IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0247

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MATHEW HOLGUIN JR.,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth Best, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
ChadWright@mt.gov
(406) 444-9505

ATTORNEY FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA A. RACKI
Cascade County Attorney
121 Fourth Street North
Suite 2A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Montana Constitution

Montana Code Annotated

Montana Rules of Evidence

INTRODUCTION

Based on the unique procedural posture of this case, undersigned counsel submits the previously identified appellate issue about the district court limiting Robert Holguin's ability to counter the assault on minor charges with the defense of direct parental discipline. Mr. Holguin will not agree to submission of this appellate issue without raising all other potential issues on appeal and emphasizing the appellate claims cannot be properly raised because transcripts were altered. Counsel, upon conscientious examination of the record, advises this Court he has not identified any additional meritorious issues for Holguin to present on appeal. Thus, counsel moves this Court for permission to withdraw as counsel for Holguin unless this Court identifies all issues which merit briefing in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and Mont. Code Ann. § 46-8-103.

Pursuant to § 46-8-103(2), counsel has mailed a copy of this brief to Holguin and advised him of his ability to file a response to this motion directly with the Court.

STATEMENT OF THE ISSUE

Should appellate counsel be allowed to withdraw when there is a combination of a potentially meritorious issue the Appellant will not authorize without submitting numerous non-meritorious claims.

STATEMENT OF THE CASE

Child Protective Services removed two brothers, B and M, from Mandy McElwain's custody. (11/27/18 Trial 3 Tr. at 239.) The investigation pivoted into an investigation of McElwain's and Holguin's discipline of the boys. McElwain was ultimately charged with Criminal Child Endangerment for "placing the child[ren] in the physical custody of another who the person knows has previously, purposely, or knowingly caused bodily injury to a child." (11/27/18 Trial Tr. at 241.) She pleaded no contest and was convicted of that charge. (11/27/18 Trial Tr. at 242.)

Holguin was charged with two counts of Assault on a Minor, a felony, in violation of Mont. Code Ann. § 45-5-212. (D.C. Doc. 2, 45.) Holguin was represented by Samuel L. Harris and entered "Not Guilty" pleas, and the matter was set for trial. (D.C. Doc. 50.) New counsel was appointed after a January 8, 2018, hearing on the status of

representation. (See, D.C. Doc. 61 and 65.) The district court allowed Harris to withdraw and new counsel was appointed to represent Holguin. (D.C. Doc. 68.) In one of his first actions, Holguin's new counsel, Larry LaFountain, moved to compel production of CPS records (D.C. Doc. 75). The State resisted the motion to compel but suggested the proper procedure would be for the court to review the record *in camera* and release any material records. (D.C. Doc. 77.1.) A hearing was held, and the court said it would review the records. (D.C. Doc. 78.) At the conclusion of the hearing, the county attorney announced it would search Holguin's jail cell based on statements he made during his testimony. (3/5/2018 Tr. at 85.) The district court said it would take judicial notice of Holguin's arrest warrant but cut short the discussion about the jail cell search. 3/5/2018 Tr. at 86-87. He next day, further discussions were had about LaFountain continuing as counsel for the appeal. (3/6/18 Tr. at 26-31.) The court later issued an order saying it had reviewed the records provided to it, and, based on its review, it found nothing discoverable in the CPS file. (D.C. Doc. 82). The court also denied Holguin's motion to substitute LaFountain. (D.C. Doc. 83.)

In the first trial, the State objected to the Defendant's proposed parental discipline affirmative defense because it was not noticed at the omnibus hearing. (03/13/18 Trial Tr. at 4.) Holguin's attorney conceded he had not noticed an affirmative defense at the omnibus hearing, (03/13/18 Trial Tr. at 10–11), but argued the State had sufficient notice of Holguin's proposed parental discipline defense via his many *ex parte* communications with the Court, (03/13/18 Trial Tr. at 12, 14). Holguin had indeed been asserting rights to parent and discipline via letters to the Court and prosecutor. (D.C. Docs. 53–58.) Thus, his attorney moved to withdraw due to potential ineffective assistance of counsel for failing to notice this primary affirmative defense. (03/13/18 Trial Tr. at 15.) The district court declared a mistrial, (03/13/18 Trial Tr. at 26.)

