IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0513

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TERRANCE ANTHONY ROBERTS,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

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I. The incorrect "knowingly" instruction for obstructing justice prejudiced Mr. Roberts.

The State concedes the District Court gave an incorrect conduct-based jury instruction for "knowingly" obstructing justice, Mont. Code Ann. § 45-7-302(1). (Appellee's Br. at 14.) Nevertheless, the State avers the Court should not reverse Mr. Roberts's conviction under plain error or ineffective assistance of counsel because Mr. Roberts suffered no prejudice. (Appellee's Br. at 16 – 18.) The State is wrong.

The State melds Mr. Roberts's claim for plain-error review into his separate ineffective assistance of counsel claim. (Appellee's Br. at 16.) The State does not deny that the erroneous instruction implicated Mr. Roberts's fundamental rights to a fair trial by an impartial jury and due process of law. Nor does the State dispute the erroneous instruction undermined the fundamental fairness of Mr. Roberts's trial, compromised the integrity of a judicial process that rests upon procedural regularity in court, and is a manifest miscarriage of justice because the District Court gave the jury an incorrect standard for determining guilt. Mr. Roberts's conviction for obstructing justice should be reversed for plain error. *See Wilson v. State*, 2010 MT 278, ¶ 18, 358 Mont. 438, 249 P.3d 28 (stating that courts will assume an

appellant's unopposed position is correct if record facts support the position).

The State focuses its aim on prejudice, contending Mr. Roberts was not prejudiced because "the facts leading to the conviction were captured on video and largely uncontested." (Appellee's Br. at 11.) But Mr. Roberts denied seeing Puddy's police badge or knowing he was an officer; he also denied Puddy identified himself as such—a fact confirmed by the State's video. (*See* Appellant's Br. at 11 – 12.) Although the State avers Puddy's show of authority was "a clear signal" to Mr. Roberts "that he was the subject of an investigation," Mr. Roberts denied he knew Puddy had the authority to stop him, believing he might just be a private "security guy," and Puddy never informed Mr. Roberts he was under investigation, stating only that he needed to stop so he could talk to him. (Appellee's Br. at 16 – 17.)

Thus, contrary to the State's argument, it was not uncontested that Mr. Roberts "knew" Puddy "was a police officer or that he "knew" Puddy "wanted to detain him to speak to him about an investigation." (Appellee's Br. at 17.) Those disputed fact questions were for the jury to decide. But the jury was told it didn't need to; so long as Mr. Roberts

admitted he knew he evaded the man on the bike—who actually was a cop conducting an investigation—it had to find him guilty of obstruction, regardless of what Mr. Roberts knew.

The State further contends, "Roberts argues that to hinder an investigation, the defendant must know, not only that an investigation is taking place, but the precise nature of the allegations behind the investigation." (Appellee's Br. at 18.) Not so. Mr. Roberts explained on Puddy's body camera video and during his post-arrest interview that he did not know why Puddy was pursuing him, believed he had done nothing wrong, and did not want to talk to Puddy. Puddy's body camera video further reveals that Puddy did not identify himself as an officer and did not tell Mr. Roberts he was investigating a crime. The State failed to prove beyond a reasonable doubt that Mr. Roberts's knowingly hindered Puddy's investigation of Z.S.'s allegations – the official duty at issue.

The State asserts Puddy "had particularized suspicion to detain [Mr.] Roberts for his investigation" and avers "there is no requirement than an officer inform a fleeing suspect of the allegations against him." (Appellee's Br. at 18.) These assertions obfuscate the issue – which is

whether Defense Counsel's failure to object to the incorrect "knowingly" instruction caused prejudicial, reversible error.

The State efforts to distinguish *State v. Secrease*, 2021 MT 212, 405 Mont. 229, 493 P.3d 335, are unavailing. (Appellee's Br. at 17, citing *Secrease*, ¶ 7.) In *Secrease*, defense counsel acquiesced in the State's incorrect conduct-based knowingly instruction for obstructing justice. *Secrease*, ¶ 6. This Court reversed, holding, "Secrease received ineffective assistance of counsel at trial when his attorneys neither objected to the incorrect 'knowingly' instruction nor proposed the correct one themselves. *Secrease*, ¶ 18. *Secrease* controls Mr. Roberts's appeal.

