IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0252

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NATHAN HOWARD,

Defendant and Appellant,

JOSEPH BULLINGTON,

Defendant and Appellant,

JOHNATHAN HETTINGER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Sixth Judicial District Court,
Park County, the Honorable Brenda R. Gilbert, Presiding

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STATEMENT OF THE ISSUES

Did defense counsel provide constitutionally ineffective assistance when they failed to follow the correct procedure to compel the testimony of a material witness, a Forest Service ranger, for the trespassing trial of three backpackers who contended they did not knowingly enter or remain on private property while hiking a Forest Service trail in the Crazy Mountains?

STATEMENT OF THE CASE

The State charged Nathan Howard, Joseph Bullington, and Johnathan Hettinger (collectively "the Backpackers") in Park County Justice Court with criminal trespass for walking onto private land while backpacking the Porcupine Lowline Trail in the Crazy Mountains. (Howard Docs., Arrest Report, 10/15/18; Bullington Docs., Arrest Report, 10/15/18; Hettinger Docs., Arrest Report, 10/16/18.)[1] The Porcupine Lowline Trail is a public trail that has become highly contested in recent years as the United States Forest Service ("USFS") has accused private

[1] Howard's, Bullington's, and Hettinger's appeals were filed separately prior to this Court consolidating them on June 11, 2021. Each appeal has a separate record. The documents from the justice court record are not numbered; this brief will cite to them by title and date.

landowners of obstructing the trail to deter public use. (Tr. Part 1 at 4-5; Tr. Part 2 at 169, 221, 229, 231.)[2] The Backpackers maintained they did not knowingly enter private property, and that the trespass occurred due to private landowners obscuring the public trail by illegally placing "No Trespassing" signs and marked gates on public land and removing USFS trail signs. (Tr. Part 1 at 37-45; Tr. Part 2 at 56-57, 176-79, 183-84, 192-93, 199-02, 259-75.) The justice court consolidated the Backpackers' cases. (Howard Docs., Order Consolidating Matter for Trial, 1/23/19 (hereinafter "Consolidation Order").)

On behalf of the Backpackers, Howard's counsel subpoenaed a USFS ranger to testify at trial to explain the landowners' obstructionist conduct and its impact on hikers' unintentional entry onto private property. (Howard Docs., Subpoena to Alex Sienkiewicz, 7/9/19 (hereinafter "Subpoena"); *see* Tr. Part 1 at 4-5.) The United States filed

[2] The official transcript for this appeal is the audio recording, which is included in Howard's record. On appeal to the district court, the Backpackers provided a certified transcript of the audio recording of the trial, which is attached to D.C. Doc. 9 of Hettinger's record. Undersigned counsel has listened to the audio recording and read the certified transcript. The written transcript is a reasonable replication for the audio recording, and the Backpackers cite to the written transcript for the Court's convenience.

a motion to quash the subpoena on the basis that the Department of Agriculture ("USDA"), which oversees the USFS, refused to permit Sienkiewicz to testify. (Howard Docs., United States' Motion and Brief to Quash Subpoena to Federal Employees, 7/15/19 (hereinafter "Motion to Quash").) The Backpackers responded by requesting the justice court hold Sienkiewicz in contempt. (Howard Docs., Response to United States' Motion to Quash Subpoenas, 7/16/19 (hereinafter "Response to Motion to Quash").) The court refused to hold Sienkiewicz in contempt and quashed the subpoena. (Howard Docs., Order, 7/16/19 (hereinafter "Order") (attached as App. A).) A jury convicted the Backpackers of trespass, and the justice court imposed a deferred sentence, a fine, and various costs. (Tr. Part 2 at 279-80; Sentencing Audio at 01:25, 08:45, 13:30, 16:00, 18:55, 20:10; Howard Doc., Sentencing Order, 10/21/19; Bullington Doc., Sentencing Order, 10/21/19; Hettinger Doc., Sentencing Order, 10/21/19 (attached as App. B).)

The Backpackers filed a joint notice of appeal to the district court and requested the court consolidate the appeals since the parties had "identical interests." (Howard Docs. 2, 4.) The court consolidated the appeals, and the Backpackers filed a joint brief challenging the order

granting the motion to quash. (Howard Docs. 5, 10, 14.) The district court affirmed. (Howard Doc. 15.) The Backpackers appealed their convictions separately to this Court. (Howard Doc. 23; Bullington Doc. 6; Hettinger Doc. 25.) On June 11, 2021, this Court consolidated the Backpackers' appeals.

STATEMENT OF THE FACTS

The alleged trespass:

Mr. Howard, Mr. Bullington, and Mr. Hettinger are avid outdoorsmen who love to hike and backpack together in the Montana mountains. (Tr. Part 2 at 163, 196-97.) When they learned that a trail in the Crazy Mountains that had been public for hundreds—if not thousands—of years was about to be rerouted and made inaccessible to the public, they planned a weekend backpacking trip. (Tr. Part 2 at 166-67.) The Backpackers had never been on this trail before and "wanted to see what it was about, and just kind of experience it one of the last times before it was given up." (Tr. Part 2 at 166-67, 228-29.) The trail was approximately 12 miles long and called Forest Service Trail 267, or the Porcupine Lowline Trail. (Tr. Part 2 at 166-67, 171-72, 176.)

Prior to the trip, the Backpackers researched the public trail and "talked significantly about the route . . . to make sure [they] knew it." (Tr. Part 2 at 168, 172, 236.) They also attended a public meeting regarding the trail and spoke with the USFS ranger, Alex Sienkiewicz. (Tr. Part 2 at 166-67.) They learned the trail was "pretty contentious" and surrounded by a lot of private property. (Tr. Part 2 at 168-69, 229.) The area by the trail was almost like "a checkerboard," alternating between private land and public land. (Tr. Part 2 at 75.) The Backpackers had no desire to hike on private property; they only wanted to experience the public trail before it was gone. (Tr. Part 2 at 179, 233.)

The Backpackers also learned that some of the private landowners had obscured the public trail by removing USFS trail signs and putting up "No Trespassing" signs and gates to intimidate people from accessing the trail. (Tr. Part 2 at 169, 221, 231.) These illegal, false signs made it "a very confusing situation for people trying to use the trail" because it was "impossible" to distinguish false signs from accurate ones. (Tr. Part 2 at 231.) Although the Backpackers were journalists and photographers and would occasionally write about their outdoor experiences for

publication, the purpose of this trip was not to write a story. (Tr. Part 2 at 162, 166-67, 197-98.)