Holguin was appointed new counsel – Victor Bunitsky. (D.C. Doc. 92.) Bunitsky renewed the discovery request for the CPS files. D.C. Docs. 104 and 105.) This time, the district court ordered the State to retrieve the entire CPS files for another *in camera* review. (D.C.Doc. 112). The court would then order the disclosure of all CPS documents the court had identified for production to the defense. (D.C. Doc. 125.)

Bunitsky filed a notice that Holguin intended to assert the affirmative defense of "the right to make parenting choices free from government intrusion." (D.C. Doc. 106.) The Court ordered briefing on whether this is a cognizable affirmative defense under Montana law. (D.C. Doc. 108.) The State contended the affirmative defense is not cognizable because Holguin was not B or M's parent, and because parents do not have an unlimited ability to discipline their children however they see fit. (D.C. Doc. 112.) The district court disallowed Holguin's proposed affirmative defense because he is not a natural or adoptive parent of B and M. (08/22/18 Status Hearing Tr. at 27.)

Through Bunitsky, Holguin also moved to dismiss the charges against him because it violated double jeopardy to prosecute him after the first mistrial. (D.C. Doc. 118.) The district court denied the motion to dismiss (D.C. Doc. 128). The case then proceeded to the second trial. The jury found Holguin guilty on both counts of Assault on a Minor. (D.C. Doc. 181.) Holguin was sentenced on each count to four years in the Montana State Prison with one year suspended, to run consecutive, and was given 672 days of credit for time served. (D.C. Doc. 205.) He timely appealed. (D.C. Doc. 211.)

STATEMENT OF THE FACTS

In 2016, Mandy McElwain lived in the Roberts Apartments in Great Falls with her two sons, B and M, and her boyfriend, Robert Holguin, Jr. (hereafter "Holguin"). (11/27/18 Trial Tr. at 230–31.) The boys were four and eight years old at the time. (11/27/18 Trial Tr. at 231.) The family had a "typical good relationship" and did "normal family things" together like cooking dinner at home, watching movies, playing games, playing football, eating out at restaurants, going bowling, and doing homework after school. (11/27/18 Trial Tr. at 27–38.) McElwain and Holguin had talked about getting married, and Holguin expressed his wish to be a father figure to her sons. (11/27/18 Trial Tr. at 231–32.) McElwain and Holguin discussed appropriate discipline for the boys when they acted out. McElwain gave Holguin permission to discipline her boys and encouraged him to fulfill the role of a father figure with them. (11/27/18 Trial Tr. at 250.) Although the two boys acted as "normal little boys," when discipline was needed, McElwain and Holguin used timeouts and withholding of privileges. (11/27/18 Trial Tr. at 232.) McElwain also occasionally spanked the boys with a

belt. (11/27/18 Trial Tr. at 232.) She allowed Holguin to do so as well. (11/27/18 Trial Tr. at 233.)

On at least one occasion, Holguin is alleged to have used another discipline technique with which McElwain claims she did not agree: putting hot sauce in the boys' eyes. (11/27/18 Trial Tr. at 233, 235.) McElwain described her role during this incident or incidents as "passive"—she would help the boys wash their faces, and she would listen to them if they wanted to talk about what happened, but she did not intervene and she did not report Holguin's conduct to anyone. (11/27/18 Trial Tr. at 236.) She believed Holguin was disciplining the boys in this manner because "he was trying to take over as being a father figure role." (11/27/18 Trial Tr. at 237.) Although McElwain was hesitant to intervene between Holguin and the boys for fear of making the situation worse, she was "not generally" scared of Holguin. (11/27/18 Trial Tr. at 238, 249.)

At trial, McElwain testified she and Holguin planned to get married. She referred to herself as Holguin's wife. She used the last name "Holguin" in correspondence. (11/27/18 Trial Tr. at 231, 248, 252.) Holguin wanted to be a parent to her boys. (11/27/18 Trial Tr. at 232.)