It is unnecessary for the jury to submit a question during deliberations for this Court to find prejudice due to ineffective assistance of counsel. *State v. Johnston*, 2010 MT 152, ¶ 16, 357 Mont. 46, 237 P.3d 70. In *Johnston*, the Court relied on the incorrect, conduct-based knowingly instruction combined with the prosecutor's argument to reverse the obstructing conviction. *Johnston*, ¶¶ 14, 16 – 17. Here, the Prosecutor told the jury in closing argument Mr. Roberts could be convicted based on his evasive conduct and inferences about what Mr.

Roberts allegedly "knew."[1] (Tr. at 635 – 36.) Defense Counsel said *nothing* in closing argument, cross-examination, or opening statements, to defend Mr. Roberts against the charge.

Defense Counsel's acquiescence in the incorrect instruction prejudiced Mr. Roberts because it reduced the State's burden of proof by relieving the State of its responsibility to prove beyond a reasonable doubt Mr. Roberts knew his conduct would hinder Puddy's official duties. But for Counsel's deficient representation there is a reasonable probability the jury would have arrived at a different outcome. The error requires reversal. *Johnston*, ¶ 16.

II. The District Court incorrectly instructed the jury in multiple instructions.

A. The District Court abused its discretion when it gave the jury an incorrect definition of "force."

The State declines to address the central point of Mr. Roberts's argument about Instruction 19 and *State v. Walker*, 139 Mont. 276, 362 P.2d 548 (1961): the language from *Walker* used by the District Court

[1] Puddy's testimony refutes the State's contention Mr. Roberts interacted with Z.S. after Puddy found him in the park talking to two women he did not know. (*Compare* Appellee's Br. at 9 n.2 *with* Tr. at 453 – 54.) The timing is important because it undermines the State's assertion Mr. Roberts "knew" the reason Puddy was chasing him down.

in Instruction 19 could apply only when a defendant is charged with "restraining another person by either secreting or holding the other person in a place of isolation" under the first clause of Mont. Code Ann. § 45-5-302(1). (*See* Appellant's Br. at 26, citing Annotator's Note to statute.) Mr. Roberts was charged with and convicted under the second clause, which explicitly requires the State to prove he used or threatened to use physical force. (Appellant's Br. at 26 – 28.) To instruct the jury that force does not require a showing of actual physical violence or threat of personal injury had the effect of negating the force element in the statute relevant to Mr. Roberts.

The State repeats the Commission Comment to Mont. Code Ann. § 45-5-302, that subsection (1) conforms with current Montana law. (Appellee's Br. at 20 – 21.) But the State ignores the subsequent Annotator's Note to the statute clarifying, "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 <u>*when the victim has been isolated*</u>," as the victim in *Walker* was, and the defendant has been charged under the second clause.

(Emphasis added.) The Commission Comment is inapposite in Mr. Roberts's case.

The State further argues this Court should apply the definition of force set forth in Mont. Code Ann. § 45-5-501(2) to kidnapping, even though that statute explicitly states the definition of force set forth therein only applies to aggravated sexual intercourse without consent in Mont. Code Ann. § 45-5-508. Because that definition on its face does not apply to kidnapping, the State's argument in unavailing. *See* Mont. Code Ann. § 1-2-107.

The State next avers the Court applied a definition of force that did not require the threat or infliction of bodily injury in *State v. Herrera*, 197 Mont. 461, 465, 643 P.2d 588, 590 (1982). (Appellee's Br. at 21 – 22.) On appeal, Herrera complained the State did not prove the threatened use of physical force under § 45-5-302(1). The Court rejected Herrera's argument because "the girls were held in a place of isolation, which is sufficient proof in itself" for kidnapping, and "the use of force was well established by the evidence" that "[t]he girls were physically dragged to" Herrera's accomplice's residence and "forced into their

chairs." *Herrera*, 197 Mont. at 465, 643 P.2d at 590. *Herrera* properly applied *Walker*.

