

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TERRANCE ANTHONY ROBERTS,

Defendant and Appellant.

REDACTED BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Leslie Halligan, Presiding

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STATEMENT OF THE ISSUES

(1) Did the District Court incorrectly instruct the jury that the mental state required to commit obstructing a peace officer is conduct-based? Alternatively, did Mr. Roberts receive ineffective assistance of counsel when Defense Counsel acquiesced the incorrect instruction?

(2) Did the District Court fail to fully and fairly instruct the jury, over objection, regarding the force required for kidnapping and, without objection, regarding the mental states required for attempted kidnapping and attempted unlawful restraint? Alternatively, did Mr. Roberts receive ineffective assistance of counsel when Defense Counsel proposed or acquiesced in the incorrect mental-state instructions?

(3) At trial, did the District Court incorrectly admit, over objection, the body-camera video of Officer Jensen's interview with Z.S.?

(4) Did the District Court illegally designate Mr. Roberts a sexual offender? Alternatively, did Mr. Roberts receive ineffective assistance of counsel when Defense Counsel acquiesced in the designation?

(5) Is the \$50 presentence investigation ("PSI") fee ordered in the written judgment but not in the oral pronouncement illegal?

STATEMENT OF THE CASE

The State charged Mr. Roberts with: (1) attempted kidnapping, a felony, in violation of Mont. Code Ann. §§ 45-4-103, 45-5-302 (2019), and (2) obstructing a peace officer, a misdemeanor, in violation of Mont. Code Ann. § 45-7-302(1) (2019). (D.C. Docs. 3, 27.) Mr. Roberts pled not guilty. (D.C. Doc. 6.) The case proceeded to a four-day trial.

The District Court instructed the jury that attempted unlawful restraint, a misdemeanor, in violation of Mont. Code Ann. §§ 45-4-103, 45-5-301, is a lesser-included offense of attempted kidnapping. (Tr. at 508 – 09, 607 – 08; D.C. Doc. 68.1 (Instruction 25).) The jury found Mr. Roberts guilty of attempting kidnapping, notwithstanding Defense Counsel's admission during closing argument the State proved Mr. Roberts was guilty of attempted unlawful restraint; the jury also found Mr. Roberts guilty of obstructing a peace officer. (Tr. at 648, 681; D.C. Doc. 74.) The District Court set the matter for sentencing and ordered a PSI, but did not order a psychosexual evaluation. (Tr. at 683 – 84.)

At sentencing, following an extended allocution with Mr. Roberts (Tr. at 707 – 30) and discussion with counsel concerning violent and sexual offender registration requirements (Tr. at 731 – 35), the District

Court imposed¹ the State’s recommended sentence of 15 years in prison with no time suspended for attempted kidnapping and a concurrent six-month jail sentence for obstructing a peace officer (Tr. at 735 – 41, attached hereto as App. A). The District Court awarded credit for time served, imposed “the county attorney surcharges, the IT surcharge, [and] the victim/witness surcharge fee[,]” designated Mr. Roberts “a sexual or violent offender”, and required him “to register as provided under Montana law” upon his release from prison. (App. A at 739 – 41.)

The written judgment conforms with the oral pronouncement in all but two respects. (D.C. Doc. 86, attached hereto as App. B.) First, the judgment declares the District Court “shall determine an appropriate level designation after receipt of a sexual offender evaluation.” (App. B at 2.) The judgment requires Mr. Roberts to register as a sexual offender under Mont. Code Ann. § 46-23-502(9), and orders him “to submit to a sexual offender evaluation to establish a level designation for purposes of registration. Upon completion of the

¹ Z.S.’s father derided “judges that give too many second, third, eighth, and fifteenth chances” and threatened Mr. Roberts vigilante-style, declaring, “Terrance, you are lucky that the police got to you before I did. Anyone that knows me . . . knows there would be no need for law enforcement to get involved.” (Tr. at 701.)

evaluation, the Court will entertain a request from the State or Defense to establish the appropriate level designation for registration.” (App. B at 4, ¶ 4.) Second, the judgment veers from the oral pronouncement by purporting to impose “a \$50 fee for completion of the PSI report” that was not imposed orally in open court during sentencing. (App. B at 3.)

Mr. Roberts timely appealed.

STATEMENT OF THE FACTS

Terrance Roberts, a Native American man, has struggled with chemical and alcohol dependency and mental health disorders for many years. (Tr. at 706 – 11; D.C. Doc. 84 at 3, Exh’s. A at 6 – 8, B at 1 – 2.²) He was adopted at age two, but his adopted parents “weren’t there for [him]” [REDACTED]

[REDACTED]

[REDACTED];

his birth parents were alcoholics and other family members had a hard time making ends meet, so he could not stay with them. (Tr. at 711,

² The two exhibits to Defendant’s Sentencing Memorandum contain confidential medical and personal identifiable information required to be redacted pursuant to M. R. App. P. 10(7)(a), (b). (D.C. Doc. 84, Exh’s. A, B.)

712; D.C. Doc. 84, Exh. A at 8.) Mr. Roberts's chronic conditions have led him to commit thefts, assaults, robberies, and illegal drug possession, which in turn have caused him to be incarcerated for much of his adult life. (Tr. at 712 – 23; D.C. Doc. 84 at 3, Exh. B at 3.) None of Mr. Roberts's prior offenses involves partner or family violence, kidnapping, sex, or children. (Tr. at 718.) Mr. Roberts has not received adequate care to manage his conditions successfully, either in or out of prison; in prison he was suicidal and engaged in self-harm. (Tr. at 725; D.C. Doc. 84 at 3, Exh's. A at 8 – 12, B at 3.)

In July 2020, Mr. Roberts, then 47-years-old, boarded a bus from Bismarck, North Dakota, intending to go to Sacramento, California. He only had enough bus fare to get to Missoula, however, so Mr. Roberts got off the bus there, hoping to get assistance from Salvation Army or a church to make it the rest of the way to California. (Exh. 30 at 1:39 – 2:00; Tr. at 727.) The day after Mr. Roberts arrived in Missoula was hot and sunny. (Tr. at 300 – 01, 353, 372 – 73, 404; Tr. Exh's. 4 – 6, 9, 21 – 27.) Mr. Roberts went downtown and to a park with a Native American man he met in Missoula. (Exh. 30 at 2:53 – 3:32; Tr. at 707.) Lots of people were at the park that afternoon. (Tr. at 288, 313 – 14.)

Eventually, Mr. Roberts and the man parted ways in the park. (Exh. 30 at Tr. at 707.)

Mr. Roberts approached 16-year-old Z.S., who was standing by herself in a bikini on the observation deck overlooking Brennan's Wave, waiting for her two friends who were surfing. (Tr. at 318 – 34.) After Mr. Roberts started making small talk with Z.S., she picked up her surfboard from a bench and put it behind her to block his view. (Tr. at 330, 334 – 35.) Z.S. stated Mr. Roberts was standing only 6 – 12 inches behind her, which made her "very uncomfortable." (Tr. at 334 – 35.) Z.S. thought they talked "max eight minutes." (Tr. at 364.)

