IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 24-0241

TERRY SULLIVAN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Fourth Judicial District Court, Cause No. DV-20-1304,
the Honorable Shane A. Vannatta presiding.

APPEARANCES:

Terry Sullivan
4908 Rattlesnake Drive
Missoula, MT 59802

Appellant, *pro se*

Montana Attorney General
P.O. Box 201401
Helena, MT 59620-1401
contactdoj@mt.gov

Attorney for Appellee

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 24-0241

TERRY SULLIVAN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Fourth Judicial District Court, Cause No. DV-20-1304,
the Honorable Shane A. Vannatta presiding.

APPEARANCES:

Terry Sullivan
4908 Rattlesnake Drive
Missoula, MT 59802

Appellant, *pro se*

Montana Attorney General
P.O. Box 201401
Helena, MT 59620-1401
contactdoj@mt.gov

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUE Montana Code Annotated §

Whether the Court erred in denying Sullivan's Petition for Postconviction Relief

STATEMENT OF THE CASE

Sullivan was convicted in Municipal Court with disorderly conduct. Sullivan filed 2 *Petitions for Postconviction Relief (D. C. Docs. 1, 17),* which the Court denied. *D. C. Docs. 16, 23.*

STATEMENT OF FACTS

1. Sullivan filed a *Petition for Postconviction Relief* from a conviction for disorderly conduct for disturbing the peace by conversing with another driver. *Petition, D. C. Doc. 1.*

2. Sullivan based his *Petition* on 76 instances of ineffective-assistance-of-counsel.

3. Sullivan supported his *Petition* with his *Declaration* (*D. C. Doc. 3*), and *Memorandum* (*D. C. Doc. 2*) of arguments, citations and authorities.

4. The Court denied Sullivan's *Petition* without addressing any of his ineffective-assistance-of-counsel claims.

5. The Court admitted that Sullivan had a right to "exchange words with the offending driver," but held that Sullivan would not have had a free speech right in the particular "location" where the speech took place if the conversation rendered "vehicular traffic impassable." The Court held that Sullivan was properly convicted because it erroneously thought he had rendered vehicular traffic

impassable and therefore denied the *Petition*. *Order p. 6, D. C. Doc. 16.*

6. Sullivan filed an *Amended Petition* correcting the Court's mistaken belief that Sullivan was convicted for "rendering vehicular traffic impassable."

7. Approximately 2 years later, the Court denied Sullivan's *Petition* because it found that Sullivan did not show good cause why he did not make his argument regarding "rendering-vehicular-traffic-impassable" in his original *Petition*. The Court forgot that it was the Court itself who alleged that Sullivan "rendered-vehicular-traffic-impassable" after Sullivan filed that *Petition*.

9. The Court also denied Sullivan's *Petition* because it thought Sullivan's claims of ineffective-assistance-of-counsel could have been reasonably raised on direct appeal and were therefore barred.

10. The Court twice ordered the County Attorney and Attorney General to file a responsive pleading to Sullivan's *Petition*. *D. C. Docs. 5, 13.* Neither Attorney ever filed a responsive pleading nor did they oppose Sullivan's *Petition*.

STANDARD OF REVIEW

An appellate court review ineffective assistance of counsel claims de novo. *State v. Bristow*, 2023 MT 188, 537 P.3d 103.

SUMMARY OF ARGUMENT

Sullivan based his *Petition for Postconviction Relief* on non-record-based ineffective assistance of counsel that showed a reasonable probability that, but for

counsel's ineffective assistance, the result of his trial would have been different. Among the 76 instances of ineffective assistance were that counsel failed to defend Sullivan on the grounds that Sullivan had a Free Speech right to speak with the reckless driver who endangered Sullivan.

The Court denied the *Petition* on grounds it *sua sponte* raised that, while Sullivan had a right to "exchange words" with the reckless driver, Sullivan did not have the right to "render vehicular traffic impassable" while speaking. The Court granted Sullivan leave to file an amended petition to address that issue. In his *Amended Petition* Sullivan proved that he was not charged with or convicted for "rendering traffic impassable." Nearly 2 years later, the Court denied that *Petition* on the grounds that Sullivan failed to show good cause why he did not raise the rendering-traffic-impassable matter in his original *Petition*. The Court forgot that it denied the *Petition* on the grounds the Court itself raised that Sullivan did not have a right to "render traffic impassable" in order to speak to the reckless driver, stating:

> The location of the speech needs to be considered to understand a person's right to free speech. Just like a person cannot yell "fire" in a crowded movie theater, a person cannot exit their vehicle at a stop light to exchange words with another driver rendering vehicular traffic impassable. (emphasis supplied) *Order*, p. 6. *D. C. Doc. 16*

The Court never addressed any of the 76 instances of ineffective-assistance-of-counsel claims raised in the *Petition*.