On a cold Saturday in October 2018, the Backpackers packed their gear, including a Forest Service map and compass, and began their hike. (Tr. Part 2 at 168, 171-73; *see* Defendant's Ex. A.) Within a half-mile of the Porcupine Lowline trailhead, the Backpackers encountered a gate with multiple "No Trespassing" signs. (Tr. Part 2 at 172, 199-200.) They crossed the gate because they knew they were on the public trail and that somebody put up the gate illegally. (Tr. Part 2 at 172.) The Backpackers continued to hike several miles before stopping and camping for the night. (Tr. Part 2 at 173-74.)

The following morning, the Backpackers resumed the hike on the public trail. (Tr. Part 2 at 174-76.) While hiking, the Backpackers observed that the trail had "been nearly driven out of existence," and was "a dying trial . . . that's being killed" by the private landowners. (Tr. Part 2 at 220-21.) The Backpackers encountered many gates, fences, and "No Trespassing" signs that they believed were illegally placed to scare people away from using public lands. (Tr. Part 2 at 176-77, 192-93, 201, 219-20, 231.) They also noticed many of the USFS's trail signs had been removed.

(Tr. Part 2 at 221.) Due to these obstructions and the lack of proper trail signage, the trail was difficult to follow. (Tr. Part 2 at 176, 201, 220-21.) So difficult, in fact, that Bullington—an experienced backpacker—testified it was the most difficult trail he has ever hiked. (Tr. Part 2 at 223-24.)

To ensure they were on the public trail, the Backpackers constantly used their compass and consulted their Forest Service map. (Tr. Part 2 at 168-69, 174, 177, 221.) They also did distance measuring with Hettinger's cell phone. (Tr. Part 2 at 169.) The Backpackers stopped every half-mile to recalculate where they were and ensure they were still on the public trail. (Tr. Part 2 at 229.) They "made more effort than [they had] ever seen anybody make to stay on the trail." (Tr. Part 2 at 229.) Nonetheless, at some point along the hike, the Backpackers got lost. (Tr. Part 2 at 180, 183.) The Backpackers stopped to try to figure out where they were when they encountered Dave Laubach. (Tr. Part 2 at 180, 220.)

Laubach manages the Eagle Ridge Ranch, an 11,000-acre private property that borders USFS land. (Tr. Part 2 at 14, 17.) Laubach and several family members and a friend were on ATVs when they approached the Backpackers. (Tr. Part 2 at 15-17.) According to

Laubach, the Backpackers were about a half-mile from the public trail. (Tr. Part 2 at 18.)

The Backpackers were hopeful Laubach would help them figure out where they were. (Tr. Part 2 at 180.) Laubach approached, was "very aggressive and very angry," and made the Backpackers feel uncomfortable and nervous. (Tr. Part 2 at 180-81, 204.) Without identifying himself, Laubach declared the land was private property and demanded to know what the Backpackers were doing. (Tr. Part 2 at 85, 181, 203-05, 235.) The Backpackers never said they knew they were on private land. (Tr. Part 2 at 38.) On the contrary, they responded that they thought they were on the public trail. (Tr. Part 2 at 79, 204.) According to Laubach, the Backpackers said: "I'm on Trail 267 and we have a right to be here." (Tr. Part 2 at 18.) Laubach said, "[T]here is no trail, hasn't been a trail; and if - - if there was, you left it a long time ago." (Tr. Part 2 at 181, 204; Tr. Part 2 at 18.) Although Laubach and his wife claimed the Backpackers were confrontational, Laubach's friend did not say the same and specifically noted that Hettinger was polite, cooperative, and respectful. (Tr. Part 2 at 84-85, 110, 153.)

Laubach told the Backpackers they must have crossed gates and "No Trespassing" signs to get to where they were. (Tr. Part 2 at 20, 41-42.) The Backpackers acknowledged they had but believed the gates and signs were placed illegally to deter them from accessing public land. (Tr. Part 2 at 41-43, 176-77, 192-93, 201, 219-20, 231.) Laubach said he would only tell the Backpackers where they were if they gave him their names and that if they did not provide their names, he would call the State fish and game warden. (Tr. Part 2 at 19, 109, 181, 205.)

Hettinger and Howard agreed to give their names; Bullington refused. (Tr. Part 2 at 19, 181, 206, 223.) Bullington told Laubach he thought the bargain was extortion and evil. (Tr. Part 2 at 19, 151, 206, 222.) The Backpackers pulled out their Forest Service map, and Laubach showed them where they were and told them how to get out. (Tr. Part 1 at 19; Tr. Part 2 at 182, 205-07, 230.) According to Bullington, the Backpackers were only a couple hundred yards from USFS property. (Tr. Part 2 at 204, 207, 210-11.)

Unfortunately, the directions did not lead the Backpackers to the public trail. (Tr. Part 2 at 186-87, 230.) It was cold, snowy, and beginning to get dark. (Tr. Part 2 at 173, 188-89, 211, 231, 237.) The Backpackers

were scared and lost. (Tr. Part 2 at 188-89, 194.) One of the Backpackers believed he was about to have a panic attack. (Tr. Part 2 at 194, 212, 237.) Ultimately, the only way the Backpackers could get out of the mountains was to follow a drainage back onto the property they had just been advised was private. (Tr. Part 2 at 186-90, 212, 231, 237.) The drainage led to a county road where they called a friend to pick them up. (Tr. Part 2 at 187-90, 212.)

After Laubach left the Backpackers, he spent a half hour on the private property following their tracks. (Tr. Part 2 at 20.) Laubach called the warden, who told Laubach he could not do anything because the Backpackers were not hunting. (Tr. Part 2 at 20, 66.) Laubach then called the sheriff's department and spoke with Deputy Hopkin. (Tr. Part 2 at 67, 81, 89.) Deputy Hopkin never came to the property to investigate nor did he interview any of the people present. (Tr. Part 2 at 82, 99-101, 104.) Based solely on his conversation with Laubach, Deputy Hopkin cited the Backpackers for criminal trespass. (Tr. Part 2 at 98-101.)

The subpoena:

Prior to trial, the Backpackers subpoenaed USFS ranger Alex Sienkiewicz. (Subpoena.) The Backpackers intended to introduce

through Sienkiewicz's testimony that Laubach and other landowners engaged in obstructionist techniques on the public trail such as putting up gates and "No Trespassing" signs and taking down USFS trail signs. (Response to Motion to Quash at 6; Tr. Part 1 at 4-5.) Sienkiewicz would testify that these obstructionist efforts increased the likelihood that hikers would unknowingly stray onto private property because they could not distinguish public land from private land. (Tr. Part 2 at 52-53, 56-57.) This testimony would corroborate the Backpackers' defense that they did not knowingly enter private property when they crossed the gates and signs—an element of criminal trespass. (Tr. Part 2 at 46, 52-53, 56-57.) Rather, they inadvertently entered private property because they thought the gates and signs were illegally placed on public land by the landowners. (Tr. Part 2 at 46, 56-57.)

