IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0510

CODY WAYNE JOHNSTON

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court, Richland County, The Honorable Elizabeth A. Best, Presiding

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Issue presented

Whether the district court erred in concluding trial counsel rendered effective assistance although counsel failed to object to multiple instances of misconduct the prosecutor committed in closing argument.

Statement of the case

In *State v. Johnston*, Cody Johnston (Johnston) was charged by Information with deliberate homicide, a felony, in violation of Mont. Code Ann. § 45-5-102(1)(a), and tampering with physical evidence, a felony, in violation of Mont. Code Ann. § 45-7-207(1)(a). (DC 15-092 (D.C.) Doc. 3.) The State theorized Johnston, on or about February 14, 2013, purposely or knowingly caused the death of his former fiancé, Nichole Waller (Waller), and thereafter concealed or removed her body with the purpose to impair its verity or availability in the proceeding or investigation. (D.C. Doc. 3.)

Johnston was indigent and Office of the State Public Defender (OSPD) attorneys Clark Mathews (Mathews) and Casey Moore (Moore) were appointed as counsel. (D.C. Docs. 18, 20.) Following a four-day jury trial, Johnston was found guilty of both counts of the Information.

(D.C. Doc. 160; Trial at 989.)[1] The court sentenced Johnston to the Montana State Prison for a period of life pursuant to Count I, and imposed a consecutive, ten-year sentence pursuant to Count II. (D.C. Doc. 180; Trial at 1108-09.) This Court affirmed Johnston's sentence by memorandum opinion on October 16, 2018. *State v. Johnston*, 2018 MT 265N, 394 Mont. 387, 428 P.3d 253.

Johnston timely pursued postconviction relief. (DV 18-185 (D.V.) Docs. 2-3.) Following the appointment of counsel, Johnston filed an amended petition and, relevant to the instant appeal, argued trial counsel rendered ineffective assistance (IAC) by failing to object to the misconduct the prosecutor committed in closing argument. (D.V. Doc. 52.)

The court found trial counsel failed to object to multiple instances of misconduct the prosecutor committed in closing argument; however, it nevertheless denied Johnston's amended petition. (D.V. Doc. 80 at 8-10.) It is from this Order Johnston now appeals. (D.V. Doc. 80, attached as Ex. A.)

[1] The trial and sentencing transcripts from DC 15-092 will be cited as "Trial;" the PCR hearing transcript will be cited as "PCR."

Statement of the facts

Waller's family took Johnston into their home for a few months in 1997 when Johnston was a senior in high school. (Trial at 281-82, 843.) Waller and Johnston reconnected years later via Facebook. (Trial at 282, 846-47.) At the time, Waller was living in a single-wide trailer in the Kalispell area and Johnston was living in a home in Fairview, Montana. (Trial at 283-84, 847-48.) They began a long-distance relationship; Waller would travel to Fairview and Johnston would travel to Kalispell. (Trial at 284.)

Waller suffered from a number of serious medical maladies and Johnston provided care and financial assistance. (Trial at 284.) Johnston ultimately purchased and remodeled a double-wide trailer in the Kalispell area for Waller and her children to reside in. (Trial at 284, 849.) Waller sold her single-wide trailer for $10,000 and applied these proceeds towards the purchase of the double-wide trailer from Johnston. (Trial at 850-51.) Although Waller agreed to pay Johnston the balance of $2,000, pursuant to monthly payments, she failed to make any additional payments towards the purchase of the double-wide

trailer. (Trial at 377, 851, 917.) Johnston did not pursue any legal action to enforce the agreement or evict Waller. (Trial at 851.)

Waller and Johnston broke up for a period of time in 2012, and Johnston began dating Amber Fleming (Fleming). (Trial at 286-87, 852, 919-20.) Waller subsequently fabricated a story about being pregnant with Johnston's child to win Johnston back. (Trial at 286, 306, 852.) Johnston broke up with Fleming and Waller moved into Johnston's home in Fairview. (Trial at 852-53, 920.) Waller later claimed she suffered a miscarriage. (Trial at 286, 853-55.) Johnston confronted Waller in January 2013 after learning she had faked the pregnancy. (Trial at 286, 853-55.)

Johnston thereafter made arrangements for Waller to enter a treatment program, but Waller refused to go. (Trial at 711, 855-56.) Johnston ultimately decided to end the relationship and told Waller she needed to return to Kalispell. (Trial at 856.) Johnston believed he still owned the double-wide trailer and had an acquaintance secure the home. (Trial at 857-58, 917, 920.)

Waller spent the days leading up to Valentine's Day 2013 packing her belongings and preparing to move back to Kalispell. (Trial at 293,

318.) She informed multiple people she intended to depart Fairview the morning of February 14, 2013. (Trial at 296, 365, 383.) Although the relationship was clearly over from Johnston's perspective, Waller invited Johnston to dinner and a movie at his home the evening of February 13, 2013. (Trial at 712-13, 858-59, 910-11.) Johnston, however, chose to socialize with a coworker and ultimately spent the night in a travel trailer parked at his employer's business in Sidney. (Trial at 495-96, 858-59, 910-11, 918.)

Waller called and texted Johnston the next morning, February 14, 2013. (Trial 715-16.) She also called her ex-husband, Jason Waller, and caregiver, Mark Hines (Hines). (Trial at 365, 716.) She texted Hines at 7:25 a.m.—"I'm on way [sic]." (Trial at 383, 717.) No further calls or texts were sent from Waller's phone after that time. Waller never arrived in Kalispell and, although there have been some reported sightings, she has never been located. (Trial at 464, 809-14, 870.)

Cell phone records demonstrate Johnston arrived home around 7:26 a.m., February 14, 2013. (Trial at 584.) Johnston located Waller's vehicle in the driveway; however, Waller was nowhere to be found. (Trial at 861.) Believing Waller was out buying cigarettes or had left

with somebody else, Johnston hatched a childish and vindictive scheme to move Waller's vehicle to a different location. (Trial at 861-63, 866, 877.)

Johnston later drove to Bill Sorteberg's (Sorteberg) home and solicited Sorteberg's assistance in moving Waller's vehicle. (Trial at 652, 863.) Sorteberg alleged Johnston, at the time, was also searching for a "banded barrel" with a secure lid. (Trial at 651-52, 656-57, 921-22.) Sorteberg did not have any such barrel, but agreed to help Johnston in moving Waller's vehicle. (Trial at 651-53.) Johnston denied seeking a "banded barrel" with a secure lid; rather, he was looking for "grease drums"—"3 feet tall, 18 inches diameter"—to use as garbage cans in his garage. (Trial at 864, 896, 919.) Johnston, with Sorteberg's assistance, ultimately abandoned Waller's vehicle west of Poplar. (Trial at 311, 316-17, 619, 655, 866-67.) Johnston would go on to spend the weekend—February 15-17, 2013—with Fleming at his home in Fairview. (Trial at 675, 727-28, 911-13.)