She gave Holguin permission to discipline her boys and encouraged him to fulfill the role of a father figure with them. (11/27/18 Trial Tr. at 250.) McElwain and Holguin discussed appropriate discipline for the boys, including "taking away games and toys" and being made to "sit[ ] in their room." (11/27/18 Trial Tr. at 233.) McElwain testified that both she and Holguin occasionally spanked the boys with belts. (11/27/18 Trial Tr. at 232–33.) The foster parent who cared for B and M when they were removed from McElwain's care testified that the boys "talked about Robert [Holguin] right away because he was in their life, you know, they were—he was their surrogate father." (11/27/18 Trial Tr. at 276.) B and M used similar language to describe Holguin. B told a Youth Dynamics counselor that he lived in an apartment with his brother, his mother, and his stepfather. (D.C. Doc. 130 (SEALED) at 6.) M. testified Holguin: "He used to be my dad . . . ." (11/27/18 Trial Tr. at 220.) During a supervised visit between M and B and McElwain and Holguin, the CPS worker made a note: "[the boys] visit with dad" and then "[M] finds a toy an[d] he an[d] dad play with it." (D.C. Doc. 130 at 17.)

The district court disallowed Holguin from asserting the affirmative defense of "the right to make parenting choices free from government intrusion" because the Court determined Holguin was not a parent under Montana law. (08/22/18 Status Hearing Tr. at 24–25, 26–27; 11/27/18 Trial Tr. at 18.) Instead, the Court instructed the jury: "An authorized agent of any parent is justified in the use of force as is reasonable and necessary to restrain or correct the parent's child. In determining whether or not the force used is justified as reasonable and necessary, you should consider, along with all the other evidence: 1. the age of the child and whether he is old enough to understand the punishment and benefit from it; 2. the nature and degree of seriousness of the act for which the punishment was inflicted; 3. the instrument used to inflict the punishment; and 4. the nature of the injuries resulting from the punishment. 7 (11/28/18 Trial Tr. at 50–51; D.C. Doc. 180 (Jury Instruction No. 28).) During closing arguments, the State referenced Instruction No. 28 and emphasized McElwain's testimony that she "was never ok" with Holguin's decision to put hot sauce in the boys' eyes. (11/28/18 Trial Tr. at 87.)

STANDARDS OF REVIEW

"In a criminal trial, the defendant bears the burden of proving an affirmative defense. A court may determine whether an affirmative defense exists as a matter of law. [This Court] review[s] a district court's conclusions of law for correctness. However, if there are conflicting facts regarding the availability of an affirmative defense in a criminal trial, the issue is properly submitted to a jury." *State v. Leprowse*, 2009 MT 387, ¶ 11, 353 Mont. 312, 221 P.3d 648 (internal citations omitted).

This Court reviews challenges to the completeness of the appellate record *de novo* as a matter of law. *State v. Caswell*, 2013 MT 39, ¶ 13, 369 Mont. 70, 295 P.3d 1063.

A trial court's denial of a defendant's motion to dismiss criminal charges on double jeopardy grounds is a question of law that we review for correctness. *State v. Stone*, 2017 MT 189, ¶ 10, 388 Mont. 239, 400 P.3d 692 (citing *Cates*, ¶ 22; *State v. Maki*, 2008 MT 379, ¶ 9, 347 Mont. 24, 196 P.3d 1281). *City of Billings ex rel. Huertas v. Billings Mun. Ct.,* 2017 MT 261, ¶ 15, 389 Mont. 158, 166, 404 P.3d 709, 715.

This Court reviews a district court's grant or denial of discovery for an abuse of discretion. *State v. Duffy*, 2000 MT 186, ¶ 18, 300 Mont. 381, 6 P.3d 453.

A district court has broad discretion to determine the relevancy and admissibility of evidence, and this Court will not overturn evidentiary rulings absent a showing of abuse of discretion. *State v. Berosik,* 2009 MT 260, ¶ 28, 352 Mont. 16, 214 P.3d 776. This Court will review a district court's application of a statute or rule of evidence *de novo* to determine whether it is correct. *Lotter,* ¶ 13. A court abuses its discretion if it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.*State v. Breeding*, 2008 MT 162, ¶ 10, 343 Mont. 323, 184 P.3d 313.