The State declares the Court need not address the appropriate definition of 'force' because, under any definition, Instruction 19 was a correct statement of the law and Mr. Roberts was not prejudiced. (Appellee's Br. at 23.) According to the State, the "force" Mr. Roberts used in grabbing Z.S.'s arm "was like the force, or 'physical compulsion,' used on the girls in *Herrera*." (Appellee's Br. at 23.) Not so. Mr. Roberts grabbed Z.S. by the arm for a few seconds in a public park. He did not act with an accomplice to drag Z.S. to a place of isolation for a drunken orgy. *Herrera*, 197 Mont. at 464 – 65, 643 P.2d at 589 – 90.

The State contends, "Although the [district] court's definition of 'force' may not have been as complete 'as it could have been,' it was an accurate statement of the law and was not an abuse of discretion." (Appellee's Br. at 24 (citation omitted).) Mr. Roberts's argument is that Instruction 19 was incorrect under the facts of his case, not that it was not as complete as it could have been.

The instruction prejudicially affected Mr. Roberts's substantial right to a fair trial by indicating to the jury that any amount of force

was sufficient for kidnapping. *State v. Daniels*, 2019 MT 214, ¶¶ 26, 30, 397 Mont. 204, 448 P.3d 511. Such a sweeping definition of force could render the force necessary for kidnapping equivalent to the minimal level of force required to restrain someone for purposes of the lesser-included offense of unlawful restraint. *See* Annotator's Note, § 45-5-501 (noting the distinction between unlawful restraint and kidnapping is the force element). In this case, the jury had no way to distinguish the requisite force needed between one offense and the other.

B. The District Court did not fully and fairly instruct the jury on the mental state required for attempted kidnapping or attempted unlawful restraint.

The State remarks "one instruction, standing alone" that is not as complete or accurate as it could have been is not reversible error. (Appellee's Br. at 19 (citation omitted).) True. However, the State overlooks the jury's confusion about the instructions as a whole. (*See* Appellant's Br. at 19, 32 – 38.) The mix of instructions given in this case were a confusing hodgepodge of result- and conduct-based instructions conflicting with one another and misstating the law.

The State argues "multiple mental states may apply to different elements of the crime." (Appellant's Br. at 26, citing *State v. Strizich*,

2021 MT 306, ¶¶ 46 – 49, 406 Mont. 391, 499 P.3d 575 (*en banc*).) The State's reliance on *Strizich* is unavailing. Strizich was charged with aggravated burglary, which required the State to prove multiple separate delineated elements of a single offense, each with a separate identifiable mental state. *Strizich*, ¶¶ 48 – 49. By contrast, attempt has a result-based mental state and kidnapping has a result-based mental state.

It is irrelevant that Indiana defines kidnapping as a conduct-based offense. (Appellee's Br. at 26 – 27, citing *Jones v. Indiana*, 159 N.E.3d, 55, 64 (Ind. Ct. App. 2020).) Indiana law defines one kidnapping offense based on the conduct of "removal" that is divided into different levels. *Jones*, 159 N.E.3d at 64, citing Ind. Code § 35-42-3-2(a). "The gravamen of the offense [of kidnapping] is removal; a particular result or motive can elevate the offense, but does not form the basis of a second, discrete offense." *Jones*, 159 N.E.3d at 64.

Conversely, Montana's kidnapping statute defines kidnapping as one offense with two discrete means of accomplishing it: restraining another person by (a) secreting or holding the person in a place of isolation or (b) using or threatening to use physical force. Mont. Code

Ann. § 45-5-302(1). Here, restraint through physical force is the kidnapping means at issue. The use of physical force is the conduct through which the result of unlawful restraint is achieved. Contrary to the State's argument, § 45-5-302(1) is a result-based offense.

The State avers, when "[r]ead together, the definitions of "liberty" and "restrain" would require proof that a person substantially interfered with the other person's right to be free from arbitrary or undue external restraint." (Appellee's Br. at 27 – 28.) But that is not what the District Court wrote in its answer to the jury's question. Nor do the jury instructions say that. This Court cannot amend the District Court response to the jury's question about "liberty" to a response the State now prefers.