Z.S. walked off the deck and headed downstream to a path leading to the river where she hoped to meet up with her friends as they finished surfing so she would not be alone. (Tr. at 335 – 36.) Mr. Roberts followed closely behind her. (Tr. at 336.) Z.S. told Mr. Roberts, "You're making me very uncomfortable[.]" to which he responded, "I shouldn't be making you feel uncomfortable." (Tr. at 337.) Z.S. turned around to face Mr. Roberts as he spoke. She testified, "[H]e grabbed my right upper arm and said, you're coming with me[.]" although she told her two friends and an investigating officer soon after the alleged

incident occurred that Mr. Roberts said, “Come with me.” (Tr. at 337, 363 – 64, 394, 402; Exh. 9 at 0:50 – 0:52, 1:51 – 1:53.)

Z.S. testified Mr. Roberts grabbed her arm “[p]retty tightly; enough where I wasn’t able to get away on my own.” (Tr. at 337 – 38.) She was “[a] hundred percent” convinced Mr. Roberts’s statement was a command, not a question. (Tr. at 339, 382.) Z.S. stated Mr. Roberts pulled her arm “enough for [her] to be able to lose my balance a little and kind of go with him, but not enough for him to take me anywhere.” (Tr. at 343.) She thought she moved about three or four steps. (Tr. at 343.) Z.S. said Mr. Roberts’s grip was painful, “[p]robably an 8 or 9” on a scale of 10. (Tr. at 339 – 40.) She felt like she had no control over her own body when Mr. Roberts first grabbed her. (Tr. at 382.)

After perhaps ten seconds, Z.S. pulled her arm away from Mr. Roberts’s grasp as she used her left arm to thwack him with the surfboard she was holding. (Tr. at 338.) Mr. Roberts’s grip lessened and she “just ripped [her] arm out of his hand and started running downstream” after releasing the tether from her ankle to the surfboard. (Tr. at 339, 368.) Z.S. said Mr. Roberts held her arm for 15 seconds total. (Tr. at 394.) She testified Mr. Roberts ran off upstream as she

ran downstream as fast as she could on the paved trail in her bare feet. (Tr. at 340.) Another witness who had observed part of Mr. Roberts's interactions with Z.S. testified that Mr. Roberts walked, not ran, away from Z.S. as she ran in the other direction. (Tr. at 416.)

Z.S. met a father and daughter who stayed with her until her friends ran up to her; they had seen Z.S. when they were a little further downstream as she was crying and talking to the father and daughter. (Tr. at 341, 372.) Once Z.S. and her friends got back to the car, Z.S. called her dad and mom. One of her friends called 911. (Tr. at 341 – 43, 388 – 390, 401, 460.) Multiple witnesses testified Z.S. was upset and visibly shaken after the incident. (Tr. at 387 – 88, 393, 398 – 99, 460 – 61.) Z.S. estimated about 10 to 15 minutes passed between the time Mr. Roberts grabbed her arm and her friend called 911. (Tr. at 344, 378.) Z.S. estimated law enforcement responded about 25 to 30 minutes after the alleged incident occurred. (Tr. at 344 – 45.)

Various people observed Mr. Roberts in or near the park that day. One person was a mom who had been paddleboarding on the river with her 18-year-old daughter. (Tr. at 287 – 88.) As they were loading their paddleboards onto the roof of their car in the parking lot, they saw Mr.

Roberts sitting nearby and injecting something from a syringe into his arm. Mr. Roberts told them, “I’m sorry you had to see that;” he stood up and tried to help them get their paddleboards tied to their car’s cross rails before walking away. (Tr. at 289 – 91.) As the mom and daughter drove away, the mom observed Mr. Roberts walking around the park talking to people he did not appear to know, including young women or girls. (Tr. at 291 – 93.) The mom denied feeling afraid or in danger, but called 911 on the drive home at 5:48 p.m., because she perceived her daughter was upset and thought “that maybe the police could come and remove him from the situation.” (Tr. at 294 – 95, 299 – 300. See also Tr. at 304 – 09.) She was concerned as a parent. (Tr. at 294.)

Officer Mark Puddy was on bike patrol that day. He responded to the mom’s 911 call at 5:55 p.m. He quickly located Mr. Roberts talking to two young women. (Tr. at 442 – 43.) In what Puddy described as a “very quick contact,” Puddy “believe[d]” he identified himself as a police officer and asked Mr. Roberts to move on. Mr. Roberts immediately complied, telling Puddy his name as he walked away. (Tr. at 443, 447.) Mr. Roberts described Puddy as “some bicycle cop or some security guy.” (Exh. 30 at 3:35 – 3:43.)

Officer Jensen responded to the 911 call from Z.S.'s friend. When Jensen arrived, Z.S., her two friends, and Z.S.'s father were standing together in a parking lot adjacent to the park. (Tr. at 460; Exh. 9 at 0:14 – 0:20.) Jensen interviewed Z.S. in the parking lot about the incident and also walked with Z.S. over to the observation deck and trail where the interaction with Mr. Roberts occurred; the interview was captured on the body camera he was wearing. (Tr. at 459 – 63; Exh. 9 at 1:35 – 3:35, 5:13 – 7:45, 13:30 – 16:50.) He also photographed the area where the incident occurred and Z.S.'s right upper arm where Z.S. said Mr. Roberts grabbed her. (Tr. at 464 – 67; Exh's 4 – 8, 9 at 8:55 – 8:57, 11:18 – 12:28.)

Meanwhile, at 5:58 p.m., only three minutes after responding to the mom's 911 call, Puddy went pedaling in search of Mr. Roberts in response to the friend's 911 call.³ Puddy soon found Mr. Roberts strolling on a sidewalk near the park and said to him, "Terrance, come here please. Terrance, come here. I need to talk to you, Terrance. No,

³ Puddy testified the timeline of the two 911 calls and surrounding events indicates Mr. Roberts interacted with Z.S. near Brennan's Wave *before* Puddy found him in the park talking to the two women he did not know. (Tr. at 453 – 54.)

come here.” (Exh. 21 at 00:26 – 00:37.) Mr. Roberts recognized Puddy from their first encounter, but he did not want to talk to Puddy and started walking away from him. (Exh. 21 at 00:32 – 00:40.) Mr. Roberts explained later to a detective that he did not stop because he did not know who Puddy was or that he was a police officer, explaining he did not see a badge on Puddy and Puddy did not identify himself as a police officer. (Exh. 30 at 3:58 – 4:30.) Mr. Roberts said he did not want to talk to Puddy, but wanted to keep socializing with other people in the park. (Exh. 30 at 4:30 – 4:40.)

Puddy was wearing a body camera as he biked to catch up to Mr. Roberts and called out, “Yeah, cause I need to talk to you. I need you to take a seat on the bench for me.” (Exh. 21 at 1:02 – 1:07.) Mr. Roberts said something indecipherable, then turned and walked away from Puddy. Puddy pedaled after him and responded, “Yeah, Terrance. Terrance, you’re detained right now. You can’t leave.” (Exh. 21 at 1:08 – 1:13.) Mr. Roberts kept walking away from Puddy while Puddy followed alongside on his bike.