Johnston later emptied the double-wide trailer of most of its contents without consulting Waller's family. (Trial 366-67, 371, 820-21, 901-02.) Waller's sister, Carmen Keibler (Keibler), alleged Johnston

had previously agreed to allow Keibler into the home to document and remove Waller's property and personal belongings. (Trial at 820-21.) Keibler retrieved Waller's personal belongings in June 2013, but only after Johnston allegedly threatened to clean out the home if Keibler was unable or unwilling to take immediate action to retrieve her sister's belongings. (Trial at 822.)

Johnston ultimately sold the double-wide trailer months after Waller's disappearance. (Trial at 869, 914-16.) He did not share any of the proceeds from the sale with Waller's family. (Trial at 915.)

State's closing

The prosecutor opened the State's closing argument by expressing the following personal opinion as to the evidence:

> I'll try to be as brief as I can, because **I, quite honestly, think it's obvious that after three years, Nicole Waller is dead**.

(Trial at 935 (emphasis added).) Regarding Waller's vehicle and its contents, the prosecutor opined: "[Waller] left two live guinea pigs. **That tells me** that's one of the last things she put in the car, and she's on her way home." (Trial at 936 (emphasis added).) Again, regarding the evidence if any of Waller's demise, the prosecutor personally opined:

> The one thing he did right was he hid that body so nobody could find her, **I think it's clear, unfortunately, that we have proven beyond a reasonable doubt that [Waller] is dead**.

(Trial at 941 (emphasis added).)

Regarding Johnston's trial testimony, and his credibility in that regard, the prosecutor personally implored the jury:

> Quite frankly, ladies and gentlemen, **the story the defendant told you yesterday** makes no sense whatsoever. It's as foggy as what we drove through this morning coming here. **You should reject it as pure fiction**.

(Trial at 942 (emphasis added).)

The prosecutor reminded the jury of Johnston's decision to brush off Waller the night of February 13, 2013, expressing his personal opinion as to the contrast between Waller's character compared to Johnston's character:

> On the 13th, even though they've had this disagreement over the house, even though she can't wait to get home—she hates it there. You heard that—she still asks if he wants to come home and watch a movie. **I think that tells us a little bit about [Waller]**.
>
> **What did this defendant do?** He lies to her. He says he's working, because **he'd already set up this little rendezvous with Jim Renner, where they can go out and have a good time, party and drink**.

(Trial at 942-43 (emphasis added).) Moreover, that Johnston decided to end the relationship with Waller and rekindle his relationship with Fleming, the prosecutor lambasted Johnston's character:

> He asked for a couple weeks from [Fleming]. He needed time to dump [Waller], get his house back, and [Fleming] would be his new girlfriend. **Who treats a person like that? Who lies to a person like that?**

(Trial at 943-44 (emphasis added).)

The prosecutor next highlighted the evidence regarding Johnston's decision to surreptitiously padlock the double-wide trailer in Kalispell, continuing his overt attack on Johnston's character:

> Knowing [Waller is] leaving, knowing that that car's packed—well, [Johnston] calls an old high school buddy, Frank Witts, and asks him to go to the house, check on it, and when it looks like nobody's there, put padlocks on the door and screw the windows closed. **Wow. Nice Guy**.

(Trial at 944 (emphasis added).) The prosecutor then expressed his own emotional reaction to this evidence: "And **what I found heart wrenching** was after she's locked out, those kids are locked out—you read the texts." (Trial at 945 (emphasis added).) Indeed, that Johnston surreptitiously padlocked the double-wide trailer, the prosecutor explicitly implored the jury to consider Johnston's character in that regard:

> [T]he defendant was extremely happy. He had locked her out. **I ask you, what kind of man does that? And what does that tell you about his character?**

(Trial at 945 (emphasis added).)

The prosecutor also highlighted the evidence of Johnston's failure to pursue a civil remedy regarding the double-wide trailer and Waller's apparent default. (Trial at 946.) Again, he reminded the jury of Johnston's decision to surreptitiously padlock the double-wide trailer and, again, expressed his personal opinion as to Johnston's character:

> [Johnston] didn't care that that's her house. She owns it. He's still going to tell her who can come and go . . . he's seeing [Fleming] at the same time he's seeing [Waller], but he doesn't want Mark Hines there, [Waller's] caretaker? **Are you kidding me?** The person who helped her sometimes get through the day, even giving her showers when she wasn't capable. **I think that, again, tells us reams about who [Johnston] is**.

(Trial at 946 (emphasis added).) The prosecutor then implored the jurors to consider the evidence regarding Johnston's sale of the double-wide trailer: "He sold that house. **Did Nicole's family get anything out of it? Did her kids get anything out of it?**" (Trial at 947 (emphasis added).)

Regarding Johnston's testimony concerning the calls he placed to Waller the morning of February 14, 2013, the prosecutor offered his

personal opinion as to this evidence: "**I found it a little unusual** when he told law enforcement, told anyone who would listen, that he turned off her phone at 8:00 because she kept bothering and hassling him with calls." (Trial at 949 (emphasis added).)

The prosecutor argued Johnston lost control and killed Waller. (Trial at 951.) Whether Waller died by strangulation or suffocation, the prosecutor speculated:

> We don't know, because he hid her body. **Her body now rests in some dirty and disrespectful location, hidden by the defendant**.

(Trial at 951 (emphasis added).)

The prosecutor also highlighted the conflicting accounts as to whether Johnston was in search of a "55-gallon barrel with a lid" or a smaller "grease drum" for use as a garbage can in his garage. (Trial at 953.) The prosecutor insisted, "no doubt about it, [Johnston] wanted a 55-gallon barrel with a lid." (Trial at 953.) He then overtly expressed his personal opinion as to Johnston's lack of credibility, and vouched for the truthfulness of Sorteberg's account:

> Now, the defendant comes up with all this little swirly stuff about having some little, small thing. I submit to you, ladies and gentlemen, **when it comes to the credibility of this defendant, who has lied and lied and lied**

> **throughout this trial**, compared to Bill Sorteberg, who raised his hand under oath, you make that decision. **I think it's simple. I think it's easy**.

(Trial at 953 (emphasis added).) The prosecutor then ridiculed Johnston's explanation for moving Waller's vehicle: "**Come on. That's ridiculous**." (Trial at 953-54 (emphasis added).)

The prosecutor next highlighted Johnston's conduct and purported lack of cooperation with Waller's family in cleaning out the double-wide trailer. (Trial at 960-61.) He then explicitly implored the jury to consider Johnston's character:

> Again, **what does that tell you about the defendant, about his character?** He couldn't wait a week? He couldn't—she's missing, and he couldn't meet with the family of [Waller] to make sure that maybe there was something they may want to hold on to?