The State and County Attorneys never filed a response to Sullivan's *Petition*. Therefore, the Court was prohibited from dismissing the *Petition*.

For all these reasons, and because incident occurred over 8 years ago, the *Petition* should be granted.

ARGUMENT

Sullivan raised 76 instances of ineffective assistance of counsel. He showed a reasonable probability that, but for counsel's ineffective assistance, the result of his trial would have been different. Neither the Attorney General nor County Attorney disputed Sullivan's claims that his counsel was ineffective, nor did the Court make any finding on that matter.

I. The Court erred in holding that Sullivan's *Amended Petition* should be denied because Sullivan did not show good cause for not making his claim regarding "rendering traffic impassable" in his original *Petition*.

Because the Court completely misunderstood the facts, it denied Sullivan's *Petition* on its erroneous belief that Sullivan "rendered traffic impassable," for which Sullivan was never charged or convicted. It agreed that Sullivan had a right to speak to another driver concerning that driver's reckless conduct towards Sullivan, but said that Sullivan did not have a right to "render vehicular traffic impassable" in order to speak with that driver. The Court erroneously concluded that, because Sullivan "rendered vehicular traffic impassable" while exercising his right to speak, he was properly convicted of disorderly conduct. Because the Court

concluded that rendering-traffic-impassable was dispositive, the Court did not address any of the ineffective-assistance-of-counsel matters Sullivan raised.

The Court completely misunderstood the facts. It thought that Sullivan had "rendered vehicular traffic impassable" while speaking with the other driver. Unfortunately, however, the Court was completely wrong. Sullivan never "rendered any vehicular traffic impassable." After Sullivan pointed out the Court's mistake in his *Amended Petition*, the Court did nothing for nearly2 years. Finally, the Court said that it had not based its decision on its "rendering-vehicular-traffic-impassable" mistaken belief. The Court's assertion is provably inaccurate because the Court unequivocally said that Sullivan was properly convicted because he had exercised his otherwise lawful right-to-free-speech while "rendering vehicular traffic impassable." *D. C. Doc. 16.* The Court correctly pointed out that exchanging words with another motorist is unlawful if one does so while "rendering vehicular traffic impassable." Sullivan never "rendered any vehicular traffic impassable." Therefore, his *Petition* should have been granted. Sullivan corrected the Court's misapprehension in his *Amended Petition*. The Court denied that *Petition* because Sullivan did not argue the "rendering-traffic-impassable" matter in the original *Petition*. Sullivan could not have done so because it was the Court itself who charged Sullivan with that nonexistent misconduct *after* Sullivan had filed the *Petition*. Sullivan could not have foreseen that the Court would make

that charge when he wrote his original *Petition*. Sullivan thus showed good cause for not raising that matter in the original *Petition*.

II. The Court erred in finding that Sullivan's claims of ineffective assistance of counsel could have been reasonably raised on direct appeal and were therefore barred. None of those claims are record-based.

The 76 grounds Sullivan cited in his *Memorandum (D. C. Doc. 2)* could not have been reasonably raised on direct appeal because they are not record-based. The record does not contain any answer as to why counsel took, or failed to take, action in providing a defense. Because Sullivan's ineffective-assistance-of-counsel claims cannot be documented from the record in the underlying case, those claims must be raised by petition for postconviction relief. *State v. Hamilton*, 2007 MT 223, 167 P.3d 906.

