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**IN THE SUPREME COURT FOR THE STATE OF MONTANA**

**No. DA 21-0200**

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STATE OF MONTANA,

Plaintiff And Appellee,

v.

TIMOTHY GALE MUNYAN,

Defendant And Appellant.

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**ANDERS BRIEF**

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On Appeal from Montana's Nineteenth Judicial District Court,  
Lincoln County, The Honorable Matthew J. Cuffe Presiding

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## **TABLE OF CONTENTS**

Table of Authorities .....	ii
Statement of the Issue .....	1
Statement of the Case and facts .....	1
Synopsis.....	1
Motion for probable cause hearing.....	3
Evidence presented at trial.....	6
Standards of Review .....	11
Argument.....	12
1. Counsel for Defendant and Appellant should be permitted to withdraw from this cause in accordance with <i>Anders v. California</i> and Mont. Code Ann. §46-8-103. ....	12
2. Mr. Munyan may arguably request the Court consider the case for review under the plain error doctrine. ....	14
3. Mr. Munyan may arguably assert he received ineffective assistance of counsel. ....	15
Conclusion .....	17
Certificate of Compliance .....	18

## **TABLE OF AUTHORITIES**

### **Montana State Constitution**

Article II, Section 17 .....	12
------------------------------	----

### **Montana Code Annotated**

Mont. Code Ann. §46-8-103 .....	1, 12, 13, 14
---------------------------------	---------------

### **Montana Cases**

<i>Sellner v. State</i> , 2004 MT 205, 322 Mont. 310.....	15
<i>State v. Baker</i> , 2004 MT 393, 325 Mont. 229 .....	11
<i>State v. Boyer</i> (1985), 215 Mont. 143, 695 P.2d 829 .....	16
<i>State v. Dahlin</i> , 1998 MT 113, 289 Mont. 182.....	15
<i>State v. Daniels</i> , 2003 MT 247, 317 Mont. 331.....	12
<i>State v. Finley</i> , 276 Mont. 126, 915 P.2d 208.....	15
<i>State v. Hass</i> , 2011 MT 296, 363 Mont. 8 .....	11
<i>State v. Henderson</i> , 2004 MT 173, 194, 322 Mont. 69 .....	16
<i>State v. Lamere</i> , 2005 MT 118, 327 Mont. 115.....	12
<i>State v. Long</i> , 2005 MT 13, 37 Mont. 238.....	14
<i>State v. Ray</i> (1994), 267 Mont. 128, 882 P.2d 1013.....	12
<i>State v. Sartain</i> , 2010 MT 213, 357 Mont. 483 .....	16

### **United States Constitution**

Fourteenth Amendment .....	4, 12, 15
----------------------------	-----------

### **Federal Cases**

<i>Anders v. California</i> , 386 U.S. 738 (1967).....	1, 12, 13, 14
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 at 764-65 (2010) .....	5

## **STATEMENT OF THE ISSUE**

Whether, pursuant to the criteria set forth in *Anders v. California*, 386 U.S. 738 (1967) and Mont. Code Ann. §46-8-103, counsel for Appellant should be permitted to withdraw from this cause of action.

## **STATEMENT OF THE CASE AND FACTS**

Defendant and Appellant Timothy Gale Munyan appeals the Judgment, entered March 1, 2021 by the Nineteenth Judicial District Court, Lincoln County, in which he was adjudged guilty of Driving Under the Influence of Alcohol (fourth or subsequent offense), a felony, and sentenced to Montana State Prison for five (5) years. (App. A, DC67)

**Synopsis.** On January 14 and 15, 2021 Mr. Munyan was tried in Lincoln County District Court for Driving Under the Influence of Alcohol, fifth or subsequent offense, Felony or, in the alternative, Operation of a Noncommercial Vehicle by a person with Alcohol Concentration of 0.08 or more, fifth or subsequent offense, Felony, pursuant to an information filed by the Lincoln County Attorney (the State) on December 31, 2019. (DC56, DC04)

The Information alleges that, on or about November 30, 2019 drove a motor vehicle upon the “ways of this state open to the public while under the influence of alcohol and/or drugs. Defendant has at least six prior convictions for DUI in Montana: 1993, 1994, two in 1995, 2010 and 2013.” (DC04) Mr. Munyan was also

charged with Careless Driving, Misdemeanor, and Seatbelt Violation, Misdemeanor.<sup>1</sup> (*Id.*)