(Trial at 961 (emphasis added).) That Johnston purportedly insisted Keibler immediately remove Waller's personal belongings from the double-wide trailer the prosecutor, again, attacked Johnston's character: "**Wow. What does that tell us about this man?**" (Trial at 961 (emphasis added).)

The prosecutor touted the significance of the timeline the State established during the course of Johnston's trial. (Trial at 961-62.) He then explicitly expressed his personal opinion as to Johnston's guilt:

> Throughout this entire trial, one of the things we've tried to do is outline a tight timeline that shows—**I believe proves—that only the defendant had the motive, only the defendant had the opportunity, and only the defendant had the means to kill Nicole Waller**.

(Trial at 961-62 (emphasis added).) The prosecutor next highlighted the evidence demonstrating Johnston was less than forthright with law enforcement regarding his whereabouts and movements. (Trial at 962-63.) He ridiculed Johnston's lack of transparency with law enforcement and expressed his personal opinion as to Johnston's motivation: "**It's crazy**. I submit what it is—and **I think that's obvious—that it's survival mode**." (Trial at 963 (emphasis added).)

The prosecutor concluded the State's initial closing with the following argument:

> **Somewhere in Montana, Nicole Waller lies in a cold and lonely grave, taken from her children, taken from her family**, by that man, Cody Johnston.

(Trial at 964-65 (emphasis added).)

Pursuant to the State's rebuttal closing, the prosecutor continued to attack Johnston's testimony and credibility in that regard: "Why would [Johnston] make up an alibi if [Waller] just went to the store for cigarettes? **That's crazy**." (Trial at 982 (emphasis added).) The prosecutor also denigrated defense counsel's closing:

> Now, I don't know where this 17—7:19 came up with. **That's crazy**. You heard the testimony, and the defendant admitted it. On the way to Fairview, he's calling 7:13, 7:17, 7:20, 7:21, 7:22, and arrives at 7:25. That's what Cody Johnston said. That's what Sy Ray said. That's what the phone records say. Then he comes up with some red herring about 7:19, couldn't have been there. **Not Credible**.

(Trial at 983 (emphasis added).)

The prosecutor again highlighted the conflicting accounts as to whether Johnston was in search of a "55-gallon barrel with a lid" or a smaller "grease drum" for work purposes. (Trial at 983-84.) He then openly mocked Johnston's testimony in that regard and explicitly expressed his personal opinion as to why Johnston was searching for a barrel:

> And then he stops—"Oh, by the way, all this going on about the"—"Oh, by the way, I need a barrel for work." **That's ridiculous. Absolutely ridiculous. I know what that barrel was for**. Bill Sorteberg knew what that barrel was for. The defendant knew what that barrel was for. And I submit you should know what that barrel was for as well.

(Trial at 984 (emphasis added).) Finally, that Johnston believed he retained ownership of the double-wide trailer, the prosecutor chided Johnston's testimony: "He thought it was his. **That's ridiculous**." (Trial at 984 (emphasis added).)

PCR evidentiary hearing

Trial counsel had been lead or co-counsel in more than 20 jury trials in Montana courts and had observed many trials. (D.V. Doc 67 (Mathews Aff.) at ¶ 5.) He alleged: "While I have objected during opening or closing and seen others do so, I do not recall having ever seen one sustained." (D.V. Doc. 67 at ¶ 5.)

Trial counsel characterized the prosecutor's closing in the present case as "histrionic." (D.V. Doc. 67 at ¶ 8; PCR at 35.) Regarding the prosecutor's statements detailed *supra*, trial counsel did not object because he did not think the arguments conflicted with Johnston's theory of defense. He also alleged: "I thought some of his arguments were a rather desperate attempt to conjure up a motive. I believed the jury would see it that way." (D.V. Doc. 67 at ¶ 8.)

Additionally, trial counsel explained: "I didn't object because it's closing . . . in my experience, the Judge typically says this is, you know,

this is closing argument. Overruled, it's argument, you know." (PCR at 22.) Again, he averred, "I didn't think they would be sustained." (PCR at 24.) Regarding the prosecutor's arguments attacking Johnston's character, trial counsel did not object because, "the more time [the prosecutor] spent, you know, focusing on things like that rather than some of the more damning evidence I was okay with." (PCR at 26-27.)

Regarding the "potential vouching" the prosecutor committed in closing, trial counsel conceded the prosecutor's personal assertions that the State had established Waller was dead were "likely inappropriate." (D.V. Doc. 67 at ¶ 12; PCR at 27.) He did not object, however, because "we made the strategic decision to not challenge [Waller] was likely dead" and "it was more appropriate for the jury to consider whether [Johnston] was the one responsible for it." (D.V. Doc. 67 at ¶ 12; PCR at 27-28.)

That the prosecutor in closing expressed his personal opinion Johnston was guilty, trial counsel alleged, "prosecutors always say that in closing." (PCR at 29-30.) He acknowledged this argument was not consistent with Johnston's theory of defense and offered the following explanation for his failure to object: "nothing jumped out to me could

cause me to want to object to where I thought the Judge would sustain it." (PCR at 32.) Again, trial counsel explained:

> Because typically, my instinct in closing, unless something jumps out at me, is I'm not going to get up there and object because, as I've seen countless times, the Judge says, you know, this is argument; this is closing argument. I remind the jury that this isn't evidence and—and so, that was—that was what happened.

(PCR at 33.)

The court found the prosecutor's closing was, "permeated with personal opinion and commentary." (Ex. A at 8.) It observed, "it's obvious . . . [the prosecutor] on—on several occasions, using—uses the pronoun 'I' and 'me' in his argument." (PCR at 31.) In that regard, the court declared, "there was certainly, a fairly significant amount of vouching by [the prosecutor] that was inappropriate and improper and may fit into the category of prosecutorial misconduct." (PCR at 44.) The court reiterated:

> [I]t rose to the level, from my perspective, of vouching and of virtual testimony, and it was—it was less of a pattern of speech, than an attempt to tell the jury that, you know, this is—this is what a prosecutor thinks, which carries a lot of weight.

(PCR at 52.) The court concluded: the prosecutor committed misconduct in closing "in the form of vouching" and "I don't think that anyone would argue that that was appropriate." (PCR at 54-55.)

The court also noted the prosecutor repeatedly expressed his "personal beliefs about the evidence," and it concluded, "this type of argument and vouching by the prosecutor is improper." (Ex. A at 8.) Although trial counsel repeatedly expressed doubt as to whether the court would have sustained an objection, the court rebuked, "I think he's wrong about that, frankly." (PCR at 48.)

