IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0252, DA 20-0434, DA 20-0435

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NATHAN EDWARD HOWARD,
JOSEPH BULLINGTON and
JONATHAN HETTINGER,

Defendant and Appellant.

BRIEF OF APPELLEE

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

1. Should this Court conduct a plain error review of Defendants' waived ineffective assistance of counsel (IAC) claim when Defendants have not asked for plain error review and their waived IAC claim is otherwise unmeritorious?

2. Assuming this Court decides to undertake a plain error review, did Defendants meet their high burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to prove IAC by showing deficient trial attorney performance and resulting prejudice?

STATEMENT OF THE CASE

Appellants Nathan Howard, Joseph Bullington, and Johnathan Hettinger (collectively "Defendants") were charged in Park County Justice Court with misdemeanor criminal trespass for walking onto private property after veering off Forest Trail 267 (a.k.a. Porcupine Lowline Trail) in October 2018 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.)

Trail 267 is a public trail that the Defendants knew was highly contested in recent years because the United States Forest Service had asserted that some private landowners had obstructed the trail to deter public use. (Tr. Part 1 at 4- 5; Tr. Part 2 at 169, 221, 229, 231.) The justice court consolidated the Defendants'

cases. (Howard Docs., Order Consolidating Matter for Trial, 1/23/19.) On behalf of all Defendants, Howard's counsel subpoenaed USFS Ranger Alex Sienkiewicz (Sienkiewicz) to testify at trial to explain the landowners' obstructionist conduct and its impact on the hikers' unintentional entry onto private property. (Howard Docs., Subpoena to Alex Sienkiewicz, 7/9/19; *see* Tr. Part 1 at 4-5.) The United States moved to quash the subpoena on the basis that the Department of Agriculture, 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 justice court quashed the subpoena. (Howard Docs., Order, 7/16/19.) A jury convicted all three Defendants 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 Docs., Sentencing Order, 10/21/19; Bullington Docs., Sentencing Order, 10/21/19; Hettinger Docs., Sentencing Order, 10/21/19.) The Defendants presented a consolidated appeal of their convictions to the district court, and the district court affirmed. (Howard Doc. 15.) The Defendants present a consolidated appeal of their convictions to this Court.

STATEMENT OF THE FACTS

In October 2018, Howard, Bullington, and Hettinger (Defendants) went on a hike in the Crazy Mountains on Forest Service Trail 267, which they all understood was publicly contentious. Some or most of Trail 267 was under consideration to be lawfully redesignated as inaccessible to the public. (Tr. Part 2 at 168-69, 229.) Forest Service Trail 267 is also called the Porcupine Lowline Trail. (Tr. Part 2 at 166-67, 171-72, 176.) The trail is about 12 miles long; on maps it is shown to be surrounded by checkerboard sections of private and public land. (Tr. Part 2 at 75, 168-69, 229.) The Defendants alleged they had wanted to experience the public trail before it was rerouted and designated non-public, and so they planned a weekend backpacking trip. (Tr. Part 2 at 166-67, 179, 233.)

One or more of the Defendants claimed they all got lost at some point along the hike. (Tr. Part 2 at 180, 183.) The three men ended up on private property, where the State's proof showed they knew or should have known the area they had entered was private property. This was the Eagle Ridge Ranch, an 11,000-acre private property that borders USFS land. (Tr. Part 2 at 14, 17.) Ranch Manager Dave Laubach (Laubach) discovered the Defendants about a half-mile from the public trail. (Tr. Part 2 at 18.)

Where Laubach discovered the Defendants, they had to have walked some distance among outbuildings whose homestead appearance indicated a

privately-owned property. (*See* Tr. Part 2 at 21.) The State's evidence, including photographic evidence, showed fresh snow tracks going all the way to the barn located on private property, even up the stairs of the barn. The testimony reflected that Defendants had gone through several gates in order to encounter Laubach; the gates were quite a distance from Trail 267. Most significantly, the Defendants had walked through gates that had "Eagle Ridge Property" signs on them.