DISCUSSION

I. Undersigned counsel should be permitted to withdraw from the appeal.

In *Anders*, the United States Supreme Court stated: "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Anders*, 386 U.S. at 744; *see also* § 46-8-103(2). Such a request must "be

accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744; § 46-8-103(2). The attorney must provide a copy of the brief to the client, and the client must have the opportunity "to raise any points that he chooses." *Anders*, 386 U.S. at 744; *see also* § 46-8-103(2). "[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744.

Here, counsel is compelled by *Anders*, § 46-8-103(2), and his duty of candor to notify this Court that, after a review of the entire record and diligent research of the applicable statutes, case law, and rules, counsel has not identified, with the exception of the parental discipline issue, any non-frivolous issues to appeal. Without arguing against his client, counsel submits this brief which discusses any issues that could arguably support an appeal.

II. The district court erred when it determined conflicting facts regarding the availability of an affirmative defense instead of submitting those conflicting facts to the jury.

A criminal defendant has constitutional rights to confront his accusers and to present evidence in his defense. *State v. Johnson*, 1998 MT 107, ¶ 22, 288 Mont. 513, 958 P.2d 1182, 10 1182; Mont. Const. art.

II, § 24; *State v. Colburn*, 2016 MT 41, ¶ 24, 382 Mont. 223, 366 P.3d 258. Although a defendant's right to put on a defense is "subject to reasonable restrictions," those restrictions may not be "arbitrary or disproportionate to the purposes they are designed to serve." *Johnson*, ¶ 22. One example of a "reasonable restriction" on a defendant's right to present a defense is the Rape Shield Law. This Court has repeatedly held the Rape Shield Law "serves a compelling state interest in preventing rape trials from becoming trials on the prior sexual conduct of the victims." *Johnson*, ¶ 23. But the Court's decision in this case to disallow Holguin's proffered affirmative defense of the right to parent served no such compelling interest. By instructing the jury that Holguin is not a parent and that he may only use the amount of force on a child that is "reasonable and necessary," (11/28/18 Trial Tr. at 50–51; D.C. Doc. 180 (Jury Instruction No. 28)), the Court forced Holguin to defend his conduct as "reasonable and necessary" punishment for minors who are not his children, rather than as a parenting decision immune from government scrutiny.

The Court's ruling on the availability of the affirmative defense of the right to parent was a narrow one; the Court did not rule the defense

does not exist as a matter of law. Rather, the Court determined the defense was not available to Holguin because he was not a "parent" under Montana law. (08/22/18 Status Hearing Tr. at 24–25, 26–27; 11/27/18 Trial Tr. at 18.) 11 There is no single definition of "parent" under Montana law that applies across all contexts. For instance, the definition of "parent" in Title 41 (Minors) regarding abuse and neglect is "a biological or adoptive parent or stepparent." Mont. Code Ann. § 41-3-102(17). But the same term "parent" is defined under Title 42 (Adoption) as "the birth or adoptive mother or the birth, adoptive, or legal father whose parental rights have not been terminated." Mont. Code Ann. § 42-1-103(14), MCA. In Title 40 (Family Law), a parent-child relationship is defined as "the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Mont. Code Ann. § 40-6-102(1). But Title 40 also authorizes a petition for a parenting plan to be filed by a person who "has established a child-parent relationship with the child." Mont. Code Ann. § 40-4-211(4)(b). The Court based its decision that Holguin was not a "parent" on several statutes, as well as Mont. Code Ann. § 40-6-104 (defining how a parent-

child relationship is established); Mont. Code Ann. § 40-4- 227(1)(a)("It is the policy of the state of Montana: (a) to recognize the constitutionally protected rights of parents and the integrity of the 12 family unit"); Mont. Code Ann. § 40-4-228(defining parenting and visitation matters between the natural parent and a third party); Mont. Code Ann. § 40-4-233(concerning final parenting plans, and their purposes and objectives); and Mont. Code Ann. § 40-4-212 (defining the best interest of the child).