In support of the Information, the State filed the accident report of Montana Highway Patrol Trooper Bryce Ford, which alleges that, on November 30, 2019, a vehicle travelling west on U.S. 2:

... drifted off the north shoulder and down into the borrow (sic) pit. The vehicle continued for approximately 60 yards in the borrow pit before crossing Paul Bunyan Ln. and going back down in to the borrow pit. The vehicle continued in the borrow pit for approximately another 90 yards where it struck several trees, breaking them off. The vehicle continued west as it rotated to the north. Vehicle then overturned and the top and front windshield struck a large tree causing the windshield and frame to be pushed into the passenger portion of the vehicle. It also caused the steering wheel and column to be pushed downward into the front portion of the driver seat. It appears that the driver of the vehicle, Mr. Timothy Munyan was not in the driver's seat at the time of the impact.

(DC02)

The report further alleges that:

Witnesses stated that the jeep had passed them and another vehicle... in a no passing zone and on a curve. The vehicle passed them at a high rate of speed. When they came up on the crash approximately 10 minutes later, the driver, Mr. Munyan had already exited the jeep. Mr. Munyan approached and asked for a flashlight, he then returned to the jeep, climbed inside, and began to gather up beer bottles and throw them into the trees.

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<sup>1</sup> Mr. Munyan was convicted of Careless Driving, but the Lincoln County Attorney subsequently moved to dismiss the charge and the district court granted the motion. (DC59, DC65, DC66) Mr. Munyan was found not guilty of Seatbelt Violation. (DC59)

(DC02)

Trooper Bryce reports that, when he arrived on the scene, he noted blood on Mr. Munyan's face and head and several cuts and contusions on his face. (DC02) Trooper Bryce reportedly asked Mr. Munyan if he had consumed alcohol, to which Mr. Munyan is alleged to have said "he had some at Happy's Inn earlier in the day." (*Id.*) Trooper Bryce reports smelling "a strong odor of alcohol emanating (sic) from Mr. Munyan, his eyes were very bloodshot, and he was slightly confused and was having trouble standing and walking." (*Id.*) Trooper Bryce states he noticed "a strong smell of alcohol in the crashed jeep, a beer bottle near the driver's side windows and several more bottles in the bushes and trees adjacent to the vehicle." (*Id.*) Mr. Munyan was reportedly taken to the Cabinet Peaks Medical Center where Officer Cody DeWitt of the Libby Police Department read Mr. Munyan the implied consent statement, and obtained a blood draw. (*Id.*)

**Motion for probable cause hearing.** January 10, 2020 Mr. Munyan filed a Motion for Probable Cause Hearing in which he argues "the State does not have a prima facie case, and it does not have enough evidence to take the case to trial.... [T]he State cannot show it is more likely than not that a crime was committed and that he committed that crime." (DC09) January 28, 2020, the State replied that Mr. Munyan's motion should be denied for failure to file a supporting brief and that "the State properly charged the Defendant according to the well-established

procedures for charging offenses in district court.” (DC12)

February 6, 2020 Mr. Munyan filed a “Surrebuttal to States Response...” in which he “recognizes this Court’s limitations in revisiting binding case law....,” before he “...respectfully requests that the Court exercise its authority under §46-11-201(2), MCA, and ‘require’ that a preliminary examination be held to assess the adequacy of the State's evidence in support of the affidavit filed in this case.”

(DC13) Mr. Munyan argues that the Due Process Clause of the Fourteenth Amendment “requires at least a preliminary examination before the issuance of a formal felony charge.” (*Id.*) Mr. Munyan contends that, “Proceeding by affidavit (without a show cause hearing) deprives the reviewing authority of two key functions related to witness testimony in the preliminary fact-finding process.... determining if there is probable cause to believe that a crime has been committed, and... protecting citizens against unfounded criminal prosecutions.” (*Id.*) Mr. Munyan further argues that bringing felony charges by information without a show cause hearing deprives the district court of the ability to determine the credibility and competency of the complaining witnesses. (*Id.*) Mr. Munyan maintains charging by information supported by an affidavit allows the prosecutor to:

...[A]void scrutiny of the underlying claim by strategically omitting facts and details that might be key to the reviewing authority (e.g., evidence indicating that actions were the result of justifiable use of force). Thus, proceeding by affidavit effectively terminates the investigative authority granted to either the grand

jury or opposing counsel in a preliminary hearing. The State is able to reduce the entire inquiry only to its own editorialization process, unencumbered by any skeptical inquiry by neutral or adverse participants.