After 20-some seconds, Mr. Roberts hopped an embankment into the Holiday Inn parking lot and got out of Puddy’s line of sight. (Exh.

21 at 1:14 – 1:40.) Puddy pursued him on his bike, pedaling fast and hard to catch up to Mr. Roberts in the parking lot. About 30 seconds later, Puddy spied Mr. Roberts in the parking lot. (Exh. 21 at 1:40 – 2:10.) For the next couple minutes Puddy and Mr. Roberts played a game of cat and mouse in the parking lot and on the sidewalk, which Puddy said was “making it difficult for me just to catch up to him.” (Tr. at 448; Exh. 21 at 2:11 – 4:05.) During this chase, Puddy can be heard variously yelling to Mr. Roberts, “Terrance,” “Stop, Terrance,” “Stop!” “Stop! Okay . . . stop!” “Stop!”. Puddy testified, “I – by saying ‘stop.’ I inferred that he’s detained, that he needs to stop so I can talk to him.” (Tr. at 447.) Puddy never announced to Mr. Roberts that he was a police officer conducting an investigation.

Puddy caught up to Mr. Roberts when Mr. Roberts tried to enter the Holiday Inn, but the doors were locked. (Exh. 21 at 4:06; Tr. at 448 – 49, 451.) Puddy got off his bike, charged a few feet toward Mr. Roberts, and yelled, “Get on the ground!”, as he slammed Mr. Roberts into glass doors and shoved him face-down onto the ground. (Exh. 21 at 4:06 – 4:09.) Tr. at 5:00.) Mr. Roberts can be heard saying, “Okay, okay. I didn’t do nothing wrong, man. I didn’t. Okay. Ow! I told you, I

don't want help, alright?" (Exh. 21 at 4:10 – 4:30.) The video of the arrest is blurry and unfocused after Puddy attacked Mr. Roberts. Ultimately, the camera went completely black. Audio continued to record, but voices are muffled. (Exh. 21 at 4:49 – 6:10.)

Although Mr. Roberts was wearing his pants normally before Puddy tackled him, his pants were unzipped and down around his thighs as Puddy walked him, handcuffed, to Officer Cissley's patrol car for a search incident to arrest and then sat him inside the patrol car for transport to jail. (Exh. 21; Exh. 28 at 0:23 – 0:33, 1:45 – 3:39, 4:09 – 5:49.) Mr. Roberts sat in the patrol car several minutes in the back seat with his pants around his knees as at least one person peered into the rear window at him and the back door was opened for someone to view him. (Exh. 21.) Puddy described his violent arrest of Mr. Roberts, an unarmed, Native American man who suffers from mental illness, as using "persuasion." (Tr. at 448.) He labeled the force used to arrest Mr. Roberts as a "[m]inimal amount of force to effect an arrest, which was simply grabbing onto him and pushing him down on the ground." (Tr. at 448, 452.)

In a post-arrest interview, Mr. Roberts acknowledged speaking with Z.S. on the observation deck. He said they talked about surfing and were socializing. He adamantly denied grabbing her arm or telling her, “Come with me,” or “You’re coming with me.” (Exh. 30 at 4:40 – 6:20.)

STANDARDS OF REVIEW

“This Court reviews evidentiary rulings for an abuse of discretion. . . . [A] court’s evidentiary rulings must be supported by rules and principles of law, and as such, when an evidentiary ruling is based on conclusions of law, this Court is tasked with determining whether the court correctly interpreted the law.” *State v. Pitkanen*, 2022 MT 231, ¶ 12, 410 Mont. 503, 520 P.3d 305 (citations, internal quotation marks omitted).

“This court reviews for correctness the legal determinations a lower court makes when giving jury instructions, including whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law. . . . District courts are given broad discretion when instructing a jury; reversible error occurs only if the instructions prejudicially affect a defendant’s substantial rights. . . . A district

court’s decision on jury instructions is presumed correct, and the appellant has the burden of showing error.” *State v. Lackman*, 2017 MT 127, ¶ 8, 387 Mont. 459, 461, 395 P.3d 477 (citation omitted).

Under the plain error doctrine, the Court “may discretionarily review claimed errors that implicate a criminal defendant’s fundamental constitutional rights, even if no contemporaneous objection was made, where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *State v. Wagner*, 2009 MT 256, ¶ 12, 352 Mont. 1, 215 P.3d 20 (en banc).

“Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo.” *State v. Wright*, 2021 MT 239, ¶ 7, 405 Mont. 383, 495 P.3d 435 (citations omitted).

This Court reviews “a district court’s imposition of sentence for legality.” *State v. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 294 P.3d 197 (en banc) (citations omitted).

SUMMARY OF ARGUMENT

The District Court incorrectly instructed the jury on the definition of “force” within Mont. Code Ann. § 45-5-302, kidnapping. Instruction 19 told the jury that force did not require actual physical violence or a threat of personal injury, which is an inaccurate statement of current law. Giving the instruction was not harmless error because the only force alleged was Mr. Roberts grabbing Z.S.’s arm for a few seconds while saying, “Come with me,” in a public park in broad daylight with many people nearby. Without the incorrect instruction, a reasonable jury could have concluded that such force was inadequate to attempt a kidnapping.

The District Court plainly erred by giving a conduct-based mental-state instruction for obstructing a peace officer, and by mixing together conduct- and result-based instructions on the mental state required to commit attempted kidnapping and attempted unlawful restraint. All three offenses require a result-based mental state instruction. The incorrect jury instructions confused the jury and lowered the State’s burden of proof. Alternatively, Defense Counsel was ineffective in

either proposing or acquiescing in incorrect instructions that prejudiced Mr. Roberts.

The District Court incorrectly admitted Officer Jensen's body-camera video of his encounter with Z.S. The video included Jensen's interview of Z.S., her father, and two friends, as well as a walk-through of the area where Z.S. stated the incident occurred, narrated by Z.S.. The State's contention that the video was not introduced for the truth of the matter asserted, but rather to establish Z.S.'s demeanor and show the area, is unsupported by law. The video was out-of-court testimonial evidence the State wanted the jury to see and hear to bolster the truth of the matters asserted in court. The District Court's error admitting the video was not harmless. Its emotional impact on the jury would have aroused sympathy for Z.S. at the expense of Mr. Roberts's constitutional rights to confront witnesses against him, to a fair trial by an impartial jury, and to due process of law.

Mr. Roberts's sentence is illegal in two respects. First, the District Court designated him a "sexual offender" and required him to register as such without ordering a psychosexual evaluation before sentencing and considering it at sentencing. The judgment's provisions ordering a

post-sentencing evaluation and making it optional for the parties to request a hearing for the purpose of designating a tier level once the evaluation occurs are ultra vires. Second, the judgment imposes a \$50 PSI fee that was not orally pronounced.

ARGUMENT

I. The jury instruction regarding the mental state necessary to commit the offense of obstructing a police officer is incorrect. Reversal is warranted under plain error or ineffective assistance of counsel.