When Laubach first encountered the men, he stated the land they were on was private property and asked the Defendants' business being there. (Tr. Part 2 at 85, 181, 203-05, 235.) According to the Defendants at trial, they insisted to Laubach they believed they were on the public trail. (Tr. Part 2 at 79, 204.) Laubach testified one of the Defendants told him, "I'm on Trail 267, and we have a right to be here." (Tr. Part 2 at 18.) Laubach told the Defendants they had left any trail "a long time ago." (Tr. Part 2 at 18, 181, 204.) One of the Defendants was very uncooperative and refused to identify himself. Laubach later reported them to law enforcement, and the men were charged with trespass. The State will discuss additional record facts in the arguments that follow.

SUMMARY OF THE ARGUMENT

Defendants had several opportunities to raise their IAC claim in the justice court, then later in the district court, but they failed to do so. Now, for the first

time, they raise their IAC claim in this Court, but fail to request and argue for plain error review. Their IAC claim is not worthy of plain error review in any event because it is not a colorable claim under *Strickland*.

The Defendants assert their attorneys could have called USFS Ranger Alex Sienkiewicz as a defense witness but failed to do so. Defendants' IAC claim is predicated upon their assumption that Sienkiewicz would unquestioningly be of high, if not indispensable, defensive value, and that the attorneys would have no second thoughts or any reconsideration about calling Sienkiewicz. Defendants' counsel, however, had several significant evidentiary and other hurdles to actually presenting Sienkiewicz at trial, even if they were successful in subpoenaing him. Sienkiewicz's testimony would not have exculpated the Defendants, but, rather, presented perils to the defenses' theories and presented such prospective evidentiary objections under Mont. R. Evid. 401, 402, 403, and 404(b) that the State would have certainly moved to prevent Sienkiewicz from actually testifying.

Strickland's presumption that attorneys act competently is supported by the view that Defendants' attorneys, when the justice court quashed Sienkiewicz's subpoena, simply abandoned their effort to call Sienkiewicz based on sound tactical and logical reasons. This Court should not conduct a plain error review of Defendants' unmeritorious IAC claim because failure to review Defendants'

waived IAC claim will not compromise the fundamental fairness or integrity of the proceeding or result in a manifest miscarriage of justice.

ARGUMENT

This Court should not conduct a plain error review because failure to review Defendants' waived IAC issue will not compromise the fundamental fairness or integrity of the proceeding or result in a manifest miscarriage of justice.

For the first time, Defendants assert IAC for their attorneys' alleged failure to call at trial Ranger Sienkiewicz to impeach and impugn the credibility of Ranch Manager Dave Laubach, the State's main witness, who had discovered the Defendants trespassing.

A. Standard of review

The district court effectively functions as an intermediate appellate court for appeals from a justice court. *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646. *See also* Mont. Code Ann. §§ 3-5-303, 3-10-115. This Court reviews a case as if the appeal originally had been filed in this Court. *Id.* This Court "examine[s] the record independently of the district court's decision, applying the appropriate standard of review." *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 296 P.3d 461.

B. Because Defendants failed to raise their IAC issue in intermediate appellate court, thus waiving their claim, and because they have also failed to request plain error review, Defendants' waived IAC issue must be dismissed *ab initio*.

This Court will not consider an issue on appeal were a defendant had an appeal to the district court and did not raise the issue in that appeal. *City of Missoula v. Asbury*, 265 Mont. 14, ¶ 20, 873 P.3d 936 (1994). The principle is well-established that this Court will not address an issue that was not presented to the trial court because both fairness and judicial economy necessitate communicating alleged errors involved so that the actual error can be prevented or corrected at the first opportunity. *Id*. This Court explained that the rationale expressed in *Asbury* "clearly carries over into a two-tiered appeal." *Id*. Accordingly, this Court declined to review a claim Asbury raised in this Court because, although he had raised it in the trial court, he did not raise it in his appeal to the district court. *Id*.

That is consistent with this Court's standard of review in this case, which requires this Court to determine "whether the district court, in its review of the trial court's decision, reached the correct conclusions under the appropriate standards of review." *Davis*, ¶ 31. If the claim was not raised in the district court, this Court cannot review whether the district court correctly decided the claim.