Among those non record-based grounds are that Sullivan's counsel failed to provide effective assistance by:

1. failing to defend him on the grounds that the City failed to prove the allegations of the Complaint with sufficient evidence that he was guilty of the conduct charged in the Complaint beyond a reasonable doubt;

2. failing to defend him via effectively objecting to the unconstitutional pretrial procedure in this case;

3. failing to defend him on the grounds that the law and evidence in this case warranted acquittal. There was insufficient evidence to convict;

4. refusing to assist him in disqualifying the disqualified judge from presiding over the trial;

5. failing to engage in proper pretrial investigation and preparation;

6. failing to defend him on the grounds that the trial procedure in this case was unconstitutional;

7. failing to defend him on the grounds that he had no notice of the charge against him; the Complaint was improperly amended; the jury was not notified of the charge set forth in the Complaint, etc. and by failing to object and move for relief based on those facts;

8. failing to defend him on the grounds that the court erroneously instructed instruct the jury on the law applicable to the case;

9. failing to defend him on the grounds that the court erroneously failed to instruct the jury on specific unanimity;

10. failing to defend him on the grounds that the City's highly prejudicial misconduct vis-à-vis the officer's testimony denied him a fair and impartial trial. The prosecutor solicited the officer to improperly testify about events that he did not witness; to assert that Sullivan was lying about said non-witnessed conduct; and to assert that he was guilty based on said non-witnessed conduct, all with the result that City destroyed Sullivan's credibility and character, causing the jury to improperly convict him due to his alleged bad character rather than for the words he allegedly uttered;

11. failing to defend him on the grounds that the City's highly prejudicial misconduct in vouching for the City's witnesses and vouching against Sullivan denied him a fair and impartial trial. The prosecutor destroyed his credibility, causing the jury to improperly convict him based on his alleged bad character rather than for the alleged speech for which he was charged;

12. failing to defend him on the grounds that the City improperly asserted to the jury that he should be convicted due to his lying about his raising a finger to someone that was supposedly the grounds for an assault charge leveled against him 10 years earlier;

13. failing to defend him on the grounds that the City's highly prejudicial misconduct in its closing argument denied him a fair and impartial trial. The prosecutor improperly testified about events that she did not witness, asserted that Sullivan was lying about said non-witnessed conduct, and asserted that he was guilty based on said non-witnessed conduct, all with the result that she

destroyed his credibility and character, causing the jury to improperly convict him based on his alleged bad character rather than his speech;

14. failing to defend him on the grounds that the City's other highly prejudicial misconduct denied him a fair and impartial trial. The prosecutor improperly testified about events that she did not witness, asserted that he was lying about said non-witnessed conduct, and asserted that he was guilty based on said non-witnessed conduct, misstated evidence, misstated the law, all with the result that she destroyed his credibility and character, causing the jury to improperly convict him based on his alleged bad character rather than his speech.

15. failing to defend him on the grounds that he was not afforded his right to a speedy trial.

Sullivan was substantially prejudiced by the above-described ineffective assistance, etc. Each of the above-referenced instances of ineffective-assistance-of-counsel was thoroughly discussed in Sullivan's *Memorandum*. For example, Sullivan made the following non record-based ineffective-assistance-of-counsel arguments to the Court that warranted relief from the conviction:

Sullivan's counsel failed to provide effective assistance by failing to defend Sullivan on the grounds that the officer's testimony establishes that Sullivan did not violate the Disorderly Conduct statute.

The officer's testimony manifestly shows that there is no evidence upon which the trier of fact could find that Sullivan's underlying conduct violated the essential elements of the Disorderly Conduct statute:

Prosecutor: So at this point in your investigation what was your viewpoint of what happened in terms of Mr. Sullivan's conduct at the light?

Officer: My viewpoint had arrived at a point where Mr. Sullivan's actions had reached a level of Disorderly Conduct: [1] His aggressive nature getting

> out of the car seemed to be very challenging, which is one of the elements of Disorderly Conduct. [2] The yelling of "obscenities"—again an element of Disorderly Conduct. So, I felt at that point his conduct definitely met the elements of Disorderly Conduct.[1]

The officer's statements concerning the elements of Disorderly Conduct were completely wrong. It is not a violation of the Disorderly Conduct statute to have an "aggressive nature" in getting out of a car. The statute does not even contain the phrase "aggressive nature." The manner of getting out of a car cannot be "challenging" within the meaning of any elements of the Disorderly Conduct statute because the statute does not refer to getting out of a car. Notably, the officer never stated that Sullivan challenged anyone to fight, but that Sullivan's "nature" in getting out of the car was "challenging." Likewise, uttering "obscenities" is not an element of Disorderly Conduct. The officer manifestly misunderstood what the elements of the Disorderly Conduct statute were, and thus his Complaint against Sullivan was completely unfounded. The evidence cited by the officer at trial as why Sullivan was allegedly guilty was insufficient to support a finding or verdict of guilty. *City of Billings v. Albert*, 2009 MT 63, 203 P.3d 828. Sullivan's counsel denied Sullivan effective assistance of counsel in failing to assert these arguments, to cross-examine the officer regarding these matters, to request jury instructions regarding these matters, to make a motion in limine, etc.