A. Instruction 33 incorrectly told the jury obstructing a peace officer is a conduct-based offense, which lowered the State’s burden to prove the offense beyond a reasonable doubt.

The State proposed a conduct-based “knowingly” instruction for obstructing a peace officer, which read: “A person acts knowingly with respect to Obstructing a Peace Officer or Other Public Servant when he is aware of his own conduct.” (D.C. Doc. 49, State Proposed Instr. 15.)

The District Court gave the State’s instruction, with no record of Defense objection. (D.C. Doc. 68.1, Instruction 33, attached hereto in App. C; Tr. at 61 – 76, 498 – 99.) This conduct-based instruction violates well-established precedent that obstructing a peace officer requires a result-based instruction because “for a person to knowingly

obstruct an officer's lawful duty, the defendant must be aware that [his] conduct is highly probable to hinder the performance of that duty."

State v. Bennett, 2022 MT 73, ¶ 10, 408 Mont. 209, 507 P.3d 1154, citing *City of Kalispell v. Cameron*, 2002 MT 78, ¶ 11, 309 Mont. 248, 46 P.3d 46. *Accord State v. Johnston*, 2010 MT 152, ¶ 14, 357 Mont. 46, 237 P.3d 70; *State v. Secrease*, 2021 MT 212, ¶ 15, 405 Mont. 229, 493 P.3d 335.

Here, the evidence submitted to the jury established Mr. Roberts did not realize Officer Puddy was a police officer conducting an investigation into an attempted kidnapping. Even though Mr. Roberts recognized Puddy from their previous encounter in the park when Puddy briefly told him to move along, Mr. Roberts thought Puddy was some "security guy" or "bicycle cop." Mr. Roberts did not see a badge on Puddy; nor did Puddy tell Mr. Roberts he was a police officer conducting an investigation. Puddy simply biked along after Mr. Roberts yelling "Stop!," "I need to talk to you!," and "You are detained!," because Puddy inferred, in his own mind, he had detained Mr. Roberts. But Mr. Roberts did not want to talk to Puddy because Mr. Roberts did not know who he was, wanted to socialize with other people in the park, and did

not need help. The evidence presented at trial does not establish Mr. Roberts knew his evasive maneuvers to avoid Puddy were “highly probable to hinder the performance” of Puddy’s investigation into Z.S.’s allegations Mr. Roberts attempted to kidnap her.

“It is the duty of the court to instruct the jury on the law[.]” *Secrease*, ¶ 16 (citation omitted). Because Instruction 33 incorrectly informed the jury Mr. Roberts could obstruct a peace officer merely by his evasive conduct, this Court should exercise plain error review. The incorrect instruction reduced the State’s burden to prove Mr. Roberts committed obstructing a peace officer beyond a reasonable doubt, which violated Mr. Roberts’s right to due process of law. “A fundamental principle of our criminal justice system is that the State prove every element of a charged offense beyond a reasonable doubt, , and we have previously stated ‘[i]f the burden of proof was shifted as [the defendant] claims, there is no doubt his fundamental constitutional rights have been violated.’” *State v. Daniels*, 2011 MT 278, ¶ 33, 362 Mont. 426, 441, 265 P.3d 623 (citations omitted). *Accord* Montana Constitution, Article II, Section 17.

Failing to address this error would result in a manifest miscarriage of justice because Mr. Roberts would remain convicted of an offense the State did not prove beyond a reasonable doubt at trial. The Court should exercise plain error review to reverse Mr. Roberts's conviction for obstructing a peace officer and remand for a new trial.

B. Mr. Roberts received ineffective assistance of counsel when his lawyer acquiesced in the incorrect instruction.

Ineffective assistance of counsel claims are appropriate for review on direct appeal when no plausible justification exists for the actions or omissions of defense counsel. *Wright*, ¶ 10 (citations omitted). In such situations, “[w]hether the reasons for defense counsel's actions are found in the record or not is irrelevant. What matters is that there could not be any legitimate reason for what counsel did.” *State v. Koughl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095.

To prevail on an IAC claim, a petitioner must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. . . . This Court applies a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance” contemplated by the Sixth Amendment. . . . To

show prejudice, the defendant must show that there is a reasonable probability the verdict would have been different but for counsel's deficient performance. *State v. Tipton*, 2021 MT 281, ¶ 17, 406 Mont. 186, 497 P.3d 610 (citations omitted).

Acquiescing in an incorrect jury instruction that makes it easier for the State to convict a defendant falls below professional norms for any criminal defense attorney. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Mont. Prof. Rules Cond. 1.1. “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance[.]” *Wright*, ¶ 18 (citations and internal quotation marks omitted).

Here, Defense Counsel acquiesced in the State’s incorrect conduct-based instruction for obstructing a peace officer. Defense Counsel could have no legitimate reason for agreeing to an incorrect instruction that made it easier for the State to convict Mr. Roberts. The evidence demonstrates only that Mr. Roberts was evading Puddy’s directions to

stop and talk to him. The evidence does not prove beyond a reasonable doubt Mr. Roberts knew he was hindering Officer Puddy's investigation into Z.S.'s allegations. But for Counsel's deficient performance there is a reasonable probability Mr. Roberts would have been acquitted of obstructing a peace officer.

If the Court declines plain error review of Instruction 33, it should reverse Mr. Roberts's conviction for obstructing a peace officer and remand for a new trial due to ineffective assistance of counsel.

II. The District Court did not fully and fairly instruct the jury on the definition of "force" required to commit kidnapping or on the mental states required for attempted kidnapping and attempted unlawful restraint.

A. The District Court incorrectly instructed the jury, over objection, on the definition of "force."

The State proposed a jury instruction concerning "force" under Mont. Code Ann. § 45-5-302(1). (Tr. at 65 – 66, 583 – 84; D.C. Doc. 49, State Proposed Instr. 22.) As authority for the instruction, the State cited *State v. Walker*, 139 Mont. 276, 362 P.2d 548 (1961), and the Criminal Law Commission Comment to § 45-5-302. Over objection, the District Court gave the jury the State's instruction: "A showing of actual physical violence or threat of personal injury are not required to

prove the force necessary to establish the crime of kidnapping.” (App. C, Instruction 19; Tr. 583 – 84.)

The defendant in *Walker* was a Montana State Prison inmate who testified that he told a guard they were in the middle of a prison riot, there was a man on the catwalk with a rifle, and he did not think the guard should cause any trouble as Walker had a knife. Walker then asked for the keys and accompanied the guard to the door to the stairway leading to “the hole,” where the guard was confined for hours without outside contact. *Walker*, 139 Mont. at 276 – 78, 362 P.2d at 549.

The State charged Walker under former § 94-2602 (1947 Rev. Code of Mont.), Kidnaping with Intent to Send Person from State or Confine Within State, a statute requiring (a) force and (b) secret confinement or removal out of Montana. At trial, the district court gave the jury Walker’s requested instruction on “force.” *Walker*, 139 Mont. at 280, 362 P.2d at 550. On appeal, Walker argued the State should not have been allowed to prove he “forcibly” seized, confined, or kidnapped the guard simply by threatening him generally while in the possession of a deadly weapon. Instead, Walker contended the State must prove

he actually used physical violence or explicitly threatened to cause the guard injury.