The State argues, "even if the court erred in giving Instructions 21, 27 and the definition of 'liberty,' this Court should decline to reverse . . . because Roberts has not proved prejudice." (Appellee's Br. at 28.) The State's argument misses the mark. The District Court's errors implicate Mr. Roberts's fundamental rights to a fair trial and due process. The District Court provided a confusing mess of instructions on kidnapping and unlawful restraint. Failure to reverse Mr. Roberts's

conviction for attempted kidnapping calls into question the fundamental fairness of the trial and would result in a manifest miscarriage of justice.

Mr. Roberts suffered prejudice from his attorney's ineffective assistance in proposing or agreeing to the erroneous instructions. Had his attorney advocated for the correct instructions, there is a reasonable probability that Mr. Roberts would have been found not guilty of felony attempted kidnapping and instead been found guilty of misdemeanor unlawful restraint.

The instructions told the jury they could convict Mr. Roberts of attempted kidnapping without proof that he restrained Z.S. with the use of physical force that substantially interfered with her liberty. Giving the jury only the correct, result-based definition of attempt was inadequate because it clashed with the incorrect, conduct-based definition of kidnapping. Defense Counsel's acquiescence in these conflicting instructions prejudiced his client. *State v. Wright*, 2021 MT 239, ¶ 18, 405 Mont. 383, 495 P.3d 435 (citations omitted).

III. The District Court abused its discretion by admitting Officer Jensen's body-camera video.

The State concedes "there might not be a 'demeanor' exception" to the hearsay prohibition. (Appellee's Br. at 30.) Nevertheless, the State contends this Court should affirm the District Court's ruling to admit the video under the "correct result for the wrong reason" doctrine. (Appellee's Br. at 31 (citation omitted).) The State provides three alternative bases for affirming the District Court's erroneous ruling. None has merit.

A. The body-camera video is not admissible as a prior consistent statement.

The State avers Z.S.'s statements in the body-cam video are excluded from the prohibition against hearsay in Rule 802 because they are prior consistent statements under Mont. R. Evid. 801(d)(1)(B). (Appellee's Br. at 31 – 35.)

Jensen's video, introduced as Exhibit 9, is over 17 minutes long. The video contains statements by not only Z.S., but also her dad, her two friends, Jensen, Puddy, and two other officers shortly after the alleged incident occurred. The State makes no attempt to shoehorn

anybody else's statements into the prior consistent statement exclusion from hearsay.

A prior consistent statement is excluded from the hearsay prohibition when "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive." *State v. Oliver*, 2022 MT 104, ¶ 26, 408 Mont. 519, 510 P.3d 1218.

The State alleges during "opening argument," Defense Counsel "argued that Z.S. fabricated the forcefulness of Roberts' [sic] command to go with him due to the improper influence of Officer Jensen misquoting her. However, the video rebuts Roberts' [sic] claim of fabrication." (Appellee's Br. at 33.) Though the video established Z.S.'s initial phrasing differed from Jensen's summary, the video did not show – nor did the State or Defense contend – Jensen "improperly influenced" Z.S. to fabricate her testimony. Indeed, the Prosecutor argued in closing the difference between "'Come with me, or You're coming with

me[,] . . . is a complete red herring[.]" (Tr. at 623.) Now on appeal, the State avers the opposite.

The State claims the admission of the two different statements by Z.S. on Jensen's video are similar to statements the Court upheld as prior consistent statements in *State v. Teters*, 2004 MT 137, 321 Mont. 379, 91 P.3d 559. (Appellee's Br. at 32, 34 – 35). *Teters* is not on-point.

Teters was charged with sexual intercourse without consent and intimidation against his 17-year-old stepdaughter, J.U. *Teters*, ¶¶ 5 – 7. At trial, defense counsel told the jury during his opening statement that "J.U. had been improperly influenced by her mother in forming the allegations of sexual abuse[,]" and cautioned they would be "'injected into the middle of a messy divorce.'" *Teters*, ¶ 23. Counsel also told the jury during his opening to be mindful of the motives of witnesses testifying and to consider what each person has to gain by their testimony. *Teters*, ¶ 23.