The United States filed a motion to quash Sienkiewicz's subpoena. (Motion to Quash.) The United States argued that because the USDA denied Sienkiewicz approval to testify, federal sovereign immunity precluded the justice court from compelling Sienkiewicz's testimony and from holding Sienkiewicz in contempt for not testifying. (Motion to Quash.) The United States attached to its motion a form filled out by

Sienkiewicz's supervisor denying Sienkiewicz approval to testify because the appearance would "result in unnecessary interference with the duties of" Sienkiewicz and would not promote a USDA interest. (Ex. E, attached to Motion to Quash (attached as App. C).) The United States informed the Backpackers they could challenge the USDA's decision through an action in federal district court under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701. (Motion to Quash at 7.)

In response, the Backpackers requested the justice court hold Sienkiewicz in contempt. (Response to Motion to Quash at 6-7.) They emphasized their constitutional rights to present a defense which included the right to compel witnesses on their behalf. (Response to Motion to Quash at 3-4.) The Backpackers insisted that Sienkiewicz's testimony was material to their defense, would only take around 20 minutes, and could be done via video to accommodate Sienkiewicz's schedule and duties. (Response to Motion to Quash at 6.) The Backpackers stated that they "underst[ood] the jurisdictional issue regarding the Court's ability to [s]anction the USFS from failing to comply with the subpoena," but claimed holding Sienkiewicz in contempt was "the only way" the case could get removed to federal court to review

the subpoena request. (Response to Motion to Quash at 6-7.) The Backpackers informed the justice court they were prepared to uphold their subpoena request in federal court. (Response to Motion to Quash at 7.)

The justice court quashed the subpoena without giving any reasoning. (Order.) The court later explained:

> [T]hat was – that was something that was more beyond me because even if I didn't sign that order, they[3] weren't going to show up.

(Tr. Part 2 at 57.)

Trial

On the morning of trial, the Backpackers made an offer of proof regarding Sienkiewicz's testimony. (Tr. Part 1 at 3-5.) The Backpackers informed the court that had it compelled Sienkiewicz to testify, Sienkiewicz would have stated that private landowners—including Laubach—engaged in obstructionist techniques on the public trail, including putting up illegal gates and "No Trespassing" signs to discourage members of the public from using the public trail and taking

[3] The Backpackers subpoenaed two USFS employees. The issue raised in this appeal only pertains to the subpoena for Sienkiewicz's testimony.

down USFS signage that marked the trail and its boundaries. (Tr. Part 1 at 4-5.)

Throughout trial, the State's theory was that the Backpackers knew they were on private land because they crossed marked gates and "No Trespassing" signs. (Tr. Part 1 at 34-36, Part 2 at 256-59, 277.) The State argued:

> I also want you to think about the fact that they knew that they were on private property. They had crossed many fences and many gates, and they were marked. They can't just disregard marked gates and fences. They're there for a reason. And the Defendants are well aware of the fact that that trail, . . . has - - crosses many private properties, and they weren't to go on those private properties. And they knew that when they went up there.

(Tr. Part 2 at 257.)

The Backpackers' defense was that they did not know they were on private property—they thought they were on the public trail. (Tr. Part 1 at 37-45; Tr. Part 2 at 52-53, 179, 181-84, 259-75.) The Backpackers maintained that because landowners illegally placed gates and "No Trespassing" signs on the public trail and removed legitimate USFS trail signs, there was no way to know which gates and signs were legitimate and which were not, and thus no way to know that they had entered private property. (Tr. Part 1 at 37-45; Tr. Part 2 at 52-57, 176-77, 192-

93, 199-202, 220-22, 259-75.) When the Backpackers attempted to elicit testimony regarding the USFS's position that landowners obstructed the trail, however, the State objected, and the court refused the testimony. (Tr. Part 2 at 46-47, 50-51, 57-59, 61, 170, 176-77.) The State contended that if the Backpackers wanted to bring in this evidence, they "need to have brought a person in to testify." (Tr. Part 2 at 51; *see* Tr. Part 2 at 46-47 ("We don't have any witnesses from the Forest Service. We have no other evidence other than Counsel's statements to the same.").) While Laubach acknowledged that he was involved in meetings with the USFS regarding the Porcupine Lowline Trail, he denied that he or his neighbor obstructed the trail. (Tr. Part 2 at 45-46, 59-60.)

During closing argument, the State emphasized to the jury that there was no evidence of the landowners obstructing the trail:

> But they're saying, oh, because the landowner did all this stuff, that's why the Defendants got lost. There's no evidence of that. There's not one bit of evidence. That's just an argument.
>
> . . .
>
> And the whole claim that the landowners have used intimidation techniques has not been proven. There is no evidence of that at all. And so that is something that should not be considered.

. . .

> Then there's all this gate and signage. And they say the landowners are doing all this. And they're destroying the signage and no evidence. Absolutely no evidence.

(Tr. Part 2 at 275-77.)

SUMMARY OF THE ARGUMENT

The Backpackers were convicted of trespass without the jury hearing the testimony of a key defense witness. When the USDA refused to authorize Sienkiewicz to testify, the United States informed defense counsel of the proper procedure to have a federal court review that decision—an APA suit. As the Ninth Circuit Court of Appeals and multiple other circuit courts have emphasized, an APA suit is the correct procedure in a case such as this because it authorizes a federal court to reverse an agency's decision and compel the testimony when withholding it violates constitutional rights. Defense counsel should have filed an APA suit.

Instead of following this well-established procedure, defense counsel asked the justice court to do something it lacked jurisdiction to do—hold Sienkiewicz in contempt. Defense counsel believed that through a contempt action, the case would get removed to federal court

for review of the USDA's decision. They were wrong. The United States Supreme Court, Ninth Circuit Court of Appeals, and multiple other circuit courts have held that a court cannot hold a federal employee in contempt for refusing to comply with a subpoena when the agency, relying on federal regulations, denied him permission to testify. Doing so violates federal sovereign immunity. Defense counsels' decision to obtain federal review of the USDA order by requesting a contempt action in justice court rather than filing an APA suit in federal court was deficient performance.

This mistake prejudiced the Backpackers. There is a reasonable probability that had defense counsel filed an APA suit, the federal court would have compelled Sienkiewicz's testimony upon determining the Backpackers' constitutional rights to present a defense far outweighed the USDA's minimal interests in keeping its employee from taking 20 minutes away from his work duties to testify. Because Sienkiewicz's testimony that the landowners obstructed the trail and caused hikers to unintentionally enter private property was critical to the Backpackers' defense, there is a reasonable probability that had he testified the

outcome of the trial would have been different. The case must be reversed for a new trial.