The Court disagreed, concluding that when a threat is made while in the possession of a deadly weapon accompanied with the apparent power to carry out that threat, the threat itself is the “equivalent of force or actual violence.” *Walker*, 139 Mont. at 279, 362 P.2d at 550. Thus, the Court determined that “any threats, fraud, or appeal to the fears of the individual, which subject the will of the person abducted, and places such person as fully under the control of the other, as if actual force were employed would make the offense as complete as by the use of force and violence.” *Walker*, 139 Mont. at 279 – 80, 362 P.2d at 550 (citation, internal quotations omitted). Contrary to the State’s assertion at Mr. Roberts’s trial, *Walker* did not hold that absent evidence of a threat while in the possession of a deadly weapon, the State does not need to show actual physical violence or threat of personal injury. The holding of *Walker* was narrower than what the Prosecutor claimed and the District Court gave as Instruction 19.

Furthermore, *Walker* interpreted Montana’s former kidnapping statute, which was repealed in 1973, and replaced with the kidnapping

statute that, in relevant part, exists today. Mont. Code Ann. § 45-5-302(1), requires the State to prove the defendant “knowingly or purposely and without lawful authority restrain[ed] by either secreting or holding the other person in a place of isolation or by using or threatening to use physical force.” The current statute divides the former kidnapping statute in half: kidnapping may be committed either by secret confinement or by use or threatened use of physical force.

At most, the Court’s reasoning in *Walker* could apply when the first clause of subsection (1) is at issue, i.e., when the State alleges a person was secreted or held in isolation. “The clause ‘holding him in a place of isolation’ in this section on kidnapping conforms with prior law by providing that a showing of actual violence or threat of injury is not required when the victim has been isolated. See State v. Walker, 139 M 276, 362 P.2d 548, 550 (1961).” Montana Criminal Code of 1973 Annotated, § 45-5-302 (Annotator’s Note) (1980 rev. ed.), (emphasis added). But *Walker* plainly is inapplicable to the second clause of subsection (1) – the only clause under which Mr. Roberts was charged – which by its plain language requires the State to prove the defendant

used or threatened to use physical force. (See App. C, Instruction 18; Tr. at 585 – 87.)

Here, Instruction 18 told the jury kidnapping required restraining another person by using or threatening to use physical force.

Instruction 19 told the jury “actual physical violence or threat of personal injury are not required to prove the force necessary to establish the crime of kidnapping.” Essentially, Instruction 19 negates the force element the State must prove to distinguish felony kidnapping from misdemeanor unlawful restraint. See Montana Criminal Code of 1973 Annotated § 45-5-301 (1980 rev. ed.), (Annotator’s Note) (“The kidnapping related offenses are arranged in a hierarchy with overlapping provisions to allow a comprehensive treatment of these crimes. Unlawful restraint is the lowest form of interference with the liberty of another.”).

Instruction 19 faithfully copies a sentence from *Walker*, but the copied sentence was not the instruction given at Walker’s trial. Furthermore, the kidnapping statute construed in *Walker* is fundamentally different than the current Mont. Code Ann. § 45-5-302. In this case, Instruction 18 alone sufficiently and accurately instructed

the jury on the definition of kidnapping applicable to this case.

Instruction 19 was an incorrect statement of law.

The critical issue in the attempted kidnapping charge was whether Mr. Roberts attempted to unlawfully restrain Z.S. by force. Had the jury been accurately instructed without improperly limiting the definition of “force,” there is a reasonable possibility Mr. Roberts would have been acquitted of attempted kidnapping. The Court should reverse Mr. Roberts’s conviction for attempted kidnapping and remand for a new trial.

B. Jury instructions pertaining to the mental state required for attempted kidnapping and attempted unlawful restraint are a confusing, contradictory mishmash of conduct- and result-based instructions. Reversal is warranted under plain error or ineffective assistance of counsel.

1. The instructions at issue.

The District Court gave the following conduct-based instructions to the jury:

(a) **Instruction 21, “Any Act”:** “In order to find the Defendant guilty of Attempt, any act toward the commission of Kidnapping or Unlawful Restraint must be done purposefully, meaning it is the Defendant’s conscious object to engage in that conduct.” (App. C,

Instruction 21; Tr. at 499 – 500 (indicating counsel drafted this language together to modify Defendant’s Proposed Instruction 8 and the District Court accepted the modified instruction as Instruction 21).

(b) **Instruction 27, Purposely:** “As to the offenses of Kidnapping and Unlawful Restraint, A [sic] person acts purposely when it is the person’s conscious object to engage in conduct of that nature.” (App. C., Instruction 27; D.C. Doc. 47, Defendant Proposed Instruction 9 (same).) The State did not object to the Defense instruction and withdrew its own result-based “purposely” instruction, which read, “A person acts purposely with respect to having the purpose that a kidnapping be committed, when it is the person’s conscious object to cause a kidnapping to be committed.” (Tr. at 65, 69 – 73, 507 – 08; D.C. Doc. 49, State Proposed Instr. 16.)

The District Court gave the following **result-based instructions**:

(c) **Instruction 17, Attempted Kidnapping:** “A person commits the offense of attempted kidnapping when, with the purpose to commit the offense of kidnapping, the person commits any act toward the commission of the offense of kidnapping.” (App. C, Instruction 17;

D.C. Doc. 49, State Proposed Instr. 19 (same); D.C. Doc. 47, Defendant Proposed Instr. 1 (same).)

(d) **Instruction 20, “With the Purpose to Commit”:** “As used in Attempt, the phrase ‘with the purpose to commit’ means it is the Defendant’s conscious object to cause a Kidnapping or Unlawful Restraint to be committed. In order to find the Defendant guilty of Attempt, the State must prove it was the Defendant’s conscious object to cause a Kidnapping or Unlawful Restraint to be committed.” (App. C, Instruction 20; D.C. Doc. 47, Defendant Proposed Instruction 7 (modified by District Court).)

(e) **Instruction 22, Issues in Attempted Kidnapping:** “To convict the Defendant of the offense of attempted Kidnapping, the State must prove the following elements: 1. The Defendant performed any act toward the commission of the offense of kidnapping; **AND** 2. That the Defendant did so with the purpose to commit the offense of kidnapping.” (App. C, Instruction 22 (emphasis original); D.C. Doc. 49, State Proposed Instruction 20 (same); D.C. Doc. 47, Defendant Proposed Instruction 2 (same).)

(f) **Instruction 28, Attempted Unlawful Restraint:** “A person commits the offense of attempted unlawful restraint when, with the purpose to commit the offense of unlawful restraint, the person commits any act toward the commission of the offense of unlawful restraint.” (App. C, Instruction 28; D.C. Doc. 47, Defendant Proposed Instruction 5 (modified by District Court).)