(DC13)

Mr. Munyan argues that proceeding by a prosecutor's affidavit removes the protective power of perjury prosecution since "the prosecutor's affidavit contains no oath attesting to the truth of the substantive allegations if the prosecutor makes clear that he or she is relying on third hand reports." (DC13) By proceeding without any substantive sworn testimony, Mr. Munyan maintains, "Montana has entirely changed the mode of inquiry which occurs before the machinery of the criminal justice system may be invoked...." and "denies a guarantee that 'is fundamental to our scheme of ordered liberty and system of justice.'" (*Id.* citing *McDonald v. City of Chicago*, 561 U.S. 742 at 764-65 (2010)) While again noting the district court lacks the authority to overturn established precedent, Mr. Munyan requests the district court grant his request for a preliminary hearing. (*Id.*)

February 7, 2020 the district court entered its order denying Mr. Munyan's motion for a show cause hearing. (DC14) The court noted that the filing was procedurally defective since Mr. Munyan did not file a supporting brief with his motion and the arguments Mr. Munyan made in his Surrebuttal did not "connect it to his original filing or tie it to his original argument." (*Id.*) After denying the motion, the district court addressed the substantive arguments raised in Mr.



Munyan's Surrebuttal, stating:

The law is well-settled that a prosecution may be commenced by applying to the district court for leave to file an information as allowed by the statutes.... The law is well-settled that any statutory method of charging a defendant with a criminal offense in district court is acceptable, and a defendant is not entitled to any particular method of charging. Here Defendant was properly charged by application to this court for leave to file an information and this court's finding of probable cause based on the affidavit in support of the State's motion for leave to file the information. No additional probable cause proceeding is authorized.

(DC14)

**Evidence presented at trial.** Dawn Munsel testified that, at about 6 P.M. on November 30, 2019, she, her husband and her two children were driving from Kalispell to Libby on Highway 2 at about 65 miles per hour when her husband said, "Hold on kids. I don't know what's about to happen." (1/14/2021 Hrg. Tr. 100:20-101:8,103:24-104:2) Her husband was looking in the rearview mirror, and said, "This person's coming up really fast behind us." (*Id.* 101:9) Ms. Munsel said:

And this car whipped out into the other lane heading towards Libby and went to pass us and the truck in front of us, there was an oncoming car, and he just about hit that. All three of us kind of split and went over to the white lines of the road. He came back in trying to avoid that car, went over the white line, corrected himself, and managed to get back on the road. When we reached up by Miller Creek on that straight stretch, we couldn't even see his taillights. He was gone. My husband said, I think we're going to find him in an accident somewhere.

1/14/2021 Hrg. Tr. 101:12-24)

Ms. Munsel said they came upon the vehicle, which she identified as a Jeep, 15 or 20 minutes later "overturned in the trees down in the ditch." (1/14/2021 Hrg.

Tr. 101:25-102:9) According to Ms. Munsel, she went down and found a man standing there with blood running down his face. (*Id.* 102:10-11) The man initially told her that the driver of the vehicle “ran off into the woods” but also denied being a passenger. (*Id.* 102:15-19) Ms. Munsel testified the man went back to the vehicle and started throwing “what looked like Coors Light beer bottles out of the vehicle. (*Id.* 103:7-9) When asked, he told Ms. Munsel, “Well yeah, it’s my vehicle. I was driving it.” (*Id.* 103:4-8) The man said he was looking for his phone. (*Id.* 103:11-12) Ms. Munyan testified that, when law enforcement arrived, she was administering first aid, donning gloves, and putting pressure on the man’s head wound. (*Id.* 104:16-19) “I turned around to talk to one of the police officers..., and I turned back around, and he was gone again. He had crawled back in the vehicle again and he was, again, throwing bottles out of the vehicle.” (*Id.* 104:19-24) Ms. Munyan testified she did not smell alcohol. (*Id.* 105:6) On cross-examination, Ms. Munyan said it was about 6:00 PM when they came upon the accident, and that it was dark. (*Id.* 106:5-7) She testified she saw the silhouette of one person when the Jeep passed them but did not get a good look at the individual because “he passed us too quickly.” (*Id.* 106:15-21) Ms. Munyan was “100 percent” certain the vehicle they came across twenty minutes later was the same as the one that passed them. Ms. Munyan acknowledged that she didn’t put everything to which she testified in the statement she gave law enforcement at the scene. (*Id.* 109:15-19) Ms. Munyan

said she didn't get close enough to smell alcohol because she just "put some pads on his head and told him to hold them there." (*Id.* 110:21-111:4)