Sullivan's counsel failed to provide effective assistance by failing to defend

[1] 1/5/17 CD #3, Track # 1, at 48:58.

Sullivan by allowing the officer to tell the jury that Sullivan was guilty of the crime, causing the jury to convict Sullivan based on the officer's opinion as to Sullivan's guilt, rather than on the jury's opinion as to whether Sullivan's alleged acts constituted commission of the crime.

As noted, the officer told the jury that Sullivan committed the crime of Disorderly Conduct. He said:

> Mr. Sullivan's actions had reached a level of Disorderly Conduct: [1] His aggressive nature getting out of the car seemed to be very challenging, which is one of the elements of Disorderly Conduct. [2] The speaking of "obscenities—again an element of Disorderly Conduct. So, I felt at that point his conduct definitely met the elements of Disorderly Conduct.[2]

By telling the jury that Sullivan's conduct met the elements of Disorderly Conduct, the officer gave his expert opinion that Sullivan was guilty of the crime. This usurped the province of the jury. This is especially egregious because the officer did not witness any of Sullivan's conduct upon which he relied in stating that Sullivan's "conduct definitely met the elements of Disorderly Conduct."

The question of Sullivan's guilt or innocence in this case comes down to very clear issues, specifically: what was Sullivan's speech; did Sullivan' speech constitute "obscenities"; did Sullivan challenge to fight; did Sullivan disturb the peace by doing those acts; are those acts prohibited by the Disorderly Conduct statute; etc. These are the ultimate facts that the jury had to determine, and it was just as competent to do so as was officer. Therefore, the officer's opinion of Sullivan's actions that he did not witness was completely irrelevant and highly

[2] 1/5/17 CD # 3, Track 1, at 49:18.

prejudicial because the jury perceived him as an expert in criminal law because he is a police officer and because he informed the jury that he knew what the elements of Disorderly Conduct are, and the prosecutor vouched for the officer's credibility, impartiality and expertise, etc.

In *People v. Graydon*, 43 A.D.2d 842 (N.Y. 1974), the court stated:

> It was highly prejudicial for the People to elicit testimony...to the effect that the witness] had found defendant's version incredible and for the witness to explain the reason for that conclusion to the jury. This was equivalent to allowing the expert to testify that defendant was guilty...it is intolerable to permit a witness, cloaked in the garb of apparent expertise, to assume the function of the jury and attempt to answer the ultimate fact issue presented...The prejudicial impact of such expert testimony is not diminished by the fact that the witness was categorizing defendant's statements to him, rather than his trial testimony, as incredible, since there was no substantial difference in the version given by [the defendant to the witness] and defendant's trial testimony.

Opinion evidence may not be received as to a matter upon which the jury can make an adequate judgment. Sullivan's counsel allowed the officer to tell the jury that Sullivan was guilty. Counsel's assistance was so ineffective that the *Petition* should be granted.

Just as a prosecutor exceeds the bounds of legitimate advocacy by eliciting the police officer's opinions on a defendant's truthfulness, she also exceeds the bounds of legitimate advocacy by eliciting the officer's opinions on a defendant's guilt. The officer's testimony regarding his opinion as to Sullivan's guilt was so prejudicial to Sullivan that he was denied a fair trial. Sullivan's counsel failed to

provide effective assistance by failing to object, failing to cross-examine, failing to ask for jury instructions, failing to argue this matter to the jury, failing to request a mistrial, etc. regarding these matters.

Sullivan's counsel failed to provide effective assistance by failing to defend Sullivan on the grounds that because, by eliciting the officer's opinion that Sullivan was guilty, the City unlawfully shifted the burden of proof required for conviction.

Prosecutorial misconduct concerning the burden of proof required for conviction is an especially serious violation. Given the greater power, resources and authority of the government/prosecutor's office, the presumption of innocence is the crucial safeguard against that power and a protection of a person's freedom from conviction. That is because, in the cold reality of a typical courtroom in a jury trial, it is very difficult to really regard the accused as innocent. He has been brought to trial because the police and prosecutor—respected representatives of the authority of the government—believe he is guilty; that alone is difficult to surmount.