Because there is no single definition of "parent" under Montana law, the district court had to decide conflicting issues of fact to conclude Holguin was not a "parent." The testimony at trial may have been sufficient to convince a jury Holguin was in fact a parent. McElwain, B, M, the foster mother, and the CPS worker all referred to Holguin as a "parent" or a "dad" or a "father." (See, e.g., 11/27/18 Trial Tr. at 220, 232, 250, 276; D.C. Doc. 130.) At the very least, this cumulative testimony created a factual conflict between Holguin not acting as a parent and his documented status as a parent should have been submitted to a jury. *Leprowse*, ¶ 11. Because there is no single definition of "parent" under Montana law that applies across all

contexts, the Court erred by determining Holguin was not a parent as a matter of law. If the Court had allowed a jury to decide if Holguin were a parent, it would then have been compelled to instruct the jury on Holguin's proposed affirmative defense because "[t]he trial judge is under a duty to instruct the jury on every issue or theory finding support in the evidence." *State v. Erickson*, 2014 MT 304, ¶ 35, 377 Mont. 84, 338 P.3d 598. The broader affirmative defense he sought to present may have made the difference between a conviction—because he was an adult using excessive force to discipline someone else's child—and an acquittal—because he was a parent whose parenting decisions should be free from excessive government interference. The right to privacy is uniquely enshrined in Montana's Constitution: "[t]he right of individual privacy is essential to the wellbeing of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. As this Court has observed before, the delegates to Montana's 1972 Constitutional Convention viewed the textual inclusion of this right in Montana's new constitution as being necessary for the protection of the individual in "an increasingly complex society . . . [in which] our area of privacy has decreased,

decreased, decreased." This "right to be let alone . . . the most important right of them all," as Delegate Campbell put it, "produces . . . a semipermeable wall of separation between individual and state" similar to the way a constitutional wall separates church and state. *Armstrong v. State*, 1999 MT 261, ¶ 32, 296 Mont. 361, 989 P.2d 364 (quoting Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1681). In fact, the right of individual privacy—that is, the right of personal autonomy or the right to be let alone—is fundamental. It is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives. *Gryczan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 125 (1997). The abhorrence of excessive governmental interference has caused this Court to declare it "beyond dispute that the right to parent one's children is a constitutionally protected fundamental liberty interest." *In re L.V.-B.*, 2014 MT 13, ¶ 15, 373 Mont. 344, 317 P.3d 191. The existence of this right has been recognized not just by courts in the context of parental-right termination proceedings, see, e.g., *In re L.V.-B.,* 2014 MT 13, ¶ 15, 373

Mont. 344, 317 P.3d 191, which implicate due process rights as well as privacy protections, but also by the legislature when grappling with the extent of a fit parent's right to make decisions for his or her child, see, e.g., Mont. Code Ann. § 20-5-405(1)(a) (outlining a religious exemption to the otherwise mandatory childhood immunizations).

The district court acknowledged the existence of this right: "I agree with you that there is and I endorse, and the supreme court has certainly recognized that there is a fundamental right to parent." (08/22/18 Status Hearing Tr. at 26.) But, the district court found because Holguin is not a parent of B or M, he was not entitled to assert an affirmative defense premised on the fundamental right to parent. Instead, the district court gave a jury instruction consistent with Mont. Code Ann. § 45-3-107, at Holguin's trial. (11/27/18 Trial Tr. at 18; 11/28/18 Trial Tr. at 50–51; D.C. Doc. 180 (Jury Instruction No. 28).) Montana Code Annotated § 45-3-107 provides: "[a] parent or an authorized agent of a parent or a guardian, master, or teacher is justified in the use of force that is reasonable and necessary to restrain or correct the person's child, ward, apprentice, or pupil." This is among one of the statutorily enumerated "justifiable use of force" affirmative

defenses. Mont. Code Ann. § 45-3-115. The Defendant bears the burden of proving this affirmative defense if he raises it at trial. *Leprowse*, ¶ 11. Because the Court found Holguin is not a "parent," his reliance on this defense could only extend as far as the agency granted to him by a "parent." (11/27/18 Trial Tr. at 18.) Notably, McElwain testified she "did not agree with" Holguin's disciplinary tactic of putting hot sauce in the boys' eyes, and Holguin knew as much. (11/27/18 Trial Tr. at 235, 252.)