Although the court found the prosecutor's closing was "permeated with personal opinion and commentary," and many of his statements were "improper," it nevertheless concluded trial counsel's failure to object did not constitute IAC. (Ex. A at 8-10.) The court reasoned trial counsel's failure to object was a "strategic decision." (Ex. A at 8.) In that regard it noted trial counsel did not object because, *inter alia*, "courts do not sustain many objections during closing argument" and the prosecutor's arguments "were not, in their opinion, effective in any event." (Ex. A at 8, 10.)

Based on the foregoing, the court concluded these "strategic decisions" were "within the 'objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances.'" (Ex. A at 10, *quoting Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861.) The court, in passing, also found, "the evidence at trial was overwhelming and proved Johnston's guilt beyond a reasonable doubt." (Ex. A at 10.)

Summary of the argument

The court correctly found the prosecutor repeatedly committed misconduct in closing argument. Indeed, it observed the prosecutor's closing was "permeated with personal opinion and commentary." The court erred, however, in concluding trial counsel's failure to object did not constitute IAC. It reasoned trial counsel's failure to object was "strategic," and said strategy was within the "objective standard of reasonableness." The court clearly misapprehended the effect of the prosecutor's misconduct, and ignored its own rebuke of counsel's purported fear of being overruled had he objected in closing.

This Court should find trial counsel's purported strategy was not objectively reasonable and, therefore, his failure to object constituted

IAC. This should be self-evident where said "strategy" permitted the prosecutor to impermissibly, *inter alia*: inflame the passions and biases of the jury; vouch for the credibility of witnesses; and express his personal opinion as to Johnston's guilt. The court's conclusion to the contrary, the foregoing misconduct violated Johnston's substantial rights.

Standard of review

This Court reviews the denial of a postconviction relief petition to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Whitlow*, ¶ 9. A finding of fact is clearly erroneous if, *inter alia*, the district court misapprehended the effect of the evidence. *State v. Eskew*, 2017 MT 36, ¶ 12, 386 Mont. 324, 390 P.3d 129. Claims of IAC present mixed questions of law and fact, which this Court reviews *de novo*. *Whitlow,* ¶ 9.

Argument

In all criminal prosecutions, the accused shall enjoy the right to the assistance of counsel for his defense. U.S. Const. Amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685 (1984). The right to

counsel is also guaranteed under the Montana Constitution, Article II, Section 24.

This Court has adopted the two-part *Strickland* test for measuring IAC claims. *State v. Boyer*, 215 Mont. 143, 147, 695 P.2d 829, 831 (1985). First, petitioners must show counsel's performance was deficient. They must demonstrate counsel made such serious errors that counsel was not functioning as the "counsel" guaranteed under both the United States and Montana Constitutions. *State v. Henderson*, 2004 MT 173, ¶ 5, 322 Mont. 69, 93 P.3d 1231.

Second, petitioners must show they were prejudiced by counsel's deficient performance. A petitioner must show a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Henderson*, ¶ 4. "*Strickland* requires only that a defendant show 'a probability sufficient to undermine confidence in the outcome.'" *State v. Rogers*, 2001 MT 165, ¶ 20, 306 Mont. 130, 32 P.3d 724, *quoting Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome, but does *not* require that a defendant demonstrate that he would have been acquitted." *State v. Kougl*, 2004

MT 243, ¶ 25, 323 Mont. 6, 97 P.3d 1095 (emphasis added), *quoting Strickland* 466 U.S. at 694. A "reasonable probability" is a lower standard than a preponderance of the evidence. *Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9th Cir. 2002) ("A 'reasonable probability' is less than a preponderance: '[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'"), *quoting Strickland*, 466 U.S. at 694.

Both the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee criminal defendants the right to a fair trial by a jury. A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial. *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091, *citing Clausell v. State*, 2005 MT 33, ¶ 11, 326 Mont. 63, 106 P.3d 1175. This Court, "measures prosecutorial misconduct by reference to established norms of professional conduct." *State v. Passmore*, 2010 MT 34, ¶ 48, 355 Mont. 187, 225 P.3d 1229 (citation omitted).

Our criminal justice system is premised on certain fundamental principles. And, a prosecutor's role is unique within the criminal justice system. It is not simply a specialized version of the duty of any attorney not to overstep the bounds of permissible advocacy. *See State ex rel. Fletcher v. District Court*, 260 Mont. 410, 415, 859 P.2d 992, 995 (1993). Indeed, Justice Sutherland of the United States Supreme Court aptly described one of these principles over 80 years ago:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. *But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, *improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.*

Berger v. U.S., 295 U.S. 78, 88 (1935) (emphasis added).

A prosecutor is required to, "execute the duties of his representative office diligently and fairly, avoiding even the appearance of impropriety that might reflect poorly on the state." *Fletcher*, 260 Mont. at 415, 859 P.2d at 995 (citation and internal quotation marks omitted). Though he or she, "must diligently discharge the duty of prosecuting individuals accused of criminal conduct, the prosecutor may not seek victory at the expense of the defendant's constitutional rights." Indeed, the prosecutor, "is obligated to respect the defendant's right to a fair and impartial trial in compliance with due process of law." *Fletcher*, 260 Mont. at 415, 859 P.2d at 995 (citation and internal quotation marks omitted).

Simply stated, "a prosecutor should seek justice and not simply an indictment or a conviction." *Fletcher*, 260 Mont. at 415, 859 P.2d at 995, *citing Preston v. State*, 615 P.2d 594, 601 (Alaska 1980). As Chief Justice McGrath has stated, "[a] prosecutor is an officer of the court," who "must strive to promote justice and the rule of law." *State v. Criswell*, 2013 MT 177, ¶ 57, 370 Mont. 511, 305 P.3d 760 (McGrath, C.J., concurring). By making improper comments to a jury, a

prosecutor undermines the respect for the criminal justice system. *Criswell*, ¶ 57 (McGrath, C.J., concurring).

Johnston received IAC where counsel failed to object to multiple instances of misconduct the prosecutor committed in closing.

This Court should find Johnston received IAC where counsel failed to object to the repeated misconduct the prosecutor committed in closing. The court clearly erred in concluding counsel's "strategy" of forgoing objections was objectively reasonable, where said misconduct deprived Johnston of his rights pursuant to the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution.

I. Counsel failed to object to multiple instances of misconduct the prosecutor committed in closing.

This Court considers, "alleged improper statements during closing argument in the context of the entire argument." *State v. Makarchuk*, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213, *citing State v. Roubideaux*, 2005 MT 324, ¶ 15, 329 Mont. 521, 125 P.3d 1114. "We will not presume prejudice from the alleged misconduct, rather the defendant must show that the argument violated his substantial rights." *Makarchuk*, ¶ 24, *citing Roubideaux*, ¶ 11.