J.U. testified about Teters's alleged conduct. On cross-examination, the defense challenged J.U.'s testimony and "implied that she had a motive to fabricate her story as a result of her hatred for the

defendant." *Teters*, ¶ 23. Teters testified in his own defense, denying the allegations. *Teters*, ¶ 23.

After Teters's testimony, the State introduced a Utah Child and Protective Services ("CPS") officer as a rebuttal witness, who testified that J.U. had disclosed allegations of sexual abuse to him during an interview in March 2001. *Teters*, ¶ 23. This Court ruled, "defense counsel launched a general attack on J.U.'s credibility by insinuating that she possessed a motive to fabricate her testimony, and that she had been improperly influenced by her mother. Although implied, these charges of improper motive and influence were sufficient to satisfy the fourth requirement of Rule 801(d)(1)(B)[.]" *Teters*, ¶ 27. Moreover, "the consistent statements were made prior to the time the alleged motivation to fabricate arose[,]" remarking that J.U.'s statements to the Utah CPS officer "occurred prior to the parties' separation in April 2001, and well before the commencement of divorce proceedings." *Teters*, ¶ 28.

Here, by contrast, the State did not introduce Jensen's video as rebuttal testimony to refute Defense Counsel's cross-examination of Z.S. Rather, the State introduced it through Z.S. to bolster the direct

testimony she had just emotionally provided to the jury. Furthermore, Z.S.'s statement that Mr. Roberts told her, "You're coming with me," occurred *after*, *not before*, Officer Jensen's mischaracterization of her original statement that Mr. Roberts told her, "Come with me." Z.S.'s statements are not prior consistent statements under Rule 801(d)(1)(B).

B. The video is not limited to Z.S.'s excited utterances or statements of her then-existing state of mind.

The State contends Z.S.'s statements were either excited utterances (Appellee's Br. at 36) or examples of Z.S.'s then-existing statement of mind (Appellee's Br. at 36 – 37). The 17-minute-plus video consists of much more than Z.S.'s alleged excited utterances or statements about her state of mind at the time. It is a recounting and reenactment of the events Z.S. testified to at trial concerning the alleged attempted kidnapping.

The Prosecutor made no attempt to use the video as an exception to hearsay by Z.S. The Prosecutor denied the video was offered for the truth of the matter asserted. In any event, the State does not claim the video contains excited utterances or state-of-mind exceptions to hearsay by any of the multiple other people who talked or appeared on the video.

The admission of the video does exactly what this Court has admonished against. Rule 803 exceptions cannot be allowed to swallow Rule 802's prohibition against hearsay. *State v. Gomez*, 2020 MT 73, ¶ 52, 399 Mont. 376, 460 P.2d 926. Yet that is exactly what the State advocates here.

C. The erroneous admission of Jensen's body-camera video was not harmless.

The State argues even if the District Court erred in admitting Jensen's video, it was harmless error. (Appellee's Br. at 37 – 39.) The State claims, "All Z.S.'s statements to Officer Jensen were admitted through other admissible testimony at trial." (Appellee's Br. at 37.) The State also avers the statements of Z.S.'s father on the video, such as when he told Jensen that Z.S. was "fucking hysterical," were cumulative of testimony about Z.S.'s demeanor after the incident. (Appellee's Br. at 38, 39.) Z.S.'s father did not testify at trial.

When inadmissible evidence is improperly admitted, the State bears the burden of directing the Court to admissible evidence that proved the same facts as the inadmissible evidence. *State v. Van Kirk*, 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735. Further, the State must prove, given the quality of the inadmissible evidence, there is no

reasonable possibility that it contributed to the verdict. *Van Kirk*, ¶ 44. Here, the State points to *some* admissible evidence that was cumulative of *some* of the video. But significant portions of the 17-minute video were not otherwise admitted in testimony or evidence, such as Puddy's interaction with Jensen and Z.S.'s father while Jensen was interviewing Z.S. or running commentary provided by Z.S.'s father throughout the video.