(g) **Instruction 30:** “To convict the Defendant of Attempted Unlawful Restraint, the State must prove the following elements: 1. That the Defendant performed any act toward the commission of the offense of Unlawful Restraint; AND 2. That the Defendant had the purpose to commit the offense of Unlawful Restraint.” (App. C, Instruction 30 (lack of a heading original; emphasis original); D.C. Doc. 47, Defendant Proposed Instruction 6.)

The District Court gave the following **definitions**:

(h) **Instruction 18, Kidnapping:** “Kidnapping is defined as knowingly or purposely and without lawful authority, restraining another person by using or threatening to use physical force.”

(i) **Instruction 26, Restrain:** “As used in kidnapping and unlawful restraint, the term “restrain” requires a substantial interference with the other person’s liberty.”

(j) **Instruction 29, Unlawful Restraint:** “Unlawful Restraint is defined as knowingly or purposely and without lawful authority restraining another so as to interfere substantially with the other person’s liberty.”

2. The instructions were incorrect as a whole and denied Mr. Roberts a fair trial.

The jury sent two questions to the judge during deliberations. The first question requested the legal definition of “liberty.” (D.C. Doc. 69, attached hereto in App. D.) The District Court responded, without objection, by providing a definition from Black’s Law Dictionary – “Freedom from arbitrary or undue external restraint.” (App. D, Doc. 70; Tr. at 662 – 63.) The word “liberty” is contained in the instruction defining “restrain” within kidnapping and unlawful restraint, meaning “a substantial interference with the other person’s liberty.” (App. C, Instruction 26.) But the Black’s Law definition given to the jury advised them “arbitrary or undue” restraint was sufficient to interfere with one’s “liberty.”

In a pretrial order denying Defendant's Motion to Dismiss and finding the kidnapping statute was not unconstitutionally void for vagueness, the District Court determined the word "restrain" within the kidnapping statute means to deprive of liberty, not simply to keep someone in check or limit someone's movement. (D.C. Doc. 37 at 9.) The District Court reasoned the restraint required for kidnapping must be consistent with restraint required for unlawful restraint, which means "to interfere substantially with the other person's liberty," and noted the Criminal Law Commission's comment that unlawful restraint "is intended to deal with the problem of false imprisonment." (D.C. Doc. 37 at 10.)

The District Court's answer to the jury's first question that "liberty" means "freedom from arbitrary or undue external restraint" makes no sense in light of Instruction 26, which requires a substantial interference with the other person's liberty, and Instructions 17, 18, and 20, which require purposeful, not arbitrary or undue, conduct to kidnap or attempt to kidnap someone. The answer also defies the District Court's pretrial order framing "liberty" and "restrain" within the

context of false imprisonment and the hierarchy of kidnapping-related offenses in §§ 45-5-301 – 303. (D.C. Doc. 37 at 10.)

Understandably, after receiving a confusing answer to its first question the jury sent a second question, asking what “Defendant’s conscious object” means in Instruction 20, defining “with the purpose to commit.” (App. D, Doc. 71.) Instruction 20 is a result-based instruction for kidnapping and unlawful restraint. But Instruction 20 necessarily leads the jury to Instructions 21 and 27, which, respectively, define “any act” and “purposely” as conduct-based instructions for the same two offenses.

The Defense argued “conscious object” should be defined as “the defendant’s intent to fully accomplish a singular result, a specific crime.” (Tr. at 671.) The Prosecutor countered with definitions from Merriam-Webster’s dictionary⁴ and complained the Defense proposal “pretty much just restate[s]” the “with the purpose to commit” instruction, i.e., Instruction 20. (Tr. at 673.) The Prosecutor observed the definition of “purposefully” states “it is the defendant’s conscious object to engage in conduct of that nature,” which is the conduct-based

⁴ The Prosecutor’s proposed definitions are not in the record.

instruction in Instruction 27. Thus, the Prosecutor correctly noted the Defense proposal “only applied to the ‘with the purpose to commit instruction’ and does not address conscious object as used in purposefully instruction that relates to conduct.” (Tr. at 673.)

Notably, Instruction 27 is the one where the Prosecutor acquiesced in the Defense’s conduct-based instruction and withdrew the State’s result-based instruction for “purposely.” The Prosecutor realized that Instruction 20 (“with the purpose to commit”) was a result-based instruction and that Instruction 27 (“purposely”) was a conduct-based instruction. Defense Counsel asserted his proposed definition should apply only to Instruction 20 and not to Instruction 27, contending it would be “misleading and inaccurate” to define the phrase similarly in both instructions. (Tr. at 676 – 77.) Defense Counsel blamed “the pattern instructions and not necessarily the law.” (Tr. at 678. *Accord* Tr. at 671 – 72.)

Ultimately, both the Prosecutor and Defense Counsel agreed with the District Court’s response to the jury, which was: “Montana law does not provide any further definition of ‘conscious object.’ When words

have no specialized legal meaning, you should give them their plain and ordinary meaning.” (App. D, Doc. 73; Tr. at 676, 678.)

Taken together, the above-referenced jury instructions along with the answers to the jury’s two questions, are a bewildering morass of conflicting statements on the mental state necessary to commit attempted kidnapping or attempted unlawful restraint. Instructions 17, 20, 22, and 28 told the jury that the defendant actually had to intend to commit the offense of kidnapping or unlawful restraint, while Instructions 21 and 27 told the jury the defendant simply had to engage in purposeful acts or conduct, without indicating the conduct must relate to the result of attempted kidnapping or attempted unlawful restraint. The instructions contradict each other, which the District Court should have recognized, especially after the Prosecutor pointed it out.

“Whether an offense is a conduct-based offense or a result-based offense is determined by an analysis of its elements.” *State v. Deveraux*, 2022 MT 130, ¶ 31, 409 Mont. 177, 512 P.3d 1198. Here, the District Court correctly instructed the jury that attempted kidnapping was a

result-based offense, based on same proposed instruction from the State and the Defense. (App. C, Instruction 17.)

The District Court further instructed the jury, “Kidnapping is defined as knowingly or purposely and without lawful authority, restraining another person by using or threatening to use physical force.” (App. C, Instruction 18.) Similarly, the District Court instructed the jury, “Unlawful Restraint is defined as knowingly or purposely and without lawful authority restraining another so as to interfere substantially with the other person’s liberty.” (App. C, Instruction 29.) Thus, an attempt to kidnap or unlawfully restrain someone necessarily involves a mental state to accomplish a kidnapping or an unlawful restraint, not merely to arbitrarily restrain someone or use physical force on another.

The District Court, however, incorrectly instructed the jury, “As to the offenses of Kidnapping and Unlawful Restraint, A person acts purposely when it is the person’s conscious object to engage in conduct of that nature,” and that “any act toward the commission of Kidnapping or Unlawful Restraint must be done purposefully, meaning it is the Defendant’s conscious object to engage in that conduct.” (App. C,

Instructions 21, 27.) These two conduct-based instructions were inconsistent with the correct, result-based instructions otherwise given. The jury was obviously confused about the instructions when it submitted two questions to the District Court about them during deliberations. The underlying problem was that the instructions were inconsistent with each other.