More recently, this Court reaffirmed its precedent that the failure to raise an appealable issue, whether preserved in the trial court or not, on intermediate appeal

from a lower court of record, generally constitutes an implied waiver of the issue for ultimate appeal to this Court. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 32, 397 Mont. 134, 447 P.3d 1048. The Court in *McCarthy* observed the narrow exception to the general rule of waiver by failure to raise an issue on intermediate appeal, that plain error review is not precluded on the ultimate appeal when raised in this Court. *Id.*

Under such circumstances, however, plain error review is available only in this Court's discretion under extraordinary circumstances where: (1) a constitutional or other substantial right is at issue; (2) the error is plain (i.e., obvious), and (3) this Court is "firmly convinced" that failure to review the issue will compromise the fundamental fairness or integrity of the proceeding, thereby resulting in a "manifest miscarriage of justice . . . ." *McCarthy*, ¶ 32.

Here, Defendants' trial counsel could have raised an IAC claim alleging their own deficient performance regarding the subpoenaing of Sienkiewicz in the justice court, especially after the guilty verdicts were announced. *See, e.g.*, *State v. Trull*, 2006 MT 119, ¶ 26, 332 Mont. 233, 136 P.3d 551 (after trial counsel moved for a new trial before the district court, alleging her own ineffectiveness and deficient actions at trial, and after the district court denied Trull's motion, Trull appealed that decision to this Court, which reviewed the IAC claims on direct appeal); *see also State v. Polak*, 2021 MT 307, ¶ 26, 406 Mont. 421, ___ P.2d ___

(citing *Trull*). Counsel could have withdrawn their representation, which would have prompted the trial court to conduct a *Gallagher* inquiry to immediately determine whether IAC had occurred and whether new counsel or a new trial was needed. *Stock v. State*, 2014 MT 46, ¶ 30, 374 Mont. 80, 318 P.3d 1053 (Wheat, J., concurring) (withdrawal of trial defense counsel who notice defense error before the final resolution of trial would prompt a district court to conduct an inquiry under *State v. Gallagher*, 1998 MT 70, ¶¶ 24-26, 288 Mont. 180, 955 P.2d 1371, to determine whether IAC has occurred and whether new counsel or a new trial is needed).

Even failing that, Defendants' trial counsel could have withdrawn their appellate representation in the district court, permitting Defendants to engage new counsel who could pursue an appeal on IAC grounds in the district court. *See generally Stock*, ¶ 30 (Wheat, J., concurring). This Court's consistent application of the contemporaneous objection rule "has been motivated by concerns of judicial economy and fundamental fairness, both of which require alleged errors to be brought to the attention of the district court 'so that actual error can be prevented or corrected at the first opportunity.'" *State v. Rogers*, 2013 MT 221, ¶ 27, 371 Mont. 239, 306 P.3d 248.

Here, Defendants did not properly preserve their IAC claim by first raising it in the justice court, as they could have done, *see Trull*, *supra*, nor did Defendants

raise IAC as an appeal claim in the district court. Having failed to preserve their claim, Defendants waived their alleged record-based IAC claim, and so the only possible avenue for this Court to address Defendants' claim is under this Court's plain error review.

Plain error review, however, is not available to Defendants. This Court employs plain error review sparingly, on a case-by-case basis, and only where a defendant shows that failing to review the claimed error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *State v. West*, 2008 MT 338, ¶ 23, 346 Mont. 244, 194 P.3d 683; *see also State v. King*, 2013 MT 139, ¶ 39, 370 Mont. 277, 304 P.3d 1.

Defendants have not asked this Court to invoke the plain error doctrine, nor do they mention any manifest miscarriage of justice from their uncalled witness Sienkiewicz not being heard by their jury. Significantly, Defendants further fail to allege or claim IAC against their trial and intermediate appellate counsel for failing to preserve their IAC claim based on their uncalled witness. Having failed to request plain error review in their opening brief, it is too late for Defendants to ask for plain error review in a reply brief. *King*, ¶ 40 ("[W]e will not apply the plain error doctrine when it was raised for the first time in a reply brief."). This Court should decline to exercise plain error review.

C. Should this Court review the merits of Defendants' waived IAC issue, no plain error exists in this record.

For argument's sake, and without forfeiting the foregoing arguments, the State submits that Defendants do not raise even a colorable IAC claim, much less any error evincing a miscarriage of justice. In considering IAC claims on direct appeal, this Court applies the two-pronged test set forth by the United States Supreme Court in *Strickland*. *State v. Deschon*, 2004 MT 32, ¶ 31, 320 Mont. 1, 85 P.3d 756. A defendant claiming IAC must ground his or her proof on facts within the record and not on conclusory allegations. *Id.*, ¶ 31. A petitioner must show that, but for counsel's errors, "the result of the proceeding would have been different." *Dawson v. State*, 2000 MT 219, ¶ 20, 301 Mont. 135, 10 P.3d 49.

