the other prong." *Bekemans*, ¶ 29.

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*, ¶ 20 (following *Strickland*, 466 U.S. at 688). There is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and the defendant 'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at 689).

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. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The United States Supreme Court has recognized several exceptions to the general *Strickland* rule and found that prejudice may be presumed in other, limited, circumstances. *E.g.*, *United States v. Cronic*, 466 U.S. 648, 659-62 (1984) (prejudice presumed when there is a complete denial of counsel or when counsel is asked to provide assistance under circumstances where competent counsel very

likely could not); *Bell v. Cone*, 535 U.S. 685, 697 (2002) (presumption of prejudice is warranted "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing").

In *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980), the United States Supreme Court held that a defendant does not have to prove prejudice if the defendant demonstrates "that an actual conflict of interest adversely affected his lawyer's performance." *State v. Christenson*, 250 Mont. 351, 355, 820 P.2d 1303 (1991) (citing *Cuyler*). For *Cuyler* to apply, the defendant must demonstrate that his counsel "actively represented conflicting interests." *Cuyler*, 446 U.S. at 350. "In such a situation, the presumption of prejudice is warranted because the duty of loyalty, 'perhaps the most basic of counsel's duties,' is breached and 'it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.'" *Christenson*, 250 Mont. at 355 (quoting *Strickland*, 466 U.S. at 692).

B. Payne fails to show that his claims of ineffective assistance are appropriate for review.

Payne argues that Scheveck, his former attorney in the PFMA and criminal mischief cases, was ineffective for: (1) not filing a motion to continue his PFMA and criminal mischief trials; and (2) testifying as a rebuttal witness at his bail-jumping trial. (Appellant's Br. at 18, 25.) In support of these arguments, Payne cites to both the *Strickland* and *Cuyler* standards. However, as a threshold point,

Payne fails to show that either of these standards are applicable because Scheveck was not acting as an attorney at the time of his testimony—he was acting as a witness.

At the core of the Sixth Amendment and article II, section 24, is the guarantee that the criminally accused will receive competent legal assistance in the proceeding in which they are being prosecuted. *Strickland*, 466 U.S. at 691-92 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."); *Cuyler*, 446 U.S. at 344 ("The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."). This right is thus focused on the conduct of the attorney that provided assistance of counsel during the proceeding at issue on appeal.

Here, Payne appeals from his bail-jumping conviction—a proceeding where Scheveck never represented Payne nor served as defense counsel. Indeed, following his arraignment on the bail-jumping charges, a different attorney, Nicole Gallagher, was assigned as defense counsel. (Doc. 7.) Scheveck never filed a notice of appearance in this case and had left the Office of the Public Defender at the time of his testimony. Thus, because Scheveck never actually performed any formal legal services to assist Payne in this specific proceeding, or otherwise

served as defense counsel during the bail-jumping trial, Payne fails to meet his burden to show that his right to counsel was violated in this case.

Tellingly, Payne fails to cite to any authority where a court has reviewed a claim of ineffective assistance by a defendant where counsel did not actively represent the defendant in the proceeding being appealed from. Rather, the cases cited by Payne were either decided under other, non-constitutional, grounds, or involved situations where defendants' claims of ineffective assistance were premised on the conduct of the attorneys that had represented them in the underlying proceedings. *E.g., United States v. Bergeson*, 425 F.3d 1221, 1226-27 (9th Cir. 2005) (affirming order quashing defense attorney's subpoena under the Federal Rules of Criminal Procedure); *Wereman*, 273 Mont. at 248-51 (reviewing claim of ineffective assistance where trial counsel's prior statements were introduced as evidence at trial); *Christenson*, 250 Mont. at 355-60 (reviewing claims under both *Cuyler* and *Strickland* that trial counsel was ineffective). Accordingly, Payne fails to allege a colorable constitutional claim and this Court should dismiss his appeal. Nevertheless, even if the Court were to review these claims, this flaw also fatally undercuts Payne's claims on the merits.