The jury instructions considered as a whole did not fully or fairly inform the jury about the law. They call into question the fundamental fairness of Mr. Roberts's trial and his conviction and compromise the integrity of the judicial process, which is grounded upon reason and the rule of law. The instructions here are a perplexing mess. The Court should exercise plain error review, reverse Mr. Roberts's conviction due to the fundamentally flawed instructions, and remand for a new trial.

3. Mr. Roberts received ineffective assistance of counsel when his lawyer proposed or acquiesced in the incorrect instructions.

Proposing or acquiescing in numerous, incorrect jury instructions falls below professional norms and is a quintessential example of unreasonable performance. Mont. Prof. Rules Cond. 1.1; *Wright*, ¶ 18. In this case, Defense Counsel failed to discern the difference between

conduct-based and result-based instructions for the charges Mr. Roberts faced at trial. Defense Counsel correctly argued that attempted kidnapping is a result-based offense, but inexplicably proposed two conduct-based instructions, i.e., Instructions 21 and 27, that conflicted with his own position. Counsel's failure to appreciate the difference between a conduct- and a result-based instruction reduced the State's burden of proof by allowing the State to argue, successfully, Mr. Roberts attempted to kidnap Z.S. without linking his conduct to the result of kidnapping.

Defense Counsel could have no legitimate reason for proposing or agreeing to incorrect instructions that made it easier for the State to convict Mr. Roberts. But for Counsel's deficient performance there is a reasonable probability Mr. Roberts would have been acquitted of attempted kidnapping. No evidence demonstrates Mr. Roberts had a purpose to kidnap Z.S., not even his alleged statement, "Come with me" or "You're coming with me" in broad daylight in a park full of people with no means of restricting her liberty through false imprisonment.

If the Court declines plain error review of the confusing instructions, it should reverse Mr. Roberts's conviction for attempted

kidnapping and remand for a new trial due to ineffective assistance of counsel.

III. The District Court incorrectly admitted, over objection, Officer Jensen's body-camera video of his interview with Z.S., her father, and her friends minutes after the incident occurred.

Z.S. testified at trial. (Tr. at 317 – 383.) After describing the alleged events, the prosecutor had Z.S. lay the foundation for admitting the photographs Officer Jensen took of her arm. (Tr. at 347.) The District Court admitted the photos without objection. (Tr. at 348; Exh's. 4 – 8.) One of the photographs shows a side profile of Z.S., including her face and her arm.

Then, the prosecutor had Z.S. provide the foundation for Jensen's interview of her taken by his body camera. (Tr. at 350 – 52.) This time, Defense Counsel objected "on hearsay grounds. It's, essentially, a collection of out of court statements not under oath being offered to show the truth of their own contents." (Tr. at 352.) The Prosecutor retorted the video was not hearsay because the State was not offering it for the truth of the matter asserted, but rather "to show her demeanor and to show the area of where this occurred." (Tr. at 352 – 53.)

Without analysis, the District Court admitted the video over objection

from the Defense. (Tr. at 354.) The State then played the video for the jury; the audio was not silenced. Z.S., her friends, her father, as well as Officers Jensen and Puddy plus two other officers talked during the video.

Subsequently, unspecified portions of the video were replayed and stopped two more times so that Z.S. could reiterate her story in court as the jury watched those portions again. (Tr. at 354 – 55.) The record indicates Z.S. cried as she introduced the video and appeared emotional while revisiting the filmed incident during her testimony. (Tr. at 351.) Jensen testified later in the trial. (Tr. at 457 – 79.) The photographs Jensen took of the area were admitted during his testimony, without objection. (Tr. at 464 – 65; Exh’s 22 – 27.)

“Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.” Mont. R. Evid. 802. “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.” Mont. R. Evid. 801(c). Montana Rule of Evidence 801(d) excludes certain out-of-court statements from the general definition of hearsay. The State made no

attempt to try to justify the video under Rule 801(d), nor could it have done so – Z.S.’s statements in the video were consistent with the testimony she had just given.

There is no “demeanor” exception to the prohibition against hearsay. Z.S. testified about how she felt during and after the encounter. So did her two friends and Officers Jensen and Puddy. Jensen’s photographs of Z.S. showing her face, her arm, and the geographic area were admitted into evidence. Jensen and Detective Brueckner testified about the geography and physical layout of the area, as well as the location of the trails and observation deck in relation to the river.

Z.S. talked with Jensen, her dad, and her two friends during the video. Z.S.’s father did not testify at trial. He was not subject to cross-examination by the Defense. Yet, he talked frequently throughout the video, walked around obviously upset while audibly sighing and holding his head, and hugged Z.S. for an extended time while consoling her. Among other things, Z.S.’s father tells Jensen, “I’m glad you got him before I did[,]” and “I just know that when she [i.e., Z.S.] called me, she was f***ing hysterical.” (Exh. 9 at 0:12 – 0:15, 03:43 – 03:48.) While

Jensen is photographing Z.S. and talking to her, Puddy appears in the video introducing himself to Z.S.'s father and shaking his hand; Jensen greets Puddy with, "Hi, Mark," and later walks up to Puddy, gives him a congratulatory slap on the back, and says, "You still got it!" Puddy amiably agrees, "Still got it, yeah." (Exh. 9 at 12:02 – 13:30.) The video could be a hornbook hearsay example, bolstering the prosecution's case with sympathetic community members, including teenage girls, and helpful law enforcement – all white people – while trampling on constitutional rights of the accused – a mentally ill, impoverished, Native American man passing through Missoula on his way home to California.

The emotional impact of Z.S. introducing the video during her testimony plainly was timed by the State to arouse the greatest sympathy from the jury for Z.S. by having her introduce the video bolstering her own testimony. The video not only repeated the testimony Z.S. had just given, it introduced statements from Z.S.'s father, Jensen, Puddy, two other officers, and Z.S.'s two friends shortly after the alleged incident occurred. The District Court's erroneous admission of the video prejudiced Mr. Roberts's fundamental rights to

confront witnesses against him, to a fair trial by an impartial jury, and to due process. The State cannot demonstrate that playing the video was harmless error.

Because of the District Court's incorrect interpretation the rules of evidence and its abuse of discretion in admitting the video, the Court should reverse Mr. Roberts's convictions and remand this matter for a new trial.

IV. The District Court violated statutory parameters when designating Mr. Roberts a sex offender. Alternatively, Mr. Roberts received ineffective assistance of counsel at sentencing.

A. Mr. Roberts's sentence is illegal.

Mont. Code Ann. § 46-23-502(9)(a) defines "sexual offense" as "any violation of or attempt, solicitation, or conspiracy to commit a violation of . . . 45-5-302 (if the victim is less than 18 years of age and the offender is not a parent of the victim)[.]" Defense Counsel conceded, he "may have overlooked" the sexual offender registration statutes, but did not "dispute what's being stated here today. I don't have a code book with me right now. . . . I won't disagree, Judge, with regard to subsection (9), sexual offense." (Tr. at 734.) Defense Counsel did not request a continuance of the sentencing hearing upon learning Mr.