While not designed to be used as criteria for judicial evaluation of misconduct, the ABA Standards for Criminal Justice do provide an appropriate benchmark for professional conduct. Chief Justice McGrath has observed: "'Unfortunately, some prosecutors have permitted an excess of zeal for conviction or a fancy for exaggerated rhetoric to carry them beyond the permissible limits of argument.'" *Criswell*, ¶ 55 (McGrath, C.J., concurring), *quoting ABA Stands. for Crim. Just.: Prosecution Function and Def. Function*, Stand. 3-5.8, Commentary, 107, *citing Berger*, 295 U.S. 78. It is also well recognized prosecutorial conduct in argument is a matter of special concern, "because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office." *ABA Stands. for Crim. Just.: Prosecution Function and Def. Function*, Stand. 3-5.8, Commentary, 107.

This Court has explained: "During closing argument, a prosecutor may comment on the 'gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various

phases of evidence, and legal principles involved, to be presented in instructions to the jury . . ..'" *State v. Green*, 2009 MT 114, ¶ 33, 350 Mont. 141, 205 P.3d 798, *quoting State v. Staat*, 251 Mont. 1, 10, 822 P.2d 643, 648 (1991). A prosecutor may also, "'comment on conflicts and contradictions in testimony, as well as to comment on the evidence presented and suggest to the jury inferences which may be drawn therefrom.'" *Green*, ¶ 33, *quoting State v. Gladue*, 1999 MT 1, ¶ 15, 293 Mont. 1, 972 P.2d 827 (emphasis added). Prosecutors must, however, "choose their words circumspectly while arguing their case to the jury." *State v. McDonald*, 2013 MT 97, ¶ 16, 369 Mont. 483, 299 P.3d 799.

Defense counsel's use of objections lies within his or her discretion, a failure to object must, beyond being error, also prejudice the defendant. *State v. Campbell*, 278 Mont. 236, 250, 924 P.2d 1304, 1313 (1996). Because many lawyers refrain from objecting during closing argument, absent egregious misstatements, the failure to object during closing argument is within the "wide range" of permissible professional legal conduct. *Dawson v. State*, 2000 MT 219, ¶ 105, 301 Mont. 135, 10 P.3d 49.

A. The prosecutor inflamed the passions of the jury by appealing to its sympathies for Waller.

Prosecutors may not make comments calculated to arouse the passions of the jury. *Viereck v. United States*, 318 U.S. 236, 247-48 (1943). A prosecutor's role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim. *Drayden v. White*, 232 F. 3d 704, 712-13 (9th Cir. 2000). Accordingly, appeals to "base, visceral emotion, without regard for evidence or proof of guilt" are improper. *Clausell*, ¶ 41 (Nelson, J., dissenting).

The Ninth Circuit has, "consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury." *United State v. Nobari*, 574 F.3d 1065, 1076 (9th Cir. 2009), *citing United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005). Statements "clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact" are "irrelevant and improper." *Weatherspoon*, 410 F.3d at 1149.

The record plainly demonstrates the prosecutor sought to improperly inflame the passions of the jury with overt appeals to its sympathies for Waller. As noted *supra*, he explicitly urged the jurors to consider Waller's unwavering kindness in the face of Johnston's

heartless cruelty and, moreover, offered his personal opinion as to her character: "You heard that—she still asks if he wants to come home and watch a movie. I think that tells us a little bit about [Waller]." (Trial at 942-43.) He then expressed his own, personal sympathy and sorrow for Waller's plight: "And what I found heart wrenching was after she's locked out, those kids are locked out—you read the texts." (Trial at 945.) That Johnston ultimately sold the double-wide trailer, the prosecutor implored the jury to consider: "Did Nicole's family get anything out of it? Did her kids get anything out of it?" (Trial at 947.)

The prosecutor also highlighted Waller's unknown whereabouts. Again, he appealed to the jurors' sympathies for Waller: "Her body now rests in some dirty and disrespectful location . . .." (Trial at 951.) The prosecutor doubled down with one final appeal calculated to arouse the jurors' sympathies for Waller and her family: "Somewhere in Montana, Nicole Waller lies in a cold and lonely grave, taken from her children, taken from her family . . .." (Trial at 964-65.)

The foregoing record demonstrates the prosecutor intentionally utilized the State's closing to improperly inflame the passions of the jury where he repeatedly and explicitly appealed to its sympathies for

Waller and her family. These emotional appeals were clearly calculated to produce a dramatic and emotional impact on the jury. The appeals to the jurors' passions and sympathies were neither brief nor harmless; rather, they were calculated plays on the jurors' emotions. "If not intended to inflame the passions of the jury through an appeal to their sympathies for this already sympathetic [victim], then what was this tactic intended to do?" *State v. Ugalde*, 2013 MT 308, ¶ 113, 372 Mont. 234, 311 P.3d 772 (McKinnon, J., dissenting).

B. The prosecutor's attack upon Johnston's character was calculated to inflame the jury's biases and prejudices.

It bears repeating, prosecutors may not make comments calculated to arouse the passions or prejudices of the jury. *Viereck*, 318 U.S. at 247-48. Moreover, it is fundamental to American jurisprudence, "'a defendant must be tried for what he did, not for who he is.'" *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980), *quoting United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978); *see also* Mont. R. Evid. 404. This precept is a "'concomitant of the presumption of innocence.'" *Foskey*, 636 F.2d at 523, *quoting Myers*, 550 F.2d at 1044.

In *Criswell,* Chief Justice McGrath stated prosecutors, "'should not make arguments calculated to appeal to the prejudices of the jury.'" *Criswell*, ¶ 55 (McGrath, C.J., concurring), *quoting* ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-5.8(c), 106 (3d ed. 1993). He also quoted the following with approval:

> "Remarks calculated to evoke bias or prejudice should never be made in court by anyone, especially the prosecutor. Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence . . .."

Criswell, ¶ 55 (McGrath, C.J., concurring), *quoting* ABA Standards at 107-08.

In *Criswell,* Chief Justice McGrath also cited with approval Justice Sotomayor's statement in *Calhoun v. United States*, 586 U.S. 1206 (2013). Although the Court rejected Calhoun's petition for certiorari, Justice Sotomayor issued a strong statement, joined by Justice Breyer, to ensure the Court's denial of the petition did not signal tolerance of the prosecutor's remarks:

> "If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest

> prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent. He should not be permitted to summon that thirteenth juror, prejudice."

Calhoun, 586 U.S. at 1207-08, *quoting United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946) (J. Frank dissenting) (footnote omitted)). Justice Sotomayor, a former prosecutor, further remarked: "We expect the Government to seek justice, not to fan the flames of fear and prejudice." *Calhoun*, 586 U.S. at 1208.