Crystal Everett of the Montana State Crime Lab testified regarding the testing of the blood sample drawn from Mr. Munyan taken at Cabinet Peaks Medical Center at the direction of Officer DeWitt. (1/14/2021 Hrg. Tr. 116:14 et seq.) Ms. Everett testified that Mr. Munyan's blood sample contained 0.205 grams of ethanol per 100 milliliters, plus or minus 0.015 grams. (*Id.* 121:5-15)

Montana Highway Patrol Trooper Bryce Ford testified regarding his observations at the scene of the accident. (1/14/2021 Hrg. Tr. 125:25 et seq.) Trooper Ford testified he arrived at the scene and saw a black or dark blue Jeep "laying on its side in the barrow pit, back door... open, debris all over the place, one male – who he identified as Mr. Munyan – with blood all over his face in the vicinity of the Jeep." (*Id.* 128:13-129:2) Trooper Ford said Mr. Munyan's speech was slurred, his eyes were bloodshot, and there was a "strong odor of alcohol emanating from him." (*Id.* 129:7-9) Trooper Ford said, "There was also a strong smell of alcohol in the vehicle. There was a beer bottle right under the... driver's side window, and then several beer bottles off in the trees." (*Id.* 130:22-25) Trooper Ford verified photos he took of the accident scene, which were entered as

exhibits.”<sup>2</sup> (*Id.* 130:1 et seq.) Trooper Ford said Ms. Munsel told him she saw Mr. Munyan pulling bottles from the Jeep and throwing them into the trees. (*Id.* 133:13-21) Trooper Ford testified that he immediately concluded that a DUI investigation was called for, but did not perform a field sobriety test due to concerns about Mr. Munyan’s head injury. (*Id.* 134:13-20) Trooper Ford stated Mr. Munyan was placed under arrest and transported to the hospital, charged with DUI based on observations including unsteadiness, blurred speech, trouble walking and the smell of alcohol. (*Id.* 135:11-18) On cross-examination, Trooper Ford agreed that people who suffer head injuries often seem confused and have difficulties walking and “those sorts of things....” (*Id.* 136:12-15)

Libby Police Officer Cody DeWitt testified that, at the request of Trooper Ford, he escorted the ambulance carrying Mr. Munyan to the hospital and performed a blood draw using a “blood draw kit.” (1/14/2021 141:14 et seq.) Officer DeWitt stated, “I read Mr. Munyan the implied consent advisory, and did not get an affirmative no from him, and the blood draw was performed.” (*Id.* 144:13-16) Officer DeWitt testified that, at the scene, he could smell “the odor of an alcoholic beverage” when Mr. Munyan walked “within a few feet” of him. (*Id.*

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<sup>2</sup> The transcript indicates Exhibit 1 consisted of three photographs and Exhibit 2 consisted of four photographs. However, the district court transmitted only the first photograph from each exhibit, each of which shows a beer bottle on the scene.

145:14-24) On cross-examination, Officer DeWitt conceded that Mr. Munyan was unconscious when he read the Montana Implied Consent Advisory to him at the hospital. (*Id.* 147:13-148:14) Officer DeWitt testified that, he is required to ask whether the arrestee consents to the blood test and, if the arrestee does not give an affirmative refusal, procedure is to perform the blood draw. (*Id.* 149:1-25) When defense counsel pressed Officer DeWitt about why he did not “deem it necessary” to get a warrant before drawing Mr. Munyan’s blood, the district court intervened, “Stop. The law does not deem it necessary. Montana case law said the procedure that he followed was correct. You have not challenged this before today. You will not challenge it now.” (*Id.* 15:9-21)