Roberts would be designated a sexual offender or offer any argument why that punishment would be inappropriate in this case. Neither the District Court nor any lawyer present in court at sentencing mentioned the statutory mandates for a sexual offender evaluation to be prepared before sentencing or for the District Court to designate an offender level at sentencing. *See* Mont. Code Ann. § 46-23-509(2), (3).

“The *Lenihan* rule⁵ provides a sentence not objected to in the district court that is ‘illegal or exceeds statutory mandates,’ *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000, and not merely an ‘objectionable’ statutory violation, *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892 (citations omitted), may be reviewed on appeal.” *State v. Hansen*, 2017 MT 280, ¶ 12, 389 Mont. 299, 405 P.3d 625, overruled in part on other grounds *Gardipee v. Salmonsens*, 2021 MT 115, 486 P.3d 689 (pro se petition for writ of habeas corpus).

Montana’s statutes governing registration of sexual and violent offenders are clear. Before the District Court could sentence Mr. Roberts, a psychosexual evaluation report needed to be prepared and a level recommended by an evaluator. Mont. Code Ann. § 46-23-509(2).

⁵ *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979).

During sentencing, the district court must consider the report, as well as testimony and argument about the report and level designation, before pronouncing sentence. Mont. Code Ann. § 46-23-509(3). The District Court lacked statutory authority to sentence Mr. Roberts as a sexual offender without first complying with § 46-23-509(2), (3). The judgment's provisions to the contrary are *ultra vires*. Because the sexual offender designation exceeds statutory parameters, the Court may address it under *Lenihan*.

There is no statutory authority for the District Court to order the sexual offender evaluation after a defendant already has been sentenced and then allow either party the option of requesting a hearing on the level designation. When a sentence violates statutory parameters, it is irrelevant that Defense Counsel acquiesced in the illegal sentence. *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶¶ 40 – 44, 396 Mont. 57, 443 P.3d 504 (*en banc*). This Court may correct the sentence on direct appeal because it was void *ab initio*. *Salsgiver*, ¶¶ 36 – 40. In this case, Counsel's acquiescence in an illegal sentence does not, and cannot, supersede statutory mandates. *Salsgiver*, ¶ 43.

Because Mr. Roberts was sentenced as a sex offender in violation of § 46-23-509(2), (3), the Court must remand for a new sentencing hearing.

B. Mr. Roberts received ineffective assistance of counsel at sentencing.

Unaware that Mr. Roberts’s conviction for attempted kidnapping rendered him a “sexual offender” pursuant to Mont. Code Ann. § 46-23-502(9), Defense Counsel argued in his sentencing memorandum and again during the sentencing hearing that kidnapping was a “non-violent offense” and Mr. Roberts was a “non-violent offender.” (D.C. Doc. 84 at 1 – 3; Tr. at 731 – 32.) Counsel explained Mr. Roberts “suffers from various mental health diagnoses that hamper his functioning” and “needs intensive chemical dependency treatment.” (D.C. Doc. 84 at 3, Exh’s A – B.) Yet Counsel made no constitutional argument against a sexual offender designation as-applied to Mr. Roberts, even though nothing in the instant offense or in Mr. Roberts’s history merits sentencing him as a “sexual offender.”

Counsel did not request a continuance to allow him to research and consider applicable law after learning it during Mr. Roberts’s sentencing hearing. Counsel did not request a psychosexual evaluation

before sentencing when the District Court failed to do so, even though sexual offender registration “effectively functions as additional punishment for crimes.” *State v. Hinman*, 2023 MT 116, ¶ 25, ___ Mont. ___, 530 P.3d 1271; Mont. Code Ann. § 46-23-506(1), (3).

Not knowing the law governing a client’s case or the legal consequences of a conviction falls below professional norms. Mont. Prof. Rules Cond. 1.1; *Wright*, ¶ 18. Representation of a client deemed a sexual offender by operation of law, without knowing what the law says or demanding mandatory, statutory procedures be followed before sex-offender registration may be imposed constitutes incompetent representation. Had Mr. Roberts’s counsel been aware of controlling law, it is a near certainty this District Court would have followed the procedures in § 46-23-509(2), (3), before sentencing Mr. Roberts. There is no plausible justification for Counsel’s failure to ensure all statutory prerequisites were met before Mr. Roberts was punished as a sexual offender. Mr. Roberts was prejudiced by his lawyer’s incompetence at sentencing. This Court must remand for a new sentencing hearing due to ineffective assistance of counsel.

V. The \$50 PSI fee in the judgment is illegal because it was not included in the oral pronouncement of sentence in open court.

During the oral pronouncement of sentence, the District Court ordered: “I’m not going to impose the public defender fee or the cost of prosecution. There are some minimal charges, otherwise, that will be imposed. Those financial obligations will be the county attorney surcharges, the IT surcharge, the victim/witness surcharge fee.” (App. A at 739.) In addition to the charges orally pronounced in open court, the written judgment orders Mr. Roberts “to pay a \$50 fee for completion of the PSI report.” (App. B at 3.)

“[I]n the event of a conflict between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement controls.” *State v. Lane*, 1998 MT 76, ¶ 48, 288 Mont. 286, 957 P.2d 9. In deciding whether a conflict exists between the oral pronouncement and the written judgment, the Court considers “whether a written judgment has, without notice, substantively increased . . . one of two things: (1) the defendant's loss of liberty; and (2) the defendant's sacrifice of property.” *State v. Johnson*, 2000 MT 290, ¶ 24, 302 Mont. 265, 14 P.3d 480.

Here, the judgment tacks on a \$50 fee for preparation of the PSI, which was not included in the oral pronouncement of sentence. (App. B. at 3.) The \$50 PSI fee is illegal and reviewable under *Lenihan*. “[W]hen a court’s written judgment conflicts with its oral pronouncement of a sentence, were the written judgment to control, then the defendant would effectively be ‘sentenced in absentia, violating his statutory right to be present....’ *Lane*, ¶ 33.” *State v. Hamilton*, 2018 MT 253, ¶ 51, 393 Mont. 102, 428 P.3d 849.

The Court should remand with instructions to strike the second full paragraph on page 3, lines 5 – 6, of the Judgment imposing the PSI fee.

CONCLUSION

For the foregoing reasons, Terrance Anthony Roberts requests the Court to reverse his conviction for obstructing a peace officer on account of the incorrect “knowing” instruction. He also requests the Court to reverse his conviction for attempted kidnapping due to multiple incorrect and conflicting jury instructions and to the incorrect admission of Officer Jensen’s body-camera video. The Court should remand for a new trial for any one or all of these reasons.

Alternatively, the Court should vacate Mr. Roberts's sentence and remand with instructions to complete a psychosexual evaluation and then set a new sentencing hearing. The Court should vacate the \$50 PSI fee in the written judgment and remand with instructions to issue an amended judgment without the \$50 fee.

Respectfully submitted this 19th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,999, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

Oral Pronouncement of Sentence.....	App. A
Judgment.....	App. B
Relevant Jury Instructions	App. C
Jury Questions and Answers	App. D