STANDARDS OF REVIEW

When a district court functions as an intermediate appellate court for an appeal from a lower court of record, this Court reviews the appeal as though it was originally filed in this Court. *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 296 P.3d 461. Claims of ineffective assistance of counsel are mixed questions of law and fact that this Court reviews *de novo*. *State v. Jefferson*, 2003 MT 90, ¶ 42, 315 Mont. 146, 69 P.3d 641.

ARGUMENT

I. Defense counsels' failure to follow the proper procedure to have a federal court review the USDA's decision constituted ineffective assistance of counsel.

The Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to effective assistance of counsel in criminal prosecutions. *State v. Johnston*, 2010 MT 152, ¶ 15, 357 Mont. 46, 237 P.3d 70. This Court applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), in evaluating ineffective assistance of

counsel claims. *Johnston*, ¶ 15. A defendant must demonstrate "(1) that counsel's representation was deficient and (2) that counsel's deficiency was prejudicial by establishing that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Johnston*, ¶ 15. This Court will consider the claim on direct appeal where the record reveals counsel's reasons or where there is no legitimate reason for what counsel did or did not do. *State v. Kougl*, 2004 MT 243, ¶¶ 14-15, 323 Mont. 6, 97 P.3d 1095.

A. Defense counsels' representation was deficient when they requested the justice court initiate a contempt action against Sienkiewicz instead of challenging the USDA's decision in federal court pursuant to the APA.

Defense counsel knew Sienkiewicz was a material witness and that his testimony was a critical part of the Backpackers' defense. (Response to Motion to Quash.) Under the criminal trespass statute, the State had to prove the Backpackers "knowingly" entered or remained unlawfully in or upon the premises of another. Mont. Code Ann. § 45-6-203(1)(b). "Knowingly" applied to all elements of the offense—the State had to prove both that the Backpackers knowingly entered or remained unlawfully upon the property of another *and* that they knew the property belonged to another. *See* Mont. Code Ann. § 45-2-101(35).

Sienkiewicz's testimony would have rebutted the State's claims that the Backpackers knew they entered private land when they crossed marked gates and "No Trespassing" signs. His testimony would have confirmed that the landowners put up illegal gates and signs and removed USFS trail signs—and that this obstructionist conduct caused people to unintentionally enter private land—, corroborated the Backpackers' testimony that the USFS informed them of the illegal gates and signs on the public trail prior to their hike, and bolstered the Backpackers' claim that they did not knowingly enter private property but instead were misled due to the landowners' conduct.

Because Sienkiewicz's testimony was crucial to the defense, defense counsel knew they had to get a federal court to review and reverse the USDA's decision to withhold Sienkiewicz's testimony. Unfortunately, they took the wrong route to get there. Instead of filing a separate action in federal court pursuant to the APA, which authorizes the federal court to review an agency decision and compel action when unlawfully withheld, defense counsel requested the justice court hold Sienkiewicz in contempt—something the court lacked authority to do.

The United States Supreme Court has held that a court cannot hold a federal employee in contempt for refusing to comply with a subpoena when the agency's internal housekeeping regulations prohibit him from doing so. In *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Attorney General relied upon a federal regulation when it prohibited an FBI agent from disclosing information pursuant to a subpoena. The trial court held the FBI agent in contempt and ordered him to comply with the subpoena. *Touhy*, 340 U.S. at 465. On appeal, the United States Supreme Court determined that since there was a valid federal regulation governing the release of documents and authorizing the Attorney General's refusal order, the employee could not be punished by contempt for acting in accordance with the order. *Touhy*, 340 U.S. at 467-68.

Courts have interpreted *Touhy* to be "jurisdictional," and have consistently held that state courts lack jurisdiction to compel federal employees to testify contrary to the direction of their agency heads. *Swett v. Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986) ("the *Touhy* doctrine is jurisdictional and precludes a contempt action"). In *Swett*, the Ninth Circuit upheld a district court's dismissal of a removed contempt proceeding against a subordinate federal official. There, a federal official

refused to testify to certain matters when there was a valid federal regulation that forbade him to provide the requested information. *Swett*, 792 F.2d at 1449, 1451. The state court found the official in contempt and ordered him to testify. *Swett*, 792 F.2d at 1449. The case was removed to federal court, and the federal court dismissed the contempt action. *Swett*, 792 F.2d at 1449. The Ninth Circuit affirmed, concluding that "the state court lacked jurisdiction to use contempt procedures against" the federal official. *Swett*, 792 F.2d at 1451. The court pointed out that "the proper method for challenging" the official's refusal to testify would be an APA suit pursuant to 5 U.S.C. § 702. *Swett*, 792 F.2d at 1452 n. 2.

Similarly, in *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997), the Ninth Circuit affirmed a district court's order quashing a state subpoena to a USFS employee. When the USFS instructed the employee to not testify pursuant to USDA regulations, the state court re-issued the subpoena. *In re Elko*, 109 F.3d at 555. The case was removed to federal court, and the federal court quashed the subpoena. *In re Elko*, 109 F.3d at 555. On appeal, relying on *Touhy* and *Swett*, the Ninth Circuit affirmed and held that sovereign immunity barred the enforcement of the

state subpoena. *In re Elko*, 109 F.3d at 556 ("the state court lacked jurisdiction to subpoena Siminoe and could not have issued a bench warrant had he refused to comply with the subpoena"). Like *Swett*, the court noted that "[t]he appropriate means for challenging the Department of Agriculture's decision under *Touhy* is an action under the Administrative Procedure Act in federal court." *In re Elko*, 109 F.3d at 557 n. 1.

Other circuit courts agree that a state court cannot compel a federal employee to testify contrary to valid federal regulations. As the Fourth Circuit explained:

> The principle of federal supremacy reinforces the protection of sovereign immunity in the case at bar. The assertion of state court authority to override the EPA's *Touhy* regulations clearly violates the Constitution's Supremacy Clause. First, Congress has expressly limited Administrative Procedure Act review to the federal courts, and a state court's assertion of the power of judicial review over federal agencies directly contravenes 5 U.S.C. § 702. Second, properly promulgated agency regulations implementing federal statutes have the force and effect of federal law which state courts are bound to follow. The action of a state court to compel an official of a federal agency to testify contrary to the agency's duly enacted regulations clearly thwarts the purpose and intended effect of the federal regulations. Such action plainly violates both the spirit and letter of the Supremacy Clause.

Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989). *See also Smith v. Cromer*, 159 F.3d 875, 883 (4th Cir. 1998) (holding that sovereign immunity barred state compulsory process against federal officers who refused to comply with a subpoena pursuant to federal regulations; defendant's remedy was action in federal court under the APA); *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1211 (D.C. Cir. 1996) (holding that state courts, and federal courts on removal, lack jurisdiction to compel production of records from federal employees when production violates agency regulations; defendants' "sole remedy" is to file an action in federal court under the APA); *Edwards v. U.S. Dept. of Justice*, 43 F.3d 312, 316-17 (7th Cir. 1994) (holding that state court, and federal court on removal, could not compel discovery of FBI tapes when Justice Department denied production pursuant to federal regulation; "the action to be reviewed has to be an APA claim" in federal court); *Louisiana v. Sparks*, 978 F.2d 226, 234-36 (5th Cir. 1992) (holding that state court, and federal court on removal, lacked jurisdiction to enforce a state-issued subpoena against a federal parole officer who refused compliance pursuant to Justice Department regulations).

While a state court cannot compel witness testimony when an

agency withholds it pursuant to a valid federal regulation, a subpoenaing defendant is not without a remedy. As the courts in *Swett*, *In re Elko*, *Boron Oil Co.*, *Smith*, *Houston Bus. Journal, Inc.*, *Edwards*—as well as the United States when moving to quash the subpoena in the case at hand—pointed out, the proper method for judicial review of the agency's decision is through an action in federal court under the APA, 5 U.S.C. § 701 *et seq*. (Motion to Quash at 7.) The APA authorizes judicial review for "[a] person suffering legal wrong because of agency action." 5 U.S.C. § 702. On review, a federal district court has authority to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity," among other reasons. 5 U.S.C. § 706(2)(B). In addition, the APA vests the district court with authority to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

Courts have explicitly highlighted the applicability of the APA for criminal defendants aggrieved by a federal agency's refusal to comply with a state subpoena. When an agency's decision violates a criminal defendant's constitutional rights, a separate action pursuant to the APA is the appropriate remedy. *U.S. v. Williams*, 170 F.3d 431, 434 (4th Cir. 1999) (noting that a "state criminal defendant, aggrieved by the response

of a federal law enforcement agency made under its regulations, may assert his constitutional claim to the investigative information before the district court, which possesses authority under the APA to compel the law enforcement agency to produce the requested information in appropriate cases"); *Kasi v. Angelone*, 300 F.3d 487, 506 (4th Cir. 2002) (same).

Here, defense counsel were ineffective when they tried to get a federal court to review the USDA's decision to withhold Sienkiewicz's testimony through a contempt action in justice court. The USDA denied Sienkiewicz permission to testify by relying upon a federal regulation. (Motion to Quash.) Because the Backpackers' constitutional rights depended upon Sienkiewicz's testimony, defense counsel knew they had to challenge the USDA's decision. (Response to Motion to Quash at 3-4.) Although defense counsel stated they "underst[ood] the jurisdictional issue regarding the Court's ability to [s]anction the USFS from failing to comply with the subpoena," they nonetheless requested the justice court hold Sienkiewicz in contempt. (Response to Motion to Quash at 6-7.) Defense counsel believed a contempt action was "the only way" to have

the case removed to federal court to review the USDA's decision. (Response to Motion to Quash at 6-7.)

They were wrong. Pursuant to holdings from the United States Supreme Court, the Ninth Circuit Court of Appeals, and multiple other circuit courts, the justice court did not have jurisdiction to compel Sienkiewicz to testify through a contempt action. Furthermore, because a federal court's jurisdiction upon removal is derivative of the state court's jurisdiction, had the justice court issued the contempt order and the United States removed the action to federal court, the federal court would not have had jurisdiction. *In re Elko*, 109 F.3d at 555 (quotation marks and citation omitted) ("The jurisdiction of the federal court on removal is, in a limited sense, derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none."); *Swett*, 792 F.2d at 1451 ("[S]ince removal jurisdiction is derivative, the district court acquired no jurisdiction on removal."). The law was clear—the Backpackers could not get a federal court to review the USDA's decision by way of a state contempt action. Defense counsels' conduct led to a dead-end street.

The correct course was for defense counsel to file a separate action in federal court pursuant to the APA. Noticeably, the United States informed of this exclusive remedy when moving to quash the subpoena. (Motion to Quash at 7.) In an APA suit, defense counsel could have argued that the agency's decision was "contrary to [the] constitutional right[s]" of the Backpackers. *See* 5 U.S.C. § 706(2)(B). Unlike the justice court, the federal court would have had authority to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). While a separate claim pursuant to the APA "may be more cumbersome" than trying to get into federal court through a contempt and removal action, that is what the law requires. *In re Boeh*, 25 F.3d 761, 767 (9th Cir. 1994). When defense counsel moved for a contempt action in lieu of filing an APA suit, they "selected an improper method of attempting to compel" Sienkiewicz's testimony. *In re Boeh*, 25 F.3d at 764 n. 3. Defense counsel's failure to follow clearly established law to have a federal court review the USDA's decision constituted deficient representation.

B. Defense counsels' deficient conduct prejudiced the Backpackers.

Defense counsels' deficient conduct satisfies the second prong of the *Strickland* analysis, which requires a demonstration that there is a

reasonable probability that, but for counsels' errors, the result of the proceeding would have been different. *Johnston*, ¶ 15. A reasonable probability is one sufficient to undermine confidence in the outcome, but it does not require a demonstration that the defendant would have been acquitted. *Kougl*, ¶ 25. The prejudice inquiry focuses on whether counsel's deficient performance renders the trial result unreliable or the proceeding fundamentally unfair. *Jefferson*, ¶ 53 (citing *Strickland*, 466 U.S. at 696). The ultimate inquiry is concerned with the fundamental fairness of the proceeding. *Jefferson*, ¶ 53 (citing *Strickland*, 466 U.S. at 696).

There is a reasonable probability that had defense counsel followed the correct procedure to have a federal court review the USDA's decision the result of the trial would have been different. Counsels' deficient conduct rendered the trial fundamentally unfair.

1. There is a reasonable probability that had counsel filed an action in federal court, the federal court would have compelled the USDA to authorize Sienkiewicz to testify.

Under the APA, the Backpackers had a strong argument that the USDA's decision was unlawful because it was contrary to their constitutional rights. *See* 5 U.S.C.A. § 706(2)(B).

Criminal defendants have a constitutional right to a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). This includes "the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (citation and quotation marks omitted). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Because "the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts," *Taylor*, 484 U.S. at 411, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). While these constitutional rights are not absolute, *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998), they serve as a critical limitation on a court's ability to exclude evidence a defendant wishes to admit.