The presumption of innocence is designed to counterbalance these powerful persuasive forces: It places upon the government the burden of proving the defendant guilty beyond a reasonable doubt. This notion, basic in the law and a free society is requirement and a safeguard of due process of law. The presumption is based on the basic concept that it is worse to convict an innocent person than to let a guilty person go free.

Sullivan's counsel allowed the prosecutor to completely omit the requirement for the City to have to prove Sullivan guilty beyond a reasonable doubt because she simply had the officer testify that Sullivan was guilty based on absolutely no admissible evidence whatsoever. Therefore, the prosecutor shifted the burden on to Sullivan to prove the officer was wrong and that Sullivan was innocent, etc. Sullivan was then forced to testify in an attempt to rebut the officer's statement that Sullivan was guilty. Sullivan's counsel failed to render effective assistance in failing to object, failing to argue, failing to ask for jury instructions, failing to move for a mistrial, etc. regarding these matters.

Sullivan's counsel failed to provide effective assistance by failing to defend Sullivan on the grounds that the City engaged in serious misconduct when it put on the highly prejudicial evidence through the officer that had no legitimate purpose in the trial.

At trial, the City had to establish the case against Sullivan beyond a reasonable doubt. The prosecution had to develop its case step-by-step, using admissible evidence. The prosecutor, faced with the burden of proving Sullivan's guilt beyond a reasonable doubt, wanted to draw the jurors inexorably to a verdict of guilty. To that end, the prosecutor went beyond merely using admissible evidence to incrementally build the case against Sullivan. Instead, she employed inadmissible evidentiary tactics that provided shortcuts designed to prime the jury for conviction that had no legitimate probative value and unfairly prejudiced Sullivan. The prosecutor used evidence to focus the jury on the officer's opinions,

rather than simply on proof of Sullivan's alleged criminal conduct. The City's case should have focused exclusively on what Sullivan did, not what law enforcement believed. There was no need for the officer to intercede between the facts and the jury.

The officer's opinions were not a legitimate part of the prosecution's case. The jury did not need to know—and should not have known—about the officer's opinions. The jury did not need—and should not have been given—any of this information or perspective. The jury's only task was to determine whether Sullivan committed the particular crime charged (disorderly conduct). To do its job, the jury did not need to know what motivated the law enforcement officer, or how the investigation unfolded. Nor did the jury need to know how law enforcement interpreted the evidence. The officer's opinions were not relevant to Sullivan's guilt or innocence, and the jury could resolve the case without knowing the officer's opinion. The prosecutor's task at trial was simply to persuade the jury to view the facts as proof of crime.

Instead, however, Sullivan's counsel allowed the prosecutor to put on a case that created the likelihood that a guilty verdict would be based on law enforcement's necessarily biased view of the evidence, rather than solely on the admissible evidence of Sullivan's alleged criminal activity. Sullivan's counsel

should have objected to the prosecution evidence of the officer's opinions as to Sullivan's credibility or guilt.

Sullivan's counsel should have objected to admission of evidence regarding the officer's opinions about what happened and who was telling the truth and that Sullivan was lying and guilty.

By allowing the prosecutor to introduce this evidence, Sullivan's counsel allowed the prosecution to establish the investigation narrative: a conscientious law enforcement officer conducted a proper investigation and charged Sullivan. That narrative was not necessary to the case. Sullivan's counsel should have recognized that the risk of unfair prejudice substantially outweighed the probative value and moved to exclude the officer's statements altogether. Sullivan's counsel should have moved to limit each witness to testimony about the crime and not about the investigation. Sullivan's counsel allowed the officer to give inadmissible hearsay testimony. The officer gained all his knowledge about Sullivan's alleged actions and words from other unidentified persons. The officer's testimony clearly violated the requirement that witnesses testify from personal knowledge. Sullivan's counsel rendered ineffective assistance because he improperly allowed the prosecutor to use law-enforcement opinion testimony. The officer testified to his opinions ascribing criminal significance to the evidence against Sullivan that he did not witness. The officer's alleged authority rested on his investigative

experience. He presented his opinions—based on hearsay—as evidence. The officer did not witness Sullivan engage in any criminal conduct.

Sullivan's counsel allowed the officer to give opinion testimony addressing inappropriate matters such as Sullivan's culpability and the credibility of witnesses and the allegation that Sullivan lied, matters that the jury was fully able to—and should have—assessed without the benefit of law-enforcement opinion testimony.