In *Criswell*, the prosecutor in closing referred to the defendants' living situation as a "squatters camp" and characterized the defendants as "professional freeloaders." *Criswell*, ¶ 7. He also asserted the Criswells had been "run out" of Idaho for abusing animals, and implied they had spent money on medical marijuana in lieu of providing food for their cats. The district court found the prosecutor's remarks were inflammatory, unprofessional, and without any basis in the record; however, it concluded the remarks, viewed in the context of the entire three-day trial, had not prejudiced the defendants' rights to a fair and impartial trial. *Criswell*, ¶ 47.

This Court concurred the prosecutor's comments were improper. *Criswell*, ¶ 49. Indeed, it noted it had repeatedly, "disapprove[d] of a

prosecuting attorney using any derogatory epithets to refer to any defendant during trial." *Criswell*, ¶ 49, *citing State v. White*, 151 Mont. 151, 161, 440 P.2d 269, 275 (1968); *see also e.g. State v. Kingman*, 2011 MT 269, ¶ 58, 362 Mont. 330, 264 P.3d 1104. This Court reiterated a "defendant must be tried for what he did, not for who he is." *Criswell*, ¶ 49, *citing Foskey*, 636 F.2d at 523; Mont. R. Evid. 404.

This Court ultimately affirmed Criswells' convictions; however, Chief Justice McGrath wrote separately to emphasize the serious nature of what he believed to be the prosecutor's misconduct and to make clear the Court did not condone or tolerate the improper remarks. *Criswell*, ¶ 54 (McGrath, C.J., concurring). Although the prosecutor, in explaining his remarks, maintained the remarks had not been intended to inflame the jury or comment on the Criswells' characters, Chief Justice McGrath rebuked:

> Personally, I find that hard to believe. If not intended to inflame the jury or comment on the Criswells' characters, then what were they intended to do? A prosecutor is an officer of the court. Prosecutors must strive to promote justice and the rule of law. By making these improper comments to the jury, the prosecutor undermined the respect for the criminal justice system.

Criswell, ¶ 57 (McGrath, C.J., concurring).

Here, the prosecutor repeatedly and overtly attacked Johnston's character in closing. These attacks were clearly calculated to inflame the jurors' biases and prejudices against Johnston who was as the prosecutor portrayed, *inter alia*, a selfish, self-centered, greedy, unscrupulous, two-timer.

Again, the prosecutor highlighted the evidence regarding Johnston's decision to brush off Waller the night of February 13, 2013. (Trial at 942-43.) After offering his personal praise as to Waller's character, the prosecutor then attacked Johnston for carousing and carrying-on with a coworker: "What did this defendant do? . . . he'd already set up this little rendezvous with Jim Renner, where they can go out and have a good time, party and drink." (Trial at 942-43.) Whether Johnston chose a night of drinking with a coworker over spending time with Waller, his ex-fiancé, was beside the point and irrelevant.

Moreover, the prosecutor's repeated and overt attacks upon Johnston's character were impermissible and clearly calculated to stoke the jurors' biases and prejudices against Johnston. Again, the prosecutor argued, *inter alia*:

Who treats a person like that? Who lies to a person like that?

***

Wow. Nice Guy.

(Trial at 944)

I ask you, what kind of man does that? And what does that tell you about his character?

(Trial at 945)

***

I think that, again, tells us reams about who he is.

(Trial at 946)

***

Again, what does that tell you about the defendant, about his character?

***

Wow. What does that tell us about this man?

(Trial at 961.)

This Court should find the foregoing statements were improper, *i.e.*, they were, *inter alia*, inflammatory, unprofessional, and calculated to arouse the jurors' biases and prejudices toward Johnston. *Criswell*, ¶¶ 47, 49. The jurors' predisposition against greedy, two-timing,

unscrupulous people, was exploited by the prosecutor to stigmatize Johnston. The prosecutor's decision to repeatedly inject these character flaws and shortcomings into the State's closing clearly invited the jury to scrutinize and consider Johnston's character in determining his innocence or guilt. Such arguments clearly trespassed the bounds of reasonable inference or fair comments on the evidence. *Criswell*, ¶ 55 (McGrath, C.J., concurring) (citation omitted). Johnston deserved to be tried for what he allegedly did, not for he is or was. *Criswell*, ¶ 49. "If not intended to inflame the jury . . . then what were they intended to do?" *Criswell*, ¶ 57 (McGrath, C.J. concurring).

C. The prosecutor vouched for the credibility of the State's case and witnesses, and impermissibly expressed his personal opinion as to Johnston's credibility and guilt.

In *United States v. Young*, 470 U.S. 1 (1985), the Court articulated why prosecutors must not simply place their personal opinions before the jury:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the

> jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Young, 470 U.S. at 18-19, *citing Berger*, 295 U.S. at 88-89.

Likewise, in *State v. Stringer*, 271 Mont. 367, 381, 897 P.2d 1063, 1072 (1995), this Court recognized prosecutors should not express their personal opinions before the jury for the following reasons:

> 1) a prosecutor's expression of guilt invades the province of the jury and is an usurpation of its function to declare the guilt or innocence of an accused;
>
> 2) the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and
>
> 3) the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and add to the probative force of the testimony adduced at the trial the weight of the prosecutor's personal, professional, or official influence.

State v. Stringer, 271 Mont. 367, 381, 897 P.2d 1063, 1071-72 (1995), *citing Campbell*, 241 Mont. at 328-29, 787 P.2d at 332-33.

This Court has also stated, "[a]ny trial counsel who invades the province of the jury by characterizing a party or a witness as a liar or his testimony as lies, is treading on thin ice, indeed." *State v. Arlington*, 256 Mont. 127, 158, 875 P.2d 307, 325 (1994). "It is for the jury, not an

attorney trying a case, to determine which witnesses are believable and whose testimony is reliable." *Hayden*, ¶ 32.

Even when grounded in an inference from the evidence, a prosecutorial statement may nevertheless be considered impermissible vouching if it "place[s] the prestige of the government behind the witness" by providing "personal assurances of a witness's veracity." *United State v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980). A prosecutor may not, for instance, "express an opinion of the defendant's guilt, denigrate the defense as a sham, implicitly vouch for a witness's credibility, or vouch for his own credibility." *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (internal citations omitted). A prosecutor's arguments not only must be based on facts in evidence, "but should be phrased in such a manner that it is clear to the jury that the prosecutor is summarizing evidence rather than inserting personal knowledge and opinion into the case." *Hermanek*, 289 F.3d at 1100.

This Court exercised plain error review and reversed the defendant's conviction in *Hayden* based upon multiple errors committed by the prosecutor. *Hayden*, ¶¶ 31-32. In *Hayden*, the prosecutor,

"impinged on the jury's role by offering his own opinion as to witnesses' testimony during his closing argument." *Hayden*, ¶ 32. Specifically, the prosecutor argued two State's witnesses were "believable" and the jury could "rely on" the investigating officer's testimony. *Hayden*, ¶ 14. The prosecutor also improperly testified, "by vouching for the efficacy of the search of Hayden's residence and by stating his opinion that a scale found in the residence was used for drugs." *Hayden*, ¶ 32. The prosecutor also argued the officers did "good work" in conducting the search of Hayden's home. *Hayden*, ¶ 14.