To protect these constitutional rights, exclusionary rules "may not be applied mechanistically to defeat the ends of justice, but must meet

the fundamental standards of due process." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also State v. Colburn*, 2016 MT 41, ¶ 29, 382 Mont. 223, 366 P.3d 258; *State v. Johnson*, 1998 MT 107, ¶ 21, 288 Mont. 513, 958 P.2d 1182. The United States Supreme Court has stated that exclusionary rules and evidentiary privileges "must yield" to Sixth Amendment rights where their application would "significantly undermine[] fundamental elements of the defendant's defense." *U.S. v. Scheffer*, 523 U.S. 303, 315 (1998); *Murdoch v. Castro*, 365 F.3d 699, 702 (9th Cir. 2004).

Whether a constitutional right to compel witness testimony and present a defense overrides an exclusionary rule or privilege depends on a fact-specific judicial balancing of the competing interests. In *Roviaro v. U.S.*, 353 U.S. 53 (1957), the United States Supreme Court applied a balancing test to determine whether the government's refusal to disclose the name of an informant violated the defendant's constitutional rights. Acknowledging that the government had a privilege to withhold the identity of an informer under certain circumstances, the Court emphasized that when the evidence sought was "relevant and helpful to the defense of an accused, or is essential to a fair determination of a

cause, the privilege must give way." *Roviaro*, 353 U.S. at 59-61. The court prescribed a balancing test in which it weighed the interests behind the governmental privilege with the defendant's right to prepare his defense. *Roviaro*, 353 U.S. at 62. Considering such factors as the crime charged, the possible defenses, the significance of the informer's testimony, "and other relevant factors," the Court held that the defendant's right to present a defense overrode the government's privilege. *Roviaro*, 353 U.S. at 62-66. *See State v. Chapman*, 209 Mont. 57, 66, 679 P.2d 1210, 1215 (1984) ("[W]hen, in the interests of fundamental fairness, disclosure of an informant's identity is relevant and helpful to the defendant's defense, or essential to a fair determination of the case, the privilege must fall.").

Federal courts have consistently applied this balancing test when weighing evidentiary privileges and exclusionary rules against constitutional rights. *Davis v. Alaska*, 415 U.S. 308, 319-20 (1974) (holding that state interest in protecting anonymity of juvenile offenders was outweighed by defendant's right to probe witness's possible bias or motive); *Taylor*, 484 U.S. at 414-15 (holding that exclusion of an undisclosed witness did not violate defendant's right to call witnesses

after balancing competing interests); *Rock*, 483 U.S. at 55-56 (holding that exclusion of hypnosis-induced testimony violated defendant's right to call witnesses while implying the existence of a balancing test ("In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.")); *Moses v. Payne*, 555 F.3d 742, 759 (9th Cir. 2009) (discussing the type of balancing test a court must employ when determining if the exclusion of evidence violated a defendant's constitutional rights); *Murdoch v. Castro*, 365 F.3d 699, 706 (9th Cir. 2004) (implying a balancing test to determine whether attorney-client privilege "must fall" to a defendant's Sixth Amendment rights); *U.S. v. W.R. Grace*, 439 F.Supp.2d 1125 (Mont. Dist. 2006) (synthesizing federal court holdings to emphasize federal courts "use the mechanism of a balancing test in which the evidence or testimony sought to be introduced by the defendant is weighed against the policy behind the rule requiring that the evidence be excluded").

The Backpackers' constitutional rights far outweighed the USDA's minimal interests in excluding the evidence. The only authority the USDA relied upon to withhold Sienkiewicz's testimony was 5 U.S.C.

§ 301 and 7 C.F.R. § 1.214. Section 301 authorizes the head of an executive department to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301. Pursuant to 5 U.S.C. § 301, the USDA set forth regulations regarding its release of information upon subpoena. Per 7 C.F.R. § 1.214(b)(1), a USDA employee served with a subpoena "may appear only if such appearance has been authorized by the head of his or her USDA agency, with the concurrence of the General Counsel, based upon a determination that such an appearance is in the interest of USDA." 7 C.F.R. § 1.214(b)(1).

When evaluating the USDA's interests in withholding information under 7 C.F.R. § 1.214, it is important to recognize that federal courts have emphasized that regulations made pursuant to 5 U.S.C. § 301 "do not create an independent privilege authorizing" executive departments to withhold information. *Kwan Fai Mak v. F.B.I.*, 252 F.3d 1089, 1092 (9th Cir. 2001) (internal quotation omitted). Indeed, 5 U.S.C. § 301 explicitly states that the statute "does not authorize withholding information from the public or limiting the availability of records to the

public." 5 U.S.C. § 301. This provision in 5 U.S.C. § 301 was added by Congress in 1958 because Congress was concerned the statute had been "'twisted from its original purpose as a 'housekeeping' statute into a claim of authority to keep information from the public.'" *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 777 (9th Cir. 1994) (quoting 2 U.S. Code Cong. & Admin. News 3352 (1958)); *see Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1978). The Ninth Circuit noted that the 1958 amendment explicitly sought to eliminate any perception that 5 U.S.C. § 301 created a privilege. *Exxon Shipping*, 34 F.3d at 777. If the action of a department head is contested through an APA suit, "the 1958 amendment assures that the department head may not base an assertion of privilege on the housekeeping statute." *In re Boeh*, 25 F.3d at 767. Similarly, the United States Supreme Court held that 5 U.S.C. § 301 is simply a "housekeeping statute, authorizing what the APA terms rules of agency organization procedure or practice as opposed to substantive rules." *Chrysler*, 441 U.S. at 310 (internal quotations omitted). The Court pointed out that nothing in 5 U.S.C. § 301's legislative history indicated that Congress intended the statute to be a grant of authority to

the heads of the executive departments to withhold information. *Chrysler*, 441 U.S. at 310.

In the case at hand, the USDA withheld Sienkiewicz's testimony pursuant to 5 U.S.C. § 301 and 7 C.F.R. § 1.214 because it claimed the testimony would interfere with Sinkiewicz's duties and would not promote any USDA interest. (Ex. E.) The USDA made no allegation that Sienkiewicz's testimony would reveal confidential information or in any other way compromise the USDA. (Ex. E.) The Backpackers emphasized that the testimony would only take approximately 20 minutes and could be done via video to accommodate schedules and to minimize any interference with Sienkiewicz's normal duties. (Response to Motion to Quash at 6.)