Particularly troublesome, Sullivan's counsel failed to object to law-enforcement opinion testimony as to Sullivan's guilt when the officer testified that Sullivan's conduct met the elements of the crime.

In *United States v. Hernandez*, 507 F.3d 826 (5th Cir. 2007) the court reversed the conviction because the prosecution not only introduced impermissible "background" hearsay but aggravated the error by arguing it for the truth of the matter in closing. Sullivan's counsel allowed the prosecution to do that in this case. It introduced impermissible hearsay and opinions from the officer, and then argued for the truth of the matter in closing, telling the jury that:

> So who are you going to believe? You're going to believe someone who we've established was very less than forthright with the officer?...and you heard Officer Malone testify that given the discrepancies and the lies he felt that Mr. Sullivan was telling him...you heard from Officer Malone that Mr. Sullivan lied to him...I'm bringing this up to you to show you the lies that Mr. Sullivan has consistently told throughout this case. He lied to you all today on his direct examination...[3]

[3] 1/5/17 CD # 4, Track 2, at 37:26.

Sullivan's counsel ineffectively failed to object to the prosecutor's violations of the rules of evidence, which should have led the court to exclude the evidence discussed above. Defense counsel failed to see that the rules governing opinion testimony and the personal knowledge requirement were enforced. He should have objected to the prosecutor's use of the law-enforcement opinion testimony. The prosecution was not entitled to put on this type of testimony. The jury had no need to understand the course of the criminal investigation or law-enforcement's perspective on how to interpret the facts. Instead, the task of the jury was to determine Sullivan's guilt or innocence based on evidence that spoke appropriately to the criminal charge.

The evidence improperly strengthened the case against Sullivan, priming the jury to convict. In *U. S. v. Meises*, 645 F.3d 5 (1st Cir. 2011) the court held that if the improper priming evidence was central to the prosecution theory of the case or featured in the prosecution's arguments to the jury, the court should reverse. Since Sullivan's counsel allowed that to occur in this case, the *Petition* should be granted.

The prosecutor's presentation of the officer's opinions irreparably harmed Sullivan. This type of evidence injected unfair prejudice against Sullivan. The officer's opinion testimony—improperly admitted—swayed the jury improperly to convict. The *Petition* should be granted because Sullivan's counsel allowed the

City to engage in serious misconduct when it put on the highly prejudicial evidence through the officer that had no legitimate purpose in the trial. Sullivan's counsel failed to provide effective assistance by failing to object to this evidence, failing to make a motion in limine, failing to argue these matters to the court or jury, failing to request jury instructions on these matters, failing to move for a mistrial, etc.

Sullivan's counsel failed to provide effective assistance by failing to defend Sullivan on the grounds that the prosecutor and the officer vouched for the government witnesses and vouched against Sullivan, which caused the jury to convict Sullivan based on that vouching rather than on its judgment of Sullivan's alleged acts.

This case was basically a credibility contest between Sullivan and reckless driver Todd Grady because no witness except Grady heard any of Sullivan's speech and there was no physical evidence. Therefore, no witness except Grady could tell the jury what Sullivan allegedly spoke—whether Sullivan uttered "obscenities" or not, whether Sullivan challenged Grady to fight or not, etc.

In order to convict Sullivan, the prosecutor and the officer both vouched for the credibility, truthfulness, good character, impartiality and expertise of the City's witnesses and vouched that Sullivan was a liar and that his entire testimony was a lie. Vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility."

Prosecutors' and police officers' personal opinions carry with them the weight

of the government and thus improperly induce the jury to trust the government's judgment rather than its own view of the evidence. Because prosecutors and officers are representatives of the people, prosecutor's and officer's statements have inherently greater authority than those of other attorneys or witnesses. For this reason, neither a prosecutor nor an officer may express a personal opinion or belief in a defendant's guilt or credibility. There is substantial danger that jurors will interpret a prosecutor's opinion as being based on information at the prosecutor's and officer's command, other than evidence adduced at trial. Because of the probability that a prosecutor or officer will unduly influence the jury in evaluating a witness's credibility, impartiality, expertise, etc., it is improper for prosecutors to vouch for the truthfulness or untruthfulness of a witness, etc., or to elicit an officer's opinion of the truthfulness or untruthfulness of a witness, etc.