C. Payne has not met his burden to show that prejudice should be presumed under *Cuyler*.

As discussed, Payne alleges that this Court should presume prejudice under *Cuyler* and cites to its decision in *Wereman*. In that case, a defendant was convicted of bail-jumping and raised an ineffective assistance claim after earlier comments made by his trial counsel were introduced at trial. *Wereman*, 273 Mont. at 248 (discussing minute entry that indicated that trial counsel had informed the district court that he had "tried different ways in which to contact [Wereman] . . . but could not find him"). The defendant in *Wereman* claimed that the introduction of his counsel's statement created a conflict of interest by turning his counsel into the prosecution's "key witness," and by precluding his attorney from advocating on his behalf. *Wereman*, 273 Mont. at 250.

In concluding that the introduction of the statements did not adversely affect trial counsel's ability to defend Wereman, and thus did not satisfy the *Cuyle*r standard, the Court relied on the Fifth Circuit's decision in *Uptain*. *Wereman*, 273 Mont. at 249-50. There, a defendant had been convicted of bail-jumping but later had his conviction reversed because his trial counsel was called by the prosecution as its sole witness during its case-in-chief. *Uptain*, 692 F.2d at 8, 11. The Fifth Circuit concluded that this testimony created a conflict of interest because trial counsel represented the defendant throughout the entirety of the trial, including after he had testified, and therefore could not have possibly served as an

effective advocate under the Sixth Amendment. *Uptain*, 692 F.2d at 10 ("No lawyer could function as a persuasive advocate before a jury when he is the crucial witness against his own client.").

Here, unlike the defendant in *Uptain*, Scheveck was not serving as trial counsel during Payne's bail-jumping trial. This factual distinction highlights the fatal flaw in Payne's argument. Under *Cuyler*, Payne must show "that an actual conflict of interest adversely affected his lawyer's *performanc*e." *Wereman*, 273 Mont. at 249 (citing *Cuyler*, 446 U.S. at 350) (emphasis added). Scheveck's rebuttal testimony could not logically affect his performance because he was not serving as trial counsel during the proceeding. Thus, under *Cuyler*, even if there was a conflict of interest, Payne cannot show his trial counsel's performance was adversely affected.

But, of course, there is no actual conflict of interest in this case because Scheveck was not serving as the prosecutor or acting as an attorney for some other defendant in this case. *E.g.*, *Cuyler*, 446 U.S. at 348-50 (discussing how the representation of multiple criminal defendants by the same attorneys may give rise to an actual conflict of interest). Additionally, Scheveck was not charged with the same crime as Payne—another situation where courts have identified an actual conflict of interest. *Mannhalt v. Reed*, 847 F.2d 576, 581-83 (9th Cir. 1988)

(actual conflict of interest existed when defense counsel was accused of a crime related to those of his client).

Instead, Payne puts forth the tenuous argument that his former attorney's testimony created a conflict of interest because it was in Scheveck's "own interest to shift the blame to his client for the lapse in communication between them and it was in his own interest to excuse himself for not filing a motion to continue." (Appellant's Br. at 21.) Payne fails to support this assertion with facts in the record, and the Court should disregard it.

Under the *Cuyler* standard, "[a]n actual conflict, as opposed to the mere possibility of a conflict, is necessary." *State v. Deschon*, 2002 MT 16, ¶ 18, 308 Mont. 175, 40 P.3d 391. "Such conflict must be proved through a factual showing on the record." *Deschon*, ¶ 18 (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994)). Here, Payne fails to explain, with supporting facts from the record, how Scheveck benefited from this testimony and created an actual, personal conflict. Instead, under the Rules of Professional Conduct, it was in Scheveck's interest to simply tell the truth under his duty of candor towards the court. Mont. R. Prof. Cond. 3.3(a)(1) ("A lawyer shall not knowingly[] make a false statement of fact or law to a tribunal . . . ."). Because Payne cannot meet his burden to show an actual conflict of interest in his case, the Court should not presume prejudice under *Cuyler*.

D. Payne fails to show that Scheveck provided ineffective assistance under *Strickland* by not filing a motion to continue the trials.