The Backpackers' interest in Sienkiewicz's testimony was substantial. The State had to prove the Backpackers were knowingly on private property. *See* Mont. Code Ann. § 45-6-203(1). The State's theory was that the Backpackers must have known they were on private property because they crossed several marked gates and "No Trespassing" signs on and near the trail. (Tr. Part 1 at 34-36, Part 2 at 257-59.) The Backpackers' defense was that because landowners illegally

placed several gates and "No Trespassing" signs on the public trail—as well as removed legitimate USFS trail signs—it was impossible to know which gates and signs were legitimate and which were not. (Tr. Part 1 at 37-45; Tr. Part 2 at 52-57, 176-77, 192-93, 199-202, 220-22, 259-75.) As such, when the Backpackers crossed marked gates and "No Trespassing" signs they did not know they were entering private property—they believed they were crossing illegally placed gates and signs on public land. The State retorted that there was no evidence the landowners engaged in such obstructionist conduct, and Laubach specifically denied such actions. (Tr. Part 2 at 59-60, 275-77.) Without Sienkiewicz's testimony, the entire defense was frustrated.

The United States Supreme Court has stated: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *U.S. v. Reynolds*, 345 U.S. 1, 9-10 (1953). That is what happened in this case. Because the USDA did not want its employee to take 20 minutes out of his day to testify, the Backpackers were deprived of a key piece of evidence in their defense. While the right to compulsory process is not absolute and at times must yield to countering claims of privilege, this was not one of those cases. The government's desire to

keep Sienkiewicz from testifying "must fall" before the right of the Backpackers in order "to seek out the truth in the process of defending" themselves. *See Davis*, 415 U.S. at 320.

Had the Backpackers' defense counsel taken the correct course to have a federal court review the USDA's decision by filing an APA suit, there is a reasonable probability the federal court would have compelled the USDA to authorize Sinkiewicz's testimony. The federal court would have applied controlling federal law and balanced the competing interests to conclude the Backpackers' constitutional rights to material testimony outweighed the USDA's negligible interest in keeping its employee from taking 20 minutes to testify. Defense counsels' failure to file an APA suit prejudiced the Backpackers.

2. There is a reasonable probability that had Sienkiewicz testified, the outcome of the trial would have been different.

Sienkiewicz's testimony was crucial for the defense. At trial, the State's case rested on its claim that the Backpackers knew they entered private property because they crossed multiple "No Trespassing" gates and signs. (Tr. Part 1 at 34-36; Tr. Part 2 at 256-59, 277.) As the State argued to the jury:

> I also want you to think about the fact that they knew that they were on private property. They had crossed many fences and many gates, and they were marked. They can't just disregard marked gates and fences. They're there for a reason.

(Tr. Part 2 at 257.)

The State knew Sienkiewicz's testimony was critical to the Backpackers' defense that they did not knowingly enter private property and capitalized on its absence throughout trial. Each time the Backpackers attempted to inform the jury that the USFS confirmed that landowners illegally placed "No Trespassing" gates and signs—which proved the landowners' obstructionist conduct and corroborated the Backpackers' claims—the State objected, and the court refused to allow the testimony. (Tr. Part 2 at 46-47, 50-51, 57-59, 61, 170, 176-77.) In front of the jury, the State informed that if the Backpackers wanted to bring in evidence that the USFS knew the landowners illegally placed gates and signs, they "need to have brought a person in to testify." (Tr. Part 2 at 51.) The State repeatedly told the jury that there was "not one bit of evidence" that the landowners placed illegal postings. (Tr. Part 2 at 46-47, 177, 275-77 ("[T]here's no evidence of that. There's not one bit of evidence."; "Absolutely no evidence."; "[N]o evidence that any gates

were illegal."; "We don't have any witnesses from the Forest Service. We have no other evidence other than Counsel's statements to the same.").) The State told the jury the Backpackers' claims that the landowners obstructed the trial and caused them to unknowingly enter private property was "very self-serving." (Tr. Part 2 at 275.)

Sienkiewicz's testimony that landowners illegally placed the gates and signs on the public trail, causing hikers to unknowingly enter private property, was the missing evidence that directly rebutted the State's case. It also undermined Laubach's testimony that the landowners did not obstruct the trail. (*See* Tr. Part 2 at 45-46, 59-60.) Without Sienkiewicz's testimony, the jury was left to believe that because the Backpackers crossed marked gates and "No Trespassing" signs—and because Laubach assured them the landowners did not place illegal gates and signs—the Backpackers must have known they entered private property. Sienkiewicz's absence undermined the Backpackers' defense.

This is true notwithstanding the fact that two of the Backpackers admitted that after Laubach told them they were on private property, they "knew" they were on private property when they later had to cross the property to get off the mountain. (*See* Tr. Part 2 at 186-90, 231.) The

record establishes that as soon as Laubach told the Backpackers they were on private property, the Backpackers tried to exit the property and get off the mountain. (Tr. Part 2 at 186-90, 195, 212, 231, 237.) Certainly, the Backpackers were not knowingly remaining on private property at this time, as they were affirmatively attempting to leave the private property. Without the ability to teleport themselves to safe ground, they had no choice but to cross private property in order to return to public land.

Moreover, although two of the Backpackers acknowledged that Laubach told them they were on private property, their whole argument at trial was that they questioned the landowners' positions regarding what was private versus public land. Laubach told the Backpackers right out of the gate that there was no public trail—which the Backpackers knew to be wrong. (Tr. Part 2 at 204.) Bullington testified that he did not know who Laubach was during the encounter and whether he had the right to do what he was doing. (Tr. Part 2 at 235-36.) The two Backpackers' acknowledgment that Laubach aggressively informed them they were on private land when they believed they were on public land did not establish they knowingly entered or remained on private

property. The Backpackers repeatedly testified they were not knowingly on private property. (Tr. Part 2 at 179, 183-84, 198, 233.)

The State knew it had a problem proving the "knowingly" mental state of trespass. Throughout trial, the State reduced the mental state by referring to the Backpackers' "duty" to know where they were. (Tr. Part 2 at 38-39, 185, 257.) The State even acknowledged that the Backpackers did not know where they were. (Tr. Part 2 at 257-58 ("It is the Defendant's duty to know where they are. They did not know where they were.").) During closing argument, the State incorrectly stated:

> Even if you believe that you don't - - that they didn't know where they were, they were entering or remaining unlawfully upon the premises of another. It was not their property. It was private property that had been marked.

(Tr. Part 2 at 259.) The State complemented this incorrect reduced mental state by aggressively highlighting the fact that there was "[a]bsolutely no evidence" that landowners obstructed the trail, and that the Backpackers must have trespassed due to the "No Trespassing" gates and signs. (Tr. Part 1 at 34-36; Tr. Part 2 at 257, 259, 275-77.)

Contrary to the State's claim, the State had to prove beyond a reasonable doubt that the Backpackers knowingly entered or remained unlawfully on private property and knew the property belonged to

another. Mont. Code Ann. § 45-6-203(1). Had Sienkiewicz testified that landowners placed illegal gates and signs on public land and removed legitimate USFS trail signs—and that such obstructionist conduct caused people to unknowingly enter private property—there is a reasonable probability the outcome of the trial would have been different.