In closing argument, the State emphasized McElwain's testimony that she "was never ok" with Holguin's decision to put hot sauce in the boys' eyes and argued the disciplinary agency she conferred on him did not extend that far. (11/28/18 Trial Tr. at 87.) By circumscribing Holguin's affirmative defense only to situations in which he was exercising the agency granted to him by McElwain, the district court deprived Holguin of his constitutional right to present a broader affirmative defense of the right to parent free from government intrusion, which a reasonable trier of fact may have found supportable. When a defendant is deprived of the right to present an affirmative defense, the appropriate remedy is a new trial. *Leprowse*, ¶ 15. The defendant need not show his version of events is likely to prevail at

trial, or even that it will be viewed by a jury as credible and reasonable. But he should be given the opportunity to present evidence he was a parent to B and M, and parents have a fundamental right to make parenting decisions without excessive government interference. If he presents such evidence, the district court should then decide whether to give his proffered affirmative defense instruction, keeping in mind its obligation to instruct the jury on every "theory finding support in the evidence," *Erickson*, ¶ 35. If such an instruction is given, it is then up to the jury to decide the credibility and reasonableness of the affirmative defense. *Leprowse*, ¶ 15. This is the procedure the district court should have followed and is now available to Holguin only on retrial.

III. Holguin claims the transcripts are not accurate.

Due process of law is guaranteed by the Fifth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution. To determine when a court's failure to record a portion of a criminal trial violates a defendant's right to due process, we review two criteria: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions

as a transcript." *State v. Deschon*, 2002 MT 16, ¶ 26, 308 Mont. 175, 40 P.3d 391 (*Deschon I*) (*quoting Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 434, 30 L.Ed.2d 400 (1971); *Madera v. Risley*, 885 F.2d 646, 648 (9th Cir.1989)). *State v. Caswell*, 2013 MT 39, ¶ 18, 369 Mont. 70, 76, 295 P.3d 1063, 1068. The lack of a verbatim transcript is not a constitutional defect when a suitable alternative is provided. *See Mayer v. City of Chicago* (1971), 404 U.S. 189, 194, 92 S.Ct. 410, 414–15, 30 L.Ed.2d 372 (a "record of sufficient completeness" does not translate automatically into a complete verbatim transcript; the state may find other means of affording adequate and effective appellate review); *see also Harris v. Estelle* (5th Cir.1978), 583 F.2d 775, 777. "A reconstructed record, as opposed to a verbatim transcript, can afford effective appellate review, particularly where appellate rules have established a procedure for reconstruction of the trial record." *U.S. v. Cashwell* (11th Cir.1992), 950 F.2d 699, 703; *see also Morgan v. Massey* (5th Cir.1976), 526 F.2d 347, 348. *Deschon I*, ¶ 13. Focusing on the March 5, 2018, transcript, Holguin says the transcripts were altered to hide evidence of collusion between the judge, county attorney and

defense counsel and the lack of accurate transcripts violates his right to due process.

IV. The record might arguably support a claim that the district court did not properly review and disclose CPS records.

CPS is part of the broad group of individuals that work for the State including any governmental subdivision. *See State v. Licht*, 266 Mont. 123, 129, 879 P.2d 670, 673 (1994). The defense is entitled to any evidence that may have a bearing on the case against the defendant. B and M spoke with school officials as well as CPS employees about same events with which Holguin was charged. Holguin was entitled to this information. *Id., and State v. Stewart*, 303 Mont. 507, 511, 16 P.3d 391, 395 (2000). CPS records covering the same investigation which underlie the criminal charges should be subject to an *in-camera* inspection to determine the constitutional materiality of the CPS records. *State v. Stutzman*, 2017 MT 169, ¶ 29, 388 Mont. 133, 398 P.3d 265.

Holguin pointed to the charging documents to show B and M made statements to CPS workers on multiple dates in 2017. When the district court conducted its *in camera* review of the CPS file it found

there were no statements in the file. (D.C. Doc. 106) Holguin alleges the file was "scrubbed" of these statements before being submitted to the district court and the court's failure to follow through with investigating the deletion was error.

V. The record might arguably support a claim that, after declaring a mistrial, the second trial violated double jeopardy.