IAC claims present mixed questions of law and fact, to be reviewed de novo. *State v. Green*, 2009 MT 114, ¶ 14, 350 Mont. 141, 205 P.3d 798. A defendant must satisfy both prongs of the *Strickland* test, and, if an insufficient showing is made on one prong, the Court need not address the other. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948 (citing *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861). Nor does this Court need to address the two prongs in any particular order. *Whitlow*, ¶ 11. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697; *accord State v. Morgan*, 2003 MT 193, ¶ 10, 316 Mont. 509, 74 P.3d 1047.

This Court may review an IAC claim on direct appeal "when the record . . . fully explain[s] why counsel took, or failed to take, action in providing a defense for the accused . . . ." *Deschon*, ¶ 32, quoting *State v. Turnsplenty*, 2003 MT 159, ¶ 17, 316 Mont. 275, 70 P.3d 1234. However, where it is clear as a matter of law that counsel's conduct did not constitute IAC there is no need to defer consideration of the issue to a subsequent proceeding for postconviction relief. *State v. Goodenough*, 2010 MT 247, ¶ 13, 358 Mont. 219, 245 P.3d 14.

1. While Defendants' counsel sought and failed to subpoena Sienkiewicz initially, Defendants fail to overcome the presumption that not making further efforts to call Sienkiewicz was based on sound trial strategy under the actual circumstances presented by counsel.

a. Given the changing uncertainties occurring in every trial, it is both plausible and consonant with *Strickland*'s presumption of competent counsel that Defendants' attorneys strategically abandoned calling Sienkiewicz at trial.

Strickland establishes a presumption that the challenged action of counsel might be considered sound trial strategy. *Strickland* at 689; *Bone v. State*, 284 Mont. 293, 303, 944 P.2d 734, 740 (1997) (a defendant must overcome the presumption that, under the circumstances, the action that he challenges might be considered sound trial strategy). This Court has declared that counsels' decisions relating to presenting cases, including whether to introduce evidence or produce witnesses, generally constitute matters of trial tactics and strategy, and this Court

will not find IAC in counsels' tactical decisions. *See Weaver v. State*, 2005 MT 158, ¶ 25, 327 Mont. 441, 114 P.3d 1039 (IAC case). Moreover, given the vagaries of trial practice, the adoption of a new defense strategy and abandonment of a trial strategy previously pursued in earnest, without more, will not make the change in strategy deficient attorney performance. *See Hampton v. Leibach*, 2001 U.S. Dist. LEXIS 19479, at *63-64 (N.D. Ill. 2001) (stating the decision to change strategy during trial is often forced upon defense counsel by the vagaries of the courtroom arena).

For example, unfulfilled opening defense statements, without more, will not make an IAC claim. *See Howard v. Davis*, 815 F.2d 1429, 1432-33 (11th Cir. 1987) (holding that counsel was not ineffective for having originally elected to pursue an insanity defense but then deciding not to present the promised evidence when the insanity defense was abandoned); *State v. Farni*, 539 P.2d 889 (Ariz. 1975) (concluding defense counsel made a tactical decision when he stated during his opening argument to the jury that he intended to call the defendant and other witnesses during the defense's presentation but then did not; the promise to call the defendant and other witnesses was not carried out because defense plans changed abruptly after a recess at the conclusion of the state's presentation).

Here, the fact that Defendants' trial counsel did not successfully call Sienkiewicz at trial, without more, does not give rise to IAC. In an IAC analysis,

courts look to the actual trial evidence, for it is the record of actual evidence adduced at trial against which the potential evidence is measured. *See Murtishaw v. Woodford*, 255 F.3d 926, 940 (9th Cir. 2001) (reciting that the Court compares the evidence actually presented to the trier of fact with evidence that counsel might have presented had counsel acted differently).