The jurors were "entitled to have the benefit of the defense theory before them so that they could make an informed judgment" regarding whether the Backpackers knowingly trespassed. *See Davis*, 415 U.S. at 317. Sienkiewicz's testimony was at the heart of the Backpackers' defense. Defense counsels' failure to file the APA suit and secure Sienkiewicz's testimony at trial undermined the fundamental fairness of the proceedings.

C. The Court should review the claim on direct appeal.

This claim is appropriate for direct appeal because the record explains why counsel did not file an APA suit—they believed they could get the federal court to review and reverse the USDA's decision through a state contempt action. *See Kougl*, ¶ 14. As explained above, defense counsel was wrong. Controlling authority provided that the justice

court—and the federal court upon removal—lacked jurisdiction to compel Sienkiewicz's testimony.

Alternatively, the claim is reviewable on direct appeal because there is no legitimate reason for counsels' conduct. *Kougl*, ¶ 15. In *State v. Weber*, 2016 MT 138, 383 Mont. 506, 373 P.3d 26, the Court determined an ineffective assistance of counsel claim was reviewable on appeal when the record demonstrated counsel intended to admit a piece of evidence but made multiple mistakes in the process of doing so. Defense counsel could not get the evidence admitted when he failed to lay the proper foundation, failed to use an applicable hearsay exception, and failed to properly question a witness. *Weber*, ¶¶ 24-26. Because it was clear that defense counsel's failure to get the court to admit the evidence did not reflect a plan or strategy—but rather was due to his own mistakes regarding the admission of evidence—the Court reviewed the claim on appeal and determined he was ineffective. *Weber*, ¶¶ 27-28. The Court emphasized that "[w]hile [the Court] note[s] that there are many ways this evidence could be admitted, the final result is that Weber's counsel failed to provide foundation for the testimony and failed to get any valuation evidence admitted." *Weber*, ¶ 27.

Similarly, here, defense counsel intended to have the federal court review and reverse the USDA's decision; they just went about it the wrong way. Defense counsel tried to get the federal court to review the USDA's decision when it asked the justice court to hold Sienkiewicz in contempt to "[e]nsure the process can get removed to federal court and the parties can respond to the action." (Response to Motion to Quash at 7.) There was nothing preventing defense counsel from arguing against the USDA's decision in federal court. On the contrary, defense counsel explicitly stated that they were "prepared to respond and uphold the request for the subpoena in any jurisdiction." (Response to Motion to Quash at 7.) Defense counsel intended to enter federal court for a proceeding on the USDA's decision to withhold Sienkiewicz's testimony, but "the final result" was that the federal court never reviewed the USDA's decision. *See Weber*, ¶ 27. There is no legitimate reason for defense counsel taking the improper route of asking the justice court to hold Sienkiewicz in contempt—which it lacked the authority to do—rather than filing an APA suit. *See Kougl*, ¶ 14. Even if the justice court had held Sienkiewicz in contempt, and the action was removed to federal court, the federal court would have held neither the state court nor the

federal court upon removal had the power to compel Sienkiewicz to testify in a state court action. Defense counsels' action would have never resulted in Sienkiewicz testifying in justice court.

D. Defense counsel for all three defendants acted together to try to compel Sienkiewicz's testimony.

Although it was only Howard's defense counsel who formally subpoenaed Sienkiewicz and responded to the motion to quash, the record establishes her actions were on behalf of all three defendants. Nearly six months prior to Howard's counsel requesting the subpoena, the three cases were consolidated for trial. (Consolidation Order.) When Howard's defense counsel made the offer of proof at trial, she discussed the collective group's—not just Howard's—need for the subpoena. (Tr. Part 1 at 4-5.) Hettinger's defense counsel explicitly referred to all three Backpackers' efforts at compelling Sienkiewicz's testimony. (Tr. Part 2 at 51-52 ("[W]e attempted to bring that testimony in. We subpoenaed Mr. Sienkiewicz.").) On appeal in district court, defense counsel consolidated the three appeals and filed a joint opening and reply brief challenging the court's order quashing the subpoena. (Howard Docs. 5, 10, 14.) At no point in time in justice or district court did anyone claim that only Howard tried to compel

Sienkiewicz's testimony. On the contrary, the record reveals that everyone understood Howard's defense counsel's actions to be a collective effort of all three defense counsel on behalf of all three defendants. And, had she succeeded in obtaining Sienkiewicz's testimony, it would have been presented to the jury in all three cases, not only Howard's case.

In the event the State argues for the first time that counsel for Hettinger and Bullington failed to even attempt to obtain Sienkiewicz's testimony at trial on behalf of their clients, that conduct clearly would constitute deficient performance. As explained above, Sienkiewicz was a material witness for all three defendants' cases. To protect Hettinger's and Bullington's rights, defense counsel for Hettinger and Bullington needed to request Sienkiewicz's testimony at trial by either ensuring Howard's subpoena request applied to Hettinger's and Bullington's cases or separately requesting Sienkiewicz's testimony and then taking all necessary and appropriate steps to ensure his testimony at trial, including filing an APA action. If, contrary to the Backpackers' argument, the Court determines defense counsel for Hettinger and Bullington did not do what they needed to do to have Howard's subpoena request apply to their clients' cases, they, like Howard's counsel, provided

deficient performance by failing to take all necessary and appropriate steps to ensure Sienkiewicz's testimony at trial. That failure prejudiced Hettinger and Bullington for the same reasons Howard's counsel's conduct prejudiced Howard.

This alternative argument of ineffective assistance of counsel is reviewable on appeal because there is no legitimate reason for the deficient conduct. *Kougl*, ¶ 15. The record establishes defense counsel for Hettinger and Bullington intended for the subpoena action to apply to their clients. (Tr. Part 2 at 51-52; Howard Docs. 10, 14.) If the Court determines they did not do enough, "the final result" was that due to their errors, a material witness did not testify at Hettinger's and Bullington's trials. *See Weber*, ¶¶ 27-28. There was no legitimate reason for their deficient conduct.

CONCLUSION

The jury found the Backpackers guilty of criminal trespass without hearing the testimony of a material defense witness. Although defense counsel tried to compel Sienkiewicz's testimony, they went about it the wrong way. Counsels' conduct was deficient, and it prejudiced the Backpackers. A new trial is warranted.

Respectfully submitted this 30th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9829, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Haley Connell Jackson
HALEY CONNELL JACKSON

APPENDIX

CERTIFICATE OF SERVICE

I, Haley Connell Jackson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-30-2021:

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