Lincoln County Sheriff’s Deputy John Hyslop testified regarding his involvement in the case. (1/14/2021 Hrg. Tr. 154:13 et seq.) Deputy Hyslop testified that he arrived on the scene of the accident just after Trooper Ford. (*Id.* 156:21) Deputy Hyslop went down to the vehicle where he observed several people standing around and a man he identified as Mr. Munyan “looking around inside the vehicle.” (*Id.* 157:1-11) Deputy Hyslop heard some of the witnesses say Mr. Munyan was “throwing beer cans out of the vehicle before we arrived. So, after we had gotten him into the ambulance and everything, we checked around and found several beer cans within close proximity of the vehicle.” (*Id.* 159:3-8) According to Deputy Hyslop, the cans appeared to be new. (*Id.*) Upon further

inquiry, Deputy Hyslop allowed that the beer containers may have been bottles instead of cans. (*Id.* 159:13-20)

The State rested its case and, after a failed motion for directed verdict, Mr. Munyan rested his case without presenting any evidence. (1/14/2021 Hrg. Tr. 161:2-163:15) The jury was released for the day. (*Id.* 163:16, et seq.) The trial resumed on January 15, 2021 after a chambers conference on setting of jury instructions. (1/15/2021 Hrg. Tr. 176:1, et seq.) The district court delivered instruction to the jury and, after brief closing statements, the jury was deliberated for about 40 minutes before returning a verdict, finding Mr. Munyan guilty of Count I, driving under the influence of alcohol.<sup>3</sup> (*Id.* 219:7-10)

### **STANDARDS OF REVIEW**

This Court reviews questions of law de novo. *State v. Hass*, 2011 MT 296, ¶13, 363 Mont. 8, 265 P.3d 1221. The Court reviews conclusions of law to determine if they are correct. *State v. Baker*, 2004 MT 393, ¶12, 325 Mont. 229, 104 P.3d 491.

“The standard of review for determining the sufficiency of the evidence in a jury trial is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

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<sup>3</sup> Mr. Munyan was also found guilty of Count III, careless driving. The district court subsequently dismissed the charge upon motion of the State.

crime beyond a reasonable doubt.” *State v. Ray* (1994), 267 Mont. 128, 138, 882 P.2d 1013, 1019.

Ineffective assistance of counsel claims constitute mixed questions of law and fact that the Court reviews de novo. *State v. Lamere*, 2005 MT 118, ¶9, 327 Mont. 115, 112 P.3d 1005.

The Court may undertake review of an issue not raised before the district court under the plain error doctrine if the issue implicates a defendant's fundamental constitutional rights and failing to review the alleged error may: 1) result in a manifest miscarriage of justice, 2) leave unsettled the question of the fundamental fairness of the proceedings, or 3) compromise the integrity of the judicial process. *State v. Daniels*, 2003 MT 247, ¶20, 317 Mont. 331, 77 P.3d 224.

## **ARGUMENT**

**1. Counsel for Defendant and Appellant should be permitted to withdraw from this cause in accordance with *Anders v. California* and Mont. Code Ann. §46-8-103.**

The Fourteenth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee every defendant the right to a fair trial and due process of law, including fair representation. 386 U.S. 738, 742 (1967). When appellant’s counsel "finds his case to be wholly frivolous" he should, after conscientious examination of the case, advise the court and request permission to withdraw. *Id.* at 744

To ensure protection of appellant's rights, counsel's request to withdraw must be accompanied by a brief that references anything in the record that might arguably support an appeal (an *Anders* brief). *Id.* A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel's motion and brief. *Id.*

The State of Montana has codified the requirements of *Anders v. California* in Mont. Code Ann. §46-8-103(2). If, after reviewing the entire record and researching the applicable law, counsel concludes that an appeal would be frivolous or wholly without merit, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. *Id.* A memorandum discussing any issues that arguably support an appeal must accompany the motion to withdraw. *Id.* The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate citations to the record and the law bearing on each issue. *Id.*

An *Anders* brief meets the requirements of both *Anders v. California* and Mont. Code Ann. §46-8-103(2). The brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). The requirements of an *Anders* brief are not meant to force counsel to argue against appellant. *Anders*, 386



U.S. at 745.