The Fifth Amendment of the United States Constitution, applicable to the states via the Fourteenth Amendment, and Article II, Section 25, of the Montana Constitution protects citizens from being placed twice in jeopardy for the same offense. U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy...."); Mont. Const. art. II, § 25 ("No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction."). These constitutional safeguards are important because the prosecution, "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense...." *Cates*, ¶ 30 (*quoting State v. Sheriff*, 190 Mont. 131, 619 P.2d 181 (1980)) (internal quotations and citations omitted). Accordingly, these provisions seek to provide finality for a criminal defendant. *State v. Carney*, 219 Mont.

412, 416, 714 P.2d 532, 534 (1986) (*quoting United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971)).

During a jury trial, jeopardy attaches as soon as the jury is impaneled and sworn. *Cates*, ¶ 30. When a mistrial is declared after jeopardy attaches, "the defendant's valued right to have his trial completed by a particular tribunal is also implicated." *Cates*, ¶ 31 (citing *Dinitz*, 424 U.S. at 606, 96 S. Ct. at 1079) (internal quotations and citations omitted). In this case, jeopardy was undisputedly attached when the jury was impaneled and sworn at the start of trial on March 12, 2018. Thus, Holguin's right to be free from double jeopardy was implicated. After a defendant's double jeopardy rights are implicated and a mistrial is declared, a "second criminal trial is barred unless there was a manifest necessity to terminate the trial, or the defendant acquiesced in the termination." *Cates*, ¶ 33 (*quoting Carney*, 219 Mont. at 417, 714 P.2d at 535). Manifest necessity to discontinue a trial exists when "particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Cates*, ¶33 (*quoting Carney*, 219 Mont. at 417, 714 P.2d at 535; *Wade v. Hunter*,

336 U.S. 684, 690, 69 S.Ct. 834, 838, 93 L.Ed. 974 (1949)). *Huertas*, ¶¶ 17-19.

VI. The record might arguably support a claim that the State improperly seized materials, including from Holguin's cell.

Interference with prisoners' communications with attorneys impacts the prisoner's Sixth Amendment rights and also violates the lawyers' First Amendment rights. *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974)). These are communications in which "the interests of both parties are inextricably meshed." "[Lawyer-client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the [client] giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383,390 (1981). "[E]ven a single instance of improper reading of a prisoner's mail can give rise to constitutional violation." *Mangiaracina v. Penzone*, 849 F.3d 1191, 1197 (9th Cir. 2017). Montana has recognized the potential violation of First and Fourth Amendment issues in relation to mail censorship by jail officials in *State v. Sheriff*, 190 Mont. 131, 619 P.2d 181 (1980) The U.S. Supreme Court in *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), held: "A prisoner has no reasonable expectation of privacy in his cell entitling

him to the protection of the Fourth Amendment against reasonable searches." *Hudson,* the Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Id.* at 525–26. The Court reasoned that privacy rights for prisoners in their individual cells "cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Id.* at 526. This Court has recognized diminished privacy expectations for probationers. *See State v. Moody*, 2006 MT 305, ¶ 19, 334 Mont. 517, 148 P.3d 662. In *Moody,* the Court relied on the U.S. Supreme Court's holding in *Hudson* and the Court recognized that prisoners in a cell have no expectation of privacy. *Moody*, ¶ 23. However, when Holguin's legal materials could not be separated from the items seized by the State the greater protections for attorney-client communication should apply.

VII. The record might arguably support a claim that the district court erroneously allowed the introduction of Holguin's pre-trial interview and *pro se* filings.

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Likewise, Article II, Section 25 guarantees that "[n]o person shall be compelled to testify against himself in a criminal proceeding." *State v. Scheffer*, 2010 MT 73, ¶ 17, 355 Mont. 523, 230 P.3d 462. The privilege against self-incrimination protects a person "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."
Pennsylvania v. Muniz, 496 U.S. 582, 589, 110 S. Ct. 2638, 2643, 110 L. Ed. 2d 528 (1990)

The State successfully introduced Holguin's recorded interview with law enforcement and his *pro* se motions and briefing. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, M.R. Evid. However, under M.R. Evid. 801(d)(2)(A) which provides that a statement is not hearsay if the statement is offered against a party and is the party's own statement. *Riggs v. State*, 2011 MT 239, ¶ 58, 362 Mont. 140, 264 P.3d 693. Holguin may wish to

argue that these items should not have been admissible because of the additional protection against self-incrimination.