When Defendants' attorneys failed to acquire the witness, it may have been a tactical decision upon re-evaluation of defense strategy not to call Sienkiewicz. Sienkiewicz's testimony would have purportedly gone to establishing corroboration of the Defendants' assertion that they were misled off Trail 267 when they wandered onto private property. But nothing in this record supports Defendants' implied assertion that Sienkiewicz was able and willing to testify specifically that Laubach misled the Defendants by fraudulently posting any specific signage misdirecting the three men onto Eagle Ridge Property. *See, e.g.*, *United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (IAC claimant must show uncalled witness would have testified). It defies common sense to believe Laubach would intentionally divert the Defendants to commit trespass, as if somehow Laubach, by his supposed bad acts, lawfully invited the three men onto the private property. Nothing in this record supports an invitee defense to trespass or that any of Defendants' attorneys meant to advance such a defense to trespass.

The attorneys may have re-considered that calling Sienkiewicz as a witness could have presented the greater risk or danger of undue highlighting.

More significantly, the gravamen of the State's trespass theory, as presented by the actual trial evidence, pointed to the irrelevance of how the three Defendants were mistaken about their bearings on Trail 267. The jury learned that footprints in the snow showed entry by the men into an area where obviously private outbuildings were located; some footprints led into the buildings themselves. This evidence demonstrates that the men purposely and knowingly entered private property, all the while insisting to Laubach that they were not on private property but in fact still on a public trail and that they had a right to be there. (Tr. Part 2 at 18:13.)

A decision not to call a witness based on sound logic and tactics is not ineffectiveness. *See United States v. Oplinger*, 150 F.3d 1061, 1071-72 (9th Cir. 1998). Defendants' trial counsel ran the risk that the jury would view Sienkiewicz's testimony as a red herring to divert the jury's attention away from the area of Laubach's discovery. Contrary to what the Defendants assert in their brief, the State's chief theory of liability was that the means or excuses whereby the Defendants left Trail 267 did not matter; what mattered was the men's unmistakable, wrongful physical presence on private property and the fact they

re-trespassed after being warned not to trespass. (Tr. Part 2 at 257; 276:2-4; 277:8, "And they went back on it anyway;" 277:13, "It is not about the trail.")

Bolstering the Defendants' misdirection theory with Sienkiewicz's testimony that Laubach's misfeasance caused them to encounter ambiguously or erroneously marked trail obstructions and signage would not paint the Defendants any more sympathetically given that the jury learned: the Defendants were aware before their planned hike that Trail 267 crossed many private properties, and they knew not go onto those private properties; they knew beforehand the trail was contested; and they were experienced hikers and map readers. Adding Sienkiewicz would only have given the prosecutor more leverage to argue the Defendants were attempting to lay red herrings before the jury.

In fact, this was the very same conclusion the district court made in its appellate disposition of Defendants' due process claim:

> There was also testimony that Defendants went through several gates in order to encounter Mr. Laubach, the landowner, and the gates were quite a distance from Trail 267. Most significantly, the Defendants walked through gates that had "Eagle Ridge Property" signs on them. *Defendants' argument and defense that they were confused about where the trail was based upon their claims that the private landowner deliberately obscured the trail are really a red herring.* The testimony of Ranger Sienkiewicz cannot be considered crucial exculpatory evidence in light of the clear evidence that these experienced hikers and map readers were knowingly on private property.

(Howard Doc. 15 at 4.) (Emphasis supplied.)

Bolstering the Defendants' trial testimonies about wrongful signage on Trail 267 just for the sake of bolstering could have undermined the defense by unduly highlighting clear evidence that the three men were experienced hikers and map readers and, by that, distracted the jury's attention away from Defendants' more reasonable explanations for their conduct when Laubach encountered them. *See, e.g.*, *Battle v. Delo*, 19 F.3d 1547, 1556 (8th Cir. 1994) (limited cross of state serology expert to avoid highlighting). The jury could have seen bolstering-for-the-sake-of-bolstering as a needless demonstration that would have diluted any sympathy the jury might have had for Defendants after they entered the ranch property. *See, e.g.*, *Hogue v. Scott*, 874 F. Supp. 1486, 1541 (N.D. Tex. 1994) (describing instances where extensive cross may be perceived by the jury as unfair badgering); *Bergmann v. McCaughtry*, 65 F.3d 1372, 1379, 1380 (7th Cir. 1995) (decision not to cross-examine sympathetic prosecution witness).