This Court concluded the prosecutor's argument, "unfairly added the probative force of his own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶ 33. The prosecutor's conduct "invaded the role of the jury" and "created a clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment." *Hayden*, ¶ 33.

Again, as the district court correctly found, the prosecutor's closing was "permeated with personal opinion and commentary." (Ex. A at 8.) And, as in *Hayden,* the prosecutor plainly and impermissibly offered his personal opinion as to the effect of the evidence. *Hayden*,

¶¶ 9, 32. The record demonstrates he twice, emphatically, expressed his personal opinion Waller was deceased: "I, quite honestly, think it's obvious that after three years, Nicole Waller is dead" and "I think it's clear, unfortunately, that we have proven beyond a reasonable doubt that Nicole is dead." (Trial at 935, 941.)

The prosecutor also impermissibly expressed his personal opinion as to the effect of the evidence regarding the contents of Waller's vehicle and Johnston's calls to Waller the morning of February 14, 2013. *Hayden*, ¶¶ 29, 32. That Waller's vehicle contained two live guinea pigs, he opined: "That tells me that's one of the last things she put in the car, and she's on her way home." (Trial at 936.) Regarding Johnston's testimony concerning the calls he placed to Waller, he opined, "I found it a little unusual . . .." (Trial at 949.)

Moreover, the prosecutor impermissibly expressed his personal opinion as to the effect of the evidence regarding Johnston's lack of transparency with law enforcement and the alleged account of his search for a barrel. *Hayden*, ¶¶ 29, 32. That Johnston deceived law enforcement, the prosecutor opined: "I think that's obvious—that it's survival mode." (Trial at 963.) The State theorized Johnston disposed

of Waller's body in a 55-gallon barrel and, in that regard, the prosecutor brazenly professed to know for a fact Johnston was searching for such a barrel and why: "I know what that barrel was for." (Trial at 984.)

As in *Hayden,* the prosecutor also, "impinged on the jury's role by offering his own opinion as to witnesses' testimony during his closing argument." *Hayden*, ¶ 32. Specifically, as to whether the jury should believe Sorteberg's testimony concerning the "55-gallon barrel" and reject Johnston's account of searching for a "grease drum," the prosecutor vouched for Sorteberg's credibility: "Bill Sorteberg, who raised his hand under oath, you make that decision. I think it's simple. I think it's easy." (Trial at 953.) The statements—"I think it's simple. I think it's easy."—clearly reflected the prosecutor's personal opinion Sorteberg's account was credible and worthy of belief by the jury. The statements were improper and constituted prosecutorial misconduct. *Hayden*, ¶ 32, *citing State v. Daniels*, 2003 MT 247, ¶ 26, 317 Mont. 331, 77 P.3d 224; *Stringer*, 271 Mont. at 380-81, 897 P.2d at 1071-72.

The record also demonstrates the prosecutor impermissibly invaded the province of the jury by expressing his personal opinion as to Johnston's credibility and guilt. *Arlington*, 256 Mont. at 157, 875 P.2d

at 325; *Gladue*, ¶ 21; *Stringer*, 271 Mont. at 381, 897 P.2d at 1071-72. Again, however, it was for the jury, not the prosecutor, to determine which witnesses were believable and whose testimony was reliable. *Hayden*, ¶ 32.

Here, the prosecutor repeatedly expressed his personal opinion as to Johnston's credibility. First, he implored the jury to dismiss Johnston's testimony—"the story [Johnston] told you yesterday"—as "pure fiction." (Trial at 942.) Regarding Johnston's account of seeking a "grease drum" for work, the prosecutor opined: "when it comes to the credibility of this defendant, who has lied and lied and lied throughout this trial, compared to Bill Sorteberg, . . . I think it's simple. I think it's easy." (Trial at 953.) The prosecutor characterized Johnston's testimony in that regard as: "That's ridiculous. Absolutely ridiculous. I know what that barrel was for." (Trial at 984.) In fact, the record demonstrates the prosecutor repeatedly characterized Johnston's testimony as "ridiculous" and "crazy." (Trial at 954, 963, 982, 984.)

The record also demonstrates the prosecutor impermissibly expressed his personal opinion regarding Johnston's guilt. As noted above, he emphasized the significance of the timeline the State

established during the course of Johnston's trial. Regarding this timeline, the prosecutor brazenly opined: "I believe proves—that only the defendant had the motive, only the defendant had the opportunity, and only the defendant had the opportunity, and only the defendant had the means to kill Nicole Waller." (Trial at 961-62.)

Finally, the prosecutor impermissibly ridiculed Johnston's defense, denigrating counsel's closing as a sham. *Hermanek*, 289 F.3d at 1098. Regarding defense counsel's argument disputing the State's timeline, the prosecutor argued: "That's crazy." (Trial at 983.) Indeed, he insisted defense counsel's argument was "[n]ot credible." (Trial at 983.)

As in *Hayden*, the prosecutor here, "unfairly added the probative force of his own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶ 33. His closing also ran afoul of the long-standing prohibitions against expressing personal opinions about the credibility and guilt of the accused. *Gladue*, ¶¶ 14, 21; *Stringer*, 271 Mont. at 381, 897 P.2d at 1071-72. The prosecutor's conduct "invaded the role of the jury" and "created a clear danger that the jurors adopted the prosecutor's views instead of exercising their own

independent judgment." *Hayden*, ¶ 33. The prosecutor's closing was "permeated with personal opinion and commentary," and constitutes reversible error. *Hayden*, ¶ 32; *Daniels*, ¶ 26; *Stringer*, 271 Mont. at 380-81, 897 P.2d at 1071-72.

II. Trial counsel's purported "strategy" of foregoing objections in closing was not objectively reasonable and constituted IAC.

The record plainly demonstrates trial counsel's failure to object allowed the prosecutor to impermissibly "permeate[]" the State's closing with his "personal opinion and commentary." The court's conclusion to the contrary, trial counsel's failure to object cannot be considered within the "wide range" of permissible professional legal conduct. *See Dawson* (commenting failure to object during closing argument is within the "wide range" of permissible professional legal conduct). The court clearly misapprehended the effect of the prosecutor's misconduct and erred in concluding trial counsel's purported "strategy" of foregoing objections in closing was objectively reasonable. (Ex. A at 8-10.)