In the alternative to his claim under *Cuyler*, Payne also argues that Scheveck committed ineffective assistance by not filing a motion to continue in his PFMA and criminal mischief cases. However, as discussed, this argument is not appropriate for review in this case because it does not involve the conduct of Payne's actual attorney in his bail-jumping case, i.e., Nicole Gallagher. Under *Strickland*, she is the proper subject for any ineffective assistance claims as she provided Payne with legal assistance during his bail-jumping proceeding.

Nevertheless, even if the Court were to consider Scheveck's conduct pursuant to the *Strickland* standard, Payne must first show that his claim of ineffective assistance is appropriate for direct review. Before reaching the merits of an ineffective assistance of counsel claim on direct appeal, the Court must decide whether such allegations are properly before it or whether the allegations should be pursued in a petition for postconviction relief. *State v. Fields*, 2002 MT 84, ¶ 31, 309 Mont. 300, 46 P.3d 612. "When a claim of ineffective assistance of counsel is based on facts of record, it may be raised on direct appeal. When, however, the allegations cannot be documented from the record, those claims must be raised in a petition for postconviction relief." *Fields*, ¶ 31.

Notwithstanding the general rule that non-record-based claims of ineffective assistance of counsel are not appropriate for direct review, Payne argues that this case falls into a rare exception to the general rule. Namely, that there is no plausible justification for Scheveck not to have filed a motion to continue. *State v. Herman*, 2008 MT 187, ¶ 16, 343 Mont. 494, 188 P.3d 978 (Court noting that it may occasionally address on direct appeal a claim that is not record-based if there is "no plausible justification" for counsel's conduct, but stressing that these situations are "relatively rare").

However, during his testimony, Scheveck stated that he did not have access to his case files or notes from his time with the Office of the Public Defender, and stated multiple times that he could not recall many of the specific details of his representation. (*E.g.*, Tr. at 71, 74, 77, 81, 84.) Indeed, it was not even clear from Scheveck's testimony that he even spoke with Payne in July 2016. *Supra*, Footnote 1. Accordingly, because the facts behind Scheveck's actions and decisions could be better fleshed out in postconviction proceedings, where Scheveck would have access to case files and notes, the Court should decline to consider Payne's claim on direct review, if it reviews the claim at all.

Furthermore, Payne's argument that there is no plausible reason for Scheveck not to have filed a motion to continue implies this action would satisfy the first prong of *Strickland* and that failing to request a continuance in this

situation would be objectively unreasonable under the situation. Contrary to this argument, "a claim of constitutionally ineffective assistance of counsel will not succeed when predicated upon counsel's failure to make motions or objections which, under the circumstances, would have been frivolous, which would have been, arguably, without procedural or substantive merit, or which, otherwise, would likely not have changed the outcome of the proceeding." *Heddings v. State*, 2011 MT 228, ¶ 33, 362 Mont. 90, 265 P.3d 600.

Here, filing a motion to continue under the circumstances of this case would have been frivolous, as the prosecution was aware that Payne had violated the conditions of his release and left the state. Any argument that the prosecution would not have objected to this motion is fantasy. Furthermore, if Scheveck would have filed the motion, he would have had to admit to the district court that Payne left the state without permission. Consequently, there would have been no way that the court would have granted the motion under those circumstances.

Additionally, under the second prong of *Strickland*, Payne also cannot show that, had the motion been filed, there is a reasonable probability that the results of the proceeding would have different. Critically, Payne was not convicted of bail-jumping because his attorney did not file a motion to continue. Payne was convicted of bail-jumping because he left the State of Montana without permission and then knowingly failed to return and attend court proceedings. As found by the

district court, Payne only had himself to blame for his situation. His actions placed his former attorney in a terrible situation and Payne should not be rewarded for it. Accordingly, this Court should find that Payne's right to effective assistance of counsel was not violated.

CONCLUSION

The Court should dismiss Payne's appeal and affirm his conviction.

Respectfully submitted this 27th day of May, 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 9,930 words, excluding certificate of service and certificate of compliance.

/s/ Michael P. Dougherty
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CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-27-2021:

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