Defendants' counsel had logical and sound tactical reasons not to bring Sienkiewicz's statements about Laubach's supposed trail obstructionism before the jury. *See Oplinger*, 150 F.3d at 1071-72 (stating a decision not to call a witness based on sound logic and tactics is not ineffectiveness). Defendants simply assume their trial counsel committed a "blatant" error in not calling Sienkiewicz, whom they also assume could only have had a favorable effect on the jury. These assumptions cannot support an IAC claim. *See State v. Hurlbert*, 232 Mont. 115,

119, 756 P.2d 1110, 1113 (1988); *see also Hall v. Luebbers*, 296 F.3d 685, 695 (8th Cir. 2002) (hearsay of counsel is not evidence to establish IAC for failure to call witness).

Defendants should not be heard in reply that the State's change-in-tactics argument assumes facts not in the record. It is the Defendants who want this Court to speculate that Sienkiewicz would have had incontrovertibly premium defense value and for this Court to simply presume that not calling Sienkiewicz was error. This approach turns *Strickland* on its head, as a court reviewing IAC claims must "strongly presume[that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. The State's change-in-tactics argument aligns with this presumption.

Defendants' counsel need not be asked for their tactical reasoning when the state court record before this Court reasonably supports the existence of a tactical purpose. *See Gallo v. Kernan*, 933 F. Supp. 878 (N.D. Cal. 1996) (record showed tactical reason not to impeach crying assault victim witness with prior inconsistent statement, noting that impeachment is a matter of trial tactics according to *Gustav v. United States*, 627 F.2d 901, 906 (9th Cir. 1980)). The Ninth Circuit has repeatedly refused to second-guess counsels' strategic decisions to present or forego particular theories of defense when their decisions were reasonable under

the circumstances. *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990).

Moreover, there is nothing manifestly unreasonable in Defendants' counsels' adopting the tactic to call Sienkiewicz then, having failed to do that, deciding upon reconsideration to forego calling Sienkiewicz, believing Sienkiewicz could do more harm than good for the defense. *Cf. Flamer v. Delaware*, 68 F.3d 710, 730 (3d Cir. 1995) (en banc) (concluding, based on state court findings, that a unified theory of defense had been presented (between guilt and penalty phase) but such a principle was not constitutionally required to have some grand, overarching theory because perhaps the most common defense is to eschew the pre-planned theory in favor of exploiting any weakness that might become evident as the trial unfolds). Thus, this Court should not hear any reply by Defendants complaining about the State's assertions about counsels' change in tactics.

b. Defendants' counsel had several significant evidentiary obstacles to bringing Sienkiewicz's statements about Laubach's supposed trail obstructionism before the jury.

Defendants' IAC claim is based on speculation, particularly on what Sienkiewicz's potential testimony could in fact have corroborated. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (mere speculation about what an expert would have said is insufficient to establish incompetence). Defendants' proposed "bad acts" testimony by Sienkiewicz about Laubach was entirely conclusory and

provided no basis even to speculate how such testimony could have been admitted at trial. *See, e.g.*, *Harden*, 846 F.2d at 1231-32 (IAC claimant must show uncalled witness would have testified). The proposed testimony would not have corroborated any single erroneous sign or gate that Laubach allegedly erected that caused the Defendants to be misdirected. Rather, Defendants proffered that Sienkiewicz's testimony would paint Laubach as a trail obstructionist in general. This renders Defendants' stated grounds for calling Sienkiewicz questionable on several evidentiary grounds, as discussed more fully below. In their brief, Defendants assert:

> 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.

(Opening Br. at 40.)

Under Mont. R. Evid. 402, all relevant evidence is admissible unless some other rule precludes its admission. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[,]" and includes "evidence bearing upon the credibility of a witness or hearsay declarant." Mont. R. Evid. 401.

Sienkiewicz's "bad acts" evidence against Laubach would have had no tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would have been without the evidence. Laubach was not on trial for obstructive or diversionary acts. Even Sienkiewicz's proposed "bad acts" evidence could not have proved Laubach obstructed any trail on the day the Defendants left Trail 267 and entered Eagle Ranch Property; no offer of proof of what Sienkiewicz would testify showed Laubach's alleged acts had any causal link to the Defendants ignoring specific allegedly false signage that day that misdirected them onto private property.