Pursuant to Mont. Code Ann. § 46-8-103(2), counsel for Appellant reluctantly advises the Court that, after conducting diligent review of the record and the relevant law, counsel has not found any non-frivolous issues appropriate for appeal in this matter. While counsel has great sympathy for the Appellant, he can find no meritorious grounds for appeal. In accordance with the requirements of *Anders* and Mont. Code Ann. § 46-8-103(2), counsel provides this memorandum (Anders Brief) discussing any issues that arguably support an appeal, a summary of the procedural history of the case and any jurisdictional problems with the appeal, and appropriate citations to the record and the law bearing on each issue. *Id.*

**2. Mr. Munyan may arguably request the Court consider the case for review under the plain error doctrine.**

The Court will generally decline to review issues raised for the first time on appeal. *State v. Long*, 2005 MT 13, ¶35, 37 Mont. 238, 113 P.3d 290. An exception arises when the Court determines an unpreserved objection implicates a fundamental constitutional right, and plain error review is necessary to avoid a manifest miscarriage of justice, leaving an unsettled question regarding the fundamental fairness of the proceeding or otherwise compromising the judicial process. *State v. Dahlin*, 1998 MT 113, ¶14, 289 Mont. 182, 961 P.2d 1247. The Court exercises plain error review only under extraordinary circumstances and, to

justify such review, appellant must affirmatively demonstrate the criteria pertain to his or her case. *State v. Finley*, 276 Mont. 126, 138, 915 P.2d 208, 215, *State v. Mitchell*, 2012 MT 227, ¶10, 366 Mont. 379, 286 P.3d 1196.

In this case, Mr. Munyan may argue that, by refusing to order a show cause hearing the district court denied him his right to due process. The charge by information in this case contained no sworn testimony as to the evidence of a crime. In order to prevail with this argument, Mr. Munyan would need to show that, the unattested allegations in Trooper Ford's report were not supported by verifiable evidence, resulting in a fundamentally unfair proceeding.

**3. Mr. Munyan may arguably assert he received ineffective assistance of counsel.**

A criminal defendant's right to counsel is guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution. *Sellner v. State*, 2004 MT 205, ¶8, 322 Mont. 310, 95 P.3d 708. Montana has held that the right to counsel guarantees, not only the presence of counsel, but the effective assistance of counsel. *State v. Boyer* (1985), 215 Mont. 143, 147, 695 P.2d 829, 831.

A defendant claiming ineffective assistance of counsel must show that: 1) counsel's performance was so deficient that counsel did not meet the requirements of the U.S. and Montana Constitutions; and 2) it is reasonably probable that, but

for counsel's deficient performance, the result of the proceeding would have been different. *State v. Henderson*, 2004 MT 173, ¶5, 194, 322 Mont. 69, 114, 93 P.3d 1231.

Because there is a “strong presumption that counsel’s actions are within the wide range of reasonable professional assistance, a record which is silent about the reasons for the attorney’s actions or omissions seldom provides sufficient evidence to rebut this presumption.” *State v. Sartain*, 2010 MT 213, ¶30, 357 Mont. 483, 241 P.3d 1032 (quotation marks and citation omitted). As a result, if the record does not demonstrate “why” counsel did or did not take an action, the ineffective assistance claim is more suitable for a petition for postconviction relief. *Id*

In this case, Mr. Munyan may assert that counsel acted outside the bounds of reasonable professional standards when it filed the motion for show cause hearing without a supporting brief, making it procedurally deficient. In order to prevail under this theory, Mr. Munyan would need to demonstrate that, if counsel had briefed the motion upon filing, the outcome of the case would have been different.

Secondly, Mr. Munyan may argue ineffective assistance of counsel based on counsel’s failure to object to the collection of his blood while he was unconscious during pre-trial. Counsel’s failure to do so precluded any inquiry into the matter during the trial. If Mr. Munyan had been convicted under the second alternative

charge of blood alcohol content above .08, the error could have constituted ineffective assistance of counsel.

### **CONCLUSION**

After thorough review of the entire record and researching applicable statutes, case law, and rules, counsel has determined that Defendant and Appellant Timothy Munyan's appeal presents no non-frivolous issues and is, therefore, wholly without merit. Counsel respectfully requests the court grant the motion to withdraw on direct appeal.

Respectfully submitted this March 11, 2022.



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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 not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



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Gregory D. Birdsong

## **CERTIFICATE OF SERVICE**

I, Gregory Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 03-11-2022:

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