VIII. The record arguably supports the claim that the district court improperly restricted questioning M about his prior testimony.

Rule 613, Mont. R. Evid. permits questioning a witness with prior inconsistent statements. M was six years old when he testified in the first trial. 3/12/18 Trial Tr. At 281. While he identified Holguin as his stepdad he would not testify about any sort of abuse. Just the opposite, he told the jury the scar on his back was caused by B – not Holguin. When the second trial rolled around, M testified for the first time that Holguin put "hot sauce in our eyes" and "spanked us on the butt" and now Holguin caused the scar on his back (11/2718 Trial Tr. at 221-222, 225). McElwain also used hot sauce and the belt (11/27/18 Trial Tr. 214 and 246), but M testified McElwain never spanked him or used hot sauce. (11/27/18 Trial Tr. at 227) M told the jury "I think I am telling the truth." (11/27/18 Trial Tr. at 228). At the start of cross examination, the court ruled, because of M's age, it would limit using the transcript of M's testimony from the first trial. Defense counsel did not object. (11/27/18 Trial Tr. at 225).

Article II, Section 24 of the Montana Constitution and Amendment VI of the United States Constitution provide a defendant with the right to confront or to face the witnesses against him.

State v. Maier, 1999 MT 51, ¶ 18, 293 Mont. 403, 977 P.2d 298. The essential purpose of the right to confront witnesses is to secure the opportunity to test the witness' testimony through cross-examination. *United States v. Owens*, 484 U.S. 554, 558, 108 S. Ct. 838, 842, 98 L. Ed. 2d 951 (1988). The right to confrontation "includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion or evasion." *United States v. Owens,* 484 U.S. 554, 558, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988). *State v. Pound*, 2014 MT 143, ¶¶ 30-31, 375 Mont. 241, 326 P.3d 422. Despite counsel's apparent waiver, Holguin should have been able to question M about why he changed his testimony from the first trial to the second trial.

IX. Holguin claims judicial bias.

A claim for disqualification of a judge must be brought within a reasonable time from when the facts form the basis for the disqualification, otherwise, the claim can be waived. *State v. Strang*,

2017 MT 217, ¶ 18, 388 Mont. 428, 401 P.3d 690. Usually, claims of judicial bias must be based on more than adverse court rulings. *State v. Howard*, 2017 MT 285, ¶ 24, 389 Mont. 356, 405 P.3d 1263 *citing Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994); *see also* Mont. Code Ann. § 3-1-805(1)(b) . Holguin's claims of judicial bias stem from the district court's openly hostile treatment of him through the pretrial, mistrial and trial proceedings, including claims of deliberately sabotaging his defense, consistent adverse rulings and his claims of tampering with the transcript content. Before the second trial, Holguin sought relief from this Court to disqualify the Honorable Elizabeth A. Best, which was denied. *See,* State v. Holguin, PR 06-0120, 11/09/2018. Holguin reasserts his claims for disqualification.

CONCLUSION

After conscientious examination of the record and thorough research of the applicable legal authorities, undersigned counsel has not identified any meritorious issues to appeal beyond the parental discipline claim. If this Court agrees and considers Holguin's refusal to

limit the briefing to the seemingly meritorious claim, it should grant counsel's motion to withdraw as direct appeal counsel.

Respectfully submitted this 18th day of May, 2022.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Chad Wright
CHAD WRIGHT
Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6254, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Chad Wright
CHAD WRIGHT

APPENDIX

CERTIFICATE OF SERVICE

I, Chad M. Wright, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 05-18-2022:

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Mardell Lynn Ployhar (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Robert Holguin
1000 3rd Ave. S. Apt. 3
Great Falls MT 59405
Service Method: Conventional

Electronically signed by Gerri Lamphier on behalf of Chad M. Wright
Dated: 05-18-2022