The State has not shown, and this Court should not conclude, there is no reasonable possibility the erroneous admission of Jensen's 17-minute body-camera video contributed to the jury's verdict, particularly considering how the State used it – to evoke an emotional response from Z.S. that would hopefully evoke a similar response from the jury. The District Court's erroneous admission of the entire video was not harmless.

IV. Under the facts of this case, post-sentencing offender designation is illegal, not merely objectionable. Alternatively, Mr. Roberts received prejudicially deficient representation at sentencing.

A. Post-sentencing offender designation is illegal here.

The State acknowledges, "Prior to sentencing, a sexual offender must undergo a psychosexual evaluation to obtain a recommended level

designation." (Appellee's Br. at 40, citing Mont. Code Ann. § 46-23-509(1) (2023).[2]) Mont. Code Ann. § 46-23-509(2)(a)—(c) (emphasis added). Nevertheless, the State contends Mr. Roberts's sexual offender registration requirement is legal because "the duty to register is a stand-alone legislative mandate" that would apply even if the District Court had not ordered him to register. (Appellee's Br. at 41.) The State misses the mark.

Mr. Roberts does not dispute that § 46-23-504 requires registration for convicted offenders. Rather, Mr. Roberts challenges the legality of his sentence under § 46-23-509, which itself contains stand-alone legislative mandates for preparation and consideration of a sexual offender evaluation *before* sentence is pronounced. The State's interpretation of § 46-23-504 would render meaningless the separate and complementary requirements in § 46-23-509. "This Court will reject a construction of a statute that would leave any part of the statute without effect." *Spoklie v. Montana Dep't of Fish, Wildlife &*

[2] The State appears to cite the current version of § 46-23-509 (2023). Except when stated otherwise, Mr. Roberts cites herein to the 2023 version of § 46-23-509.

Parks, 2002 MT 228, ¶ 24, 311 Mont. 427, 56 P.3d 349 (citation omitted).

The State also contends that § 46-23-509(7), (8) excuse the statutory mandates of § 46-23-509(1), (2) by allowing the county attorney to petition the sentencing court for an evaluation and level designation if the sentencing court has failed to do so at sentencing. (Appellee's Br. at 40 – 42.) The State misunderstands how the subsections of § 46-23-509 must be interpreted together and overlooks the relevant legislative history of section 509.

Mont. Code Ann. § 46-23-509 was enacted in 1997, eight years after the enactment of the Sexual Offender Registration Act ("SORA") in 1989. 1997 Mont. L. 375, Ch. 375, § 12.[3] As enacted in 1997, § 46-23-509 did not contain a subsection allowing subsequent evaluation or a level designation for an offender who was sentenced before its enactment.

To address this issue, the Legislature added a new subsection to § 46-23-509, allowing the Department of Corrections ("DOC") to

[3] 1997 Mont. L. 375, Ch. 375, § 1, changed the name of the SORA to the Sexual or Violent Offender Registration Act ("SVORA").

designate a level when the offender is released from confinement, if the sentencing judge had not done so. 1999 Mont. L. Ch. 358, § 2, codified at Mont. Code Ann. § 46-23-509(5) (1999).

In 2007, the Legislature amended the SVORA to specify DOC may only designate a tier level for an offender where the sentencing judge did not do so ***and*** where sentencing occurred prior to October 1, 1997, i.e., the original effective date of § 46-23-509. 2007 Mont. L. Ch. 483, § 24, codified at Mont. Code Ann. § 46-23-509(5) (2007).

In 2013, the Legislature modified § 46-23-509 to allow the attorney general, or a county attorney to petition a district court at any time to designate a level for an offender required to register under the SVORA but who does not have a level designation. 2013 Mont. L. Ch. 182, § 1, codified at Mont. Code Ann. § 46-23-509(8) (2013). *See* H.B. 335, 63rd Legislature, § 1, adding § 46-23-509(8), by request of the Attorney General. The new subsection (8) allowed a district court to order an evaluation at the petitioner's expense upon receiving the petition and required a hearing with notice to the offender of the petition and the hearing before designating a level. *See State v.*

Samples, 2008 MT 416, ¶¶ 33 – 34, 347 Mont. 292, 198 P.3d 803 (requiring notice and hearing).