In violation of the law, however, the prosecutor and the officer both vouched for the truthfulness of the City's witnesses and vouched for the untruthfulness of Sullivan. The prosecutor and officer vouched for the City's witnesses by placing the prestige of the government behind the witnesses' testimony. They implied that the prosecutor and officer knew more than they were allowed to say, that they had personal knowledge of guilt or of evidence not presented. This wink, nod, "trust us, he's guilty" is vouching, and improper. The *Petition* should be granted because

defense counsel failed to object to the prosecutor's and the officer's unlawful vouching.

In order to convict Sullivan, the prosecutor and the officer both vouched for Grady's truthfulness, describing him an "independent witness" who had no reason to lie and was "credible." The prosecutor also vouched that Grady was a very regretful and apologetic person for having beaten Sullivan up. The prosecutor also vouched that Grady was a had such a great sense of wanting the jury to know the "truth" that he travelled all the way from Helena to attend the trial, when he did not have to.[4] The prosecutor further unconstitutionally impaired Sullivan's right to a fair trial because the prosecutor falsely testified that Grady wanted the jury to hear what really happened because he had no faith that Sullivan was going to be honest.[5] That testimony was false because Grady never testified that he had no faith that Sullivan was going to be honest. The prosecutor also falsely represented that Grady did not believe Sullivan was honest.

Furthermore, the prosecutor and the officer vouched for the other government witnesses, calling them "independent."

Additionally, the prosecutor vouched for the officer. She told the jury that the officer was impartial and that the officer had conducted a "full investigation,"[6] that

[4] 1/5/17 CD # 2, Track 1, at 5:45. This was false; the City subpoenaed Grady. Doc. 1, p. 76.
[5] 1/5/17 CD # 4, Track 2, at 18:50.
[6] *Id.* at 7:45.

he was knowledgeable as to people's credibility, that he knew that Sullivan was a liar, etc. For example:

The prosecutor told the jury:

> Officer Pat Malone was dispatched to the incident and *conducted a full investigation.* You're going to hear what his *impressions* were and *why he made the determination to charge Mr. Sullivan*, and he also, as a police officer, *is an objective witness*. He is supposed to be *impartial and conducted his own investigation* and this is just what he did.[7]

Later the prosecutor said:

> In this type of situation, how do you, as an *impartial* officer, reconcile the inconsistencies that you were getting from Mr. Sullivan with the stories you were getting from the other *independent* witnesses?[8]

Both the prosecutor and officer vouched that Sullivan was a liar.

Prosecutorial vouching is manifestly improper. Obviously, how does the prosecutor ever know if a witness is telling the truth? Here, the prosecutor told the jury that the City's agent (the officer) was "impartial" and that he conducted a full investigation. How did the prosecutor know if the officer was impartial or whether he conducted a full investigation? She also told the jury that Grady was an "independent witness," a citizen who wanted the jury to know the truth, credible, had no incentive to lie, had no axe to grind, was very apologetic, and very regretful. How did the prosecutor know whether Grady was independent, a good citizen, credible, had no incentive to lie, or very regretful? She told the jury that

---

[7] *Id.*
[8] 1/5/17 CD # 3, Track 1, at 50:20.

Sullivan was a liar. How did the prosecutor know whether Sullivan was a liar? The officer also told the jury that Grady's version of events was the truth and that Sullivan was a liar. How did the officer know any of that? This was egregious vouching, because neither the prosecutor, nor the officer, ever witnessed any of the events at issue.

In *Commonwealth v. Meuse*, 423 Mass. 831 (1996), the court correctly pointed out that the government does not know whether a witness is telling the truth. The court held that it was reversible error when the prosecutor told the jury that state troopers were able to tell whether an informer was telling the truth. Here, the prosecutor did the same thing when she put the officer's opinion before the jury on the issue of whether Sullivan was telling the truth and asserted that the officer's opinion as to Sullivan's veracity was worthwhile. When the prosecutor and the officer vouch for or against a witness, like here, Sullivan's counsel should have objected and asked the court to tell the jury that neither the prosecutor nor the officer knew who was telling the truth or who has a good character, etc.

This Court holds that vouching constitutes reversible error. In *Harne v. Deadmond*, 1998 MT 22, 954 P.2d 732 this Court stated that:

> The Montana Rules of Professional Conduct clearly forbid [vouching] by an officer of the court unless the attorney is acting as a witness. Rule 3.4, adopted to ensure fairness to the opposing party and