Counsel's conduct is presumed to be within the range of competence demanded of attorneys under like circumstances. *Strickland*, 466 U.S. at 687-89. Deference, however, is not absolute:

"The question is not merely whether counsel's conduct flowed from strategic decisions and trial tactics but, rather, whether it was based on '*reasonable*' *or* '*sound*' professional judgment." *Whitlow*, ¶19 (emphasis added). "'Even if [counsel's] decision could be considered one of strategy, that does not render it immune from attack—it must a *reasonable* strategy.'" *Whitlow*, ¶19, *quoting Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997) (alteration and emphasis as supplied).

Here, as noted *supra*, trial counsel's purported "strategy" allowed the prosecutor to, *inter alia*:

1) Inflame the passions of the jury by appealing to its sympathies for Waller;

2) Inflame the jurors' biases and prejudices against Johnston;

3) Impermissibly vouch for the credibility of a key State's witness, the State's case, and Johnston's guilt; and

4) Explicitly and repeatedly offer personal opinions as to Johnston's credibility.

Indeed, the court found many of the prosecutor's statements in closing constituted impermissible "vouching" and were otherwise "improper." (Ex. A at 8-10.)

Given the foregoing, and pursuant to the above-referenced authorities, this Court should find the district court clearly misapprehended the effect of the prosecutor's misconduct. It also clearly erred in concluding trial counsel's purported "strategy" was objectively reasonable and did not constitute IAC. A "strategy" that allows a prosecutor to "permeate[]" the State's closing with impermissible "personal opinion and commentary" cannot be considered "'a *reasonable* strategy.'" *Whitlow*, ¶19 (emphasis added).

III. The prosecutor's misconduct, and trial counsel's failure to object thereto, was prejudicial.

The district court did not conduct a traditional prejudice analysis pursuant to the second prong of the *Strickland* test. It did however, in passing, remark: "the evidence at trial was overwhelming and proved Johnston's guilt beyond a reasonable doubt." (Ex. A at 10.) As will be demonstrated below, this Court should find Johnston is entitled to a reversal of his conviction because the misconduct the prosecutor committed in closing violated his substantial rights.

A defendant must demonstrate the alleged prosecutorial misconduct violated his substantial rights in order for the court to reverse a conviction. *State v. Soraich*, 1999 MT 87, ¶ 20, 294 Mont. 175,

979 P.2d 206, *citing Arlington*, 265 Mont. at 150, 875 P.2d at 325. The relevant question is whether the prosecutor's comments, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

The question of "harm" is not dependent on the reviewing court's assessment of the defendant's guilt. "*Chapman* . . . instructs the reviewing court to consider . . . not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993), *citing Chapman v. California*, 386 U.S. 18 (1967). The inquiry is, thus, "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." S*ullivan*, 508 U.S. at 279. Moreover, this Court has rejected the argument prosecutorial misconduct only applies when the State's evidence at trial is weak. *State v. Sullivan*, 280 Mont. 25, 35, 927 P.2d 1033, 1039 (1996).

The cumulative effect of the prosecutor's misconduct cannot be underestimated. In *United States v. Roberts*, 119 F.3d 1006, 1016 (1st

Cir. 1990), the court explained when a prosecutor misrepresented the burden of proof, presumption of innocence and referred to facts outside the record: "these instances of prosecutorial misconduct, in combination, undermined the fundamental fairness of the trial and requires us, in the interest of justice, to wipe the slate clean."

This Court too should consider the total effect of the prosecutor's misconduct. Where, as here, there are a number of errors at trial "a balkanized, issue-by-issue harmless error review" is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988).

In *Berger*, the United States Supreme Court discussed the special responsibility of a prosecutor and the harm potentially resulting from improper prosecutorial efforts. The Court stated:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are *apt to carry much weight against the accused when they should properly carry none*.

Berger, 295 U.S. at 88 (emphasis added). Recognizing the special influence a prosecutor has with a jury based upon his or her status as a representative of the State, this Court should not condone the prosecutorial misconduct evident in the instant proceeding. In fact, prejudice to the cause of the accused is so highly probable in the present case this Court would be unjustified in assuming its non-existence. The evidence against Johnston was anything but overwhelming and, therefore, "the prosecution in this case [should] be looking forward to a new trial by reason of the prosecutor's comments." *Arlington*, 265 Mont. at 158, 875 P.2d at 325.

This Court need look no further than *Hayden* to determine Johnston was in fact prejudiced by the prosecutor's misconduct. There, this Court concluded the prosecutor's conduct invaded the role of the jury and created a, "clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment." *Hayden*, ¶ 33. In *Hayden*, the prosecutor's arguments and testimony, "also unfairly added the probative force of his own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶ 33, *citing Stringer*, 271 Mont. at 381, 897 P.2d at 1071-72.

This Court held Hayden met the incredibly high standard of plain error; the prosecutorial misconduct undermined his right to a fair trial. *Hayden*, ¶¶ 33-34.

Here, the misconduct so plainly evident in the prosecutor's closing far exceeds that condemned in *Hayden* as prejudicial and violative of Hayden's right to a fair trial. Moreover, we have not here a case where the misconduct of the prosecutor was slight or confined to a single instance, but one where such misconduct was pronounced and persistent. Again, as the court found, the prosecutor's closing was "permeated with personal opinion and commentary." Accordingly, the probable cumulative effect of the misconduct upon the jury cannot be disregarded as inconsequential.

It is also important to note at no point did the district court instruct the jury that it was to decide the case based solely on the evidence presented and, that, the statements of the prosecutors and defense counsel were *not* evidence. *Gladue*, ¶ 31. Regardless, it is doubtful at best a curative instruction could have neutralized the harm of the prosecutor's misconduct in closing. Moreover, such failures to correct the improper statements at the time they were made cannot be

salvaged by a later, generalized jury instruction reminding the jurors that a lawyer's statements during closing do not constitute evidence. *Weatherspoon*, 410 F.3d at 1151, *citing United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990).

Based on the foregoing, this Court should conclude Johnston has established both prongs of *Strickland*. A new trial must be awarded. *Berger*, 295 U.S. at 89; *Hayden*, ¶ 34.

Conclusion

This Court should reverse the district court's denial of Johnston's amended petition and remand with instructions to vacate and overturn his convictions. Trial counsel's purported "strategy" of foregoing objections in closing was not objectively reasonable and the prosecutor's misconduct violated Johnston's substantial rights. Johnston deserved to be tried for what he allegedly did, not for who is or was. The prosecutor's misconduct in closing and counsel's failure to object ensured Johnston was tried for the latter.

Respectfully submitted this 18th day of March 2022.

/s/ Joseph P. Howard
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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 9969 words, not averaging more than 280 words per page.

/s/ Joseph P. Howard
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Appendix

Order Denying Petition for Postconviction Relief.....Attached

CERTIFICATE OF SERVICE

I, Joseph Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-18-2022:

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