Most significantly, Sienkiewicz's "bad acts" evidence would not have made improbable the material contentions that Defendants were incontrovertibly walking upon private property, entering private structures, and maintaining, in clear contradiction to the circumstances when speaking with Laubach, that they were on public land. Given the strength of the State's case, Sienkiewicz's proposed testimony would have done very little, if anything, to exculpate Defendants of their guilt. *See State v. Henderson*, 2004 MT 173, ¶ 9, 322 Mont. 69, 93 P.3d 1231 ("The prejudice analysis takes into account the potential strength of the state's case, as well as the likelihood of success of the actions counsel failed to take."); *Tinsley v. Borg*, 895 F.2d 520, 532 (9th Cir. 1990) (with respect to his claim that his trial counsel failed to call witnesses, in order to show ineffective assistance of

counsel based on the failure to call a witness, the defendant must show, among other things, that the witnesses' testimony would have been sufficient to create a reasonable doubt as to guilt).

Had Defendants attempted to introduce Sienkiewicz's "bad acts" evidence against Laubach, the State would have had opportunities to challenge such evidence, including a strong objection based on Mont. R. Evid. 404(b). It is a frequent misconception that Mont. R. Evid. 404(b) bars evidence. Rule 404(b) does not bar evidence; rather, it prohibits a "theory of admissibility: using evidence of other crimes, wrongs, or acts to prove the defendant's subjective character, disposition, or propensity . . . in order to show conduct in conformity with that character on a particular occasion." *See State v. Eighteenth Judicial Dist. Court*, 2010 MT 263, ¶ 47, 385 Mont. 325, 246 P.3d 415. Rule 404(b)'s "prohibition applies only when that ultimate inference is coupled with the intermediate inference of the defendant's personal, subjective character. If the prosecutor can arrive at an ultimate inference of conduct through a different intermediate inference, the prohibition is inapplicable." *State v. Stewart*, 2012 MT 317, ¶ 65, 367 Mont. 503, 291 P.3d 1187 (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 4:1, 4-5 to 4-6 (Rev. ed. 2009)).

Specific instances of Laubach's alleged obstructionist conduct, when not tied to any direct causation for Defendants' misdirection, would have been

construed by the trial judge as a collateral matter having the impermissible and sole purpose of impugning Laubach's character—insinuating that since Laubach is an obstructionist or saboteur he acted that day in conformity with his character to misdirect or lure the Defendants into trespassing onto ranch property. Such an impermissible purpose, certainly available to the State to raise by objection, would have militated against calling Sienkiewicz in the first place. *Cf. Skillicorn v. Luebbers*, 475 F.3d 965, 974 (8th Cir. 2007) (not ineffective to fail to ask questions of a witness that would elicit information either beyond the witness's knowledge or that would be inadmissible); *Stewart v. Wolfenbarger*, 468 F.3d 338, 358 (6th Cir. 2006) (witness had no firm recollection of the event and another's contribution was not shown and the witness would likely invoke the Fifth Amendment). It is the Defendants' duty, not the State's, to establish here on direct appeal the absence of countervailing arguments to Sienkiewicz's "bad acts" evidence.

To the extent Sienkiewicz could have presented testimony stating *in general* that Trail 267 has shown evidence of obstructionist signage or obstacles, without necessarily suggesting an impermissible character attack on Laubach, such testimony would have been cumulative. Counsel has no obligation to present cumulative evidence. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (counsel not ineffective for deciding not to pursue witnesses whose testimony would have been "largely cumulative"). Montana Code Annotated § 26-1-102(4)

defines cumulative evidence as "additional evidence of the same character to the same point." The evidentiary considerations in Mont. R. Evid. 403 and 404(b) do not command the use of cumulative evidence to secure a fair trial. In fact, Rule 403 specifically permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Similarly, Defendants assume they could have called Sienkiewicz without further objection by Sienkiewicz's employer. Defendants devote nine pages in their opening brief debating new, unused arguments they now believe would have overcome any further objection by the Forest Service. (Opening Br. at 29-38.) In suggesting potential winning argumentation that Defendants' trial attorneys could have pursued, Defendants implicitly endorse the view that their attorneys faced an uncertain prospect in successfully subpoenaing Sienkiewicz. IAC claimants such as Defendants cannot assert they met their *Strickland* burden by saying a legal theory existed that they might have pursued. "[T]he relevant inquiry . . . is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." *Babbitt*, 151 F.3d at 1173. Moreover, attorneys cannot be faulted for failing to advance novel legal theories, or to be experts in other areas of law not within their immediate area of practice. *See Larrea v.*

Bennett, 368 F.3d 179, 184 n.2 (2d Cir. 2004) (failure to anticipate change in state law not ineffective; rejecting view that an attorney should be familiar with cases from other jurisdictions).