In 2023, the Legislature amended § 46-23-509(7)[4] to allow an offender without a level designation to petition for one. 2023 Mont. L. Ch. 643, § 6, codified at Mont. Code Ann. § 46-23-509(7) (2023).

Reading § 46-23-509 in its entirety, and in conjunction with the rest of the SVORA, the post-sentencing designation procedures manifestly apply only to people who were sentenced either in Montana before the effective date of section 509 in 1997, or in other jurisdictions at any time. *See* Mont. Code Ann. § 46-23-509(5) (governing offender registration for predicate convictions from another state or the federal government). Section 509 does not authorize a sentencing court to require registration without ordering and then reviewing an evaluation and designating a tier level at sentencing under the facts present here.

The State's reliance on *State v. Pine*, 2023 MT 172, ¶¶ 27 – 32, 413 Mont. 254, ___ P.3d ___, is misplaced. Here, unlike in *Pine*, the District

[4] The State's brief mistakenly cites to former subsection (8) and incorrectly excludes the attorney general's authority to petition for an offender designation. (Appellee's Br. at 41.) 2021 Mont. L. Ch. 481, § 3, amending Mont. Code Ann. § 46-23-509.

Court failed to order an evaluation before sentencing, in violation of § 49-23-509(1). Therefore, the judge could not consider the evaluation before imposing sentence, in violation of § 49-23-509(2). Mr. Roberts has an illegal sentence pursuant to *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979), not an objectionable sentence under *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892.

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

The State argues no prejudice occurred because § -504 requires Mr. Roberts to register as a sexual offender regardless of the requirements in § 46-23-509(1), (2). The State also contends counsel was not ineffective for not arguing against registration, citing *Pine*, ¶ 37. (Appellee's Br. at 42.) But as explained above, section 504 does not vitiate the independent mandates of section 509(1), (2), and *Pine* is inapposite. *See Pine*, ¶ 37 (counsel's performance was not deficient and Pine suffered no prejudice where the district court ordered an evaluation and considered it at sentencing).

Here, Defense Counsel possessed a professional obligation to ensure Mr. Roberts received a sentence in compliance with § 46-23-509(1), (2), *before* he was designated a sexual offender. The post-

sentencing procedure authorized by subsection (7) does not meet the statutory requirements of subsections (1) or (2). This Court has recognized "there is a liberty interest at stake when a person is designated as a particular risk level under the [SVORA]." *Samples*, ¶ 34. The determination of whether and to what degree that liberty interest should be infringed is statutorily required to occur at sentencing, where a defendant has a right to the effective assistance of counsel, regardless of indigency. Here, Defense Counsel was unaware Mr. Roberts would be sentenced as a sexual offender and was unprepared to represent Mr. Roberts effectively at sentencing.

Professional norms required counsel to request a continuance to research, insist on statutory requirements being followed, or make an as-applied constitutional argument that Mr. Roberts should not be sentenced as a sexual offender. Instead, counsel did nothing to ensure the District Court sentenced Mr. Roberts in conformance with statutory requirements or due process. Contrary to the State's assertion, appellate counsel may not advance as-applied constitutional challenges on appeal where they were waived below. (Appellee's Br. at 42.) *See Pine*, ¶ 18 (citation omitted). But for counsel's deficient performance it

is a near certainty, had Counsel informed the District Court of its obligations under § 46-23-509(1), (2), the District Court would have ordered and considered an offender evaluation before sentencing Mr. Roberts.

V. The State concedes the PSI fee is illegal.

The parties agree the PSI fee was not included in the oral pronouncement and must be struck. (Appellee's Br. at 42 – 43.)

CONCLUSION

Mr. Roberts respectfully maintains the requests for relief in his opening brief. (Appellant's Br. at 50 – 51.)

Respectfully submitted this 8th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 4,993, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
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CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-08-2023:

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