Counsel simply cannot be required to utilize unsettled or debatable theories of law. *See Chambers*, 918 F.2d at 1461 (at time of trial, instructional error case had not been decided); *see also Fields v. United States*, 201 F.3d 1025, 1028 (8th Cir. 2000) (noting no IAC exists for failure to object where the law is unsettled on a subject). Counsel, thus, should not be found to have breached the competency requirement unless counsel failed to advance a theory or defense "dictated by precedent" controlling at the time the representation occurred. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). "The result in a given case is not dictated by precedent if it is 'susceptible to debate among reasonable minds,' or, put differently, if 'reasonable jurists may disagree.'" *Graham v. Collins*, 506 U.S. 461, 475 (1993) (quoting *Stringer v. Black*, 503 U.S. 222, 238 (1992) (Souter, J., dissenting)).

Defendants' suggestions of legal theories to execute a successful subpoena of a withess are not irrefutable slam dunks of argumentation, but proposals for what the Defendants believe their trial attorneys "could have" done. Such a suggestion is precisely the sort of "rigid" and backward-looking IAC rule that *Strickland* expressly condemns. *See Harrington v. Richter*, 562 U.S. 86, 89, 106 (2011) ("Even the best criminal defense attorneys would not defend a particular

client in the same way. Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach."). (Internal citations omitted.)

2. Defendants' assertion of *Strickland* prejudice rests on speculation that Sienkiewicz might have given helpful information.

Defendants in no way establish prejudice. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2001), amended on denial of rehearing, 253 F.3d 1150 (9th Cir. 2001) (a defendant's mere speculation that a witness might have given helpful information is insufficient). This Court should reject Defendants' IAC allegations because they are conclusory and otherwise grounded on a silent record. *See Strickland*, 466 U.S. at 690; *see also State v. Black*, 270 Mont. 329, 338, 891 P.2d 1162, 1167 (1995) (finding that IAC allegation could not be addressed on direct appeal because the allegation could neither be established nor disproved on the record before the court); *State v. Webster*, 2005 MT 38, ¶ 15, 326 Mont. 112, 107 P.3d 500 ("The record before us does not reflect the reasons behind counsel's failure to object to the questioning by the prosecution. As a result, we conclude this claim cannot be raised on direct appeal."). (Citations omitted.)

Lastly, Defendants err in asserting (no less than twice) that "no legitimate reason [exists] for the deficient conduct." (Opening Br. at 48.) Such an assertion is tantamount to the oft-expressed IAC assertion that "no conceivable rationale"

existed for an attorney not to have taken certain actions. "No legitimate reason" and "no conceivable rationale" are throwaway phrases used to draw attention away from the fact it is the Defendants' burden as IAC claimants to show that the action undertaken by counsel was not warranted. *See Knowles v. Mirzayance*, 556 U.S. 111, 121-22 (2009) (pointedly rejecting the claim that counsel is ineffective simply because he or she did not take an action when "there was nothing to lose by pursuing it"); *Rice v. Hall*, 564 F.3d 523, 526 (1st Cir. 2009) (prejudice allegations were deficient when they rested almost entirely on "mays" and "could haves"); *Hunt v. Houston*, 563 F.3d 695, 705 (8th Cir. 2009) (unsupported speculation about the possible existence of some as yet undiscovered malfeasance does not establish prejudice). Defendants have not established deficient performance or prejudice—certainly not to the degree sufficient to warrant *sua sponte* plain error review.

/ / /

CONCLUSION

Defendants' arguments and claims are meritless. There being no showing of error in the record, this Court should affirm all Defendants' convictions and sentences.

Respectfully submitted this 30th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,354 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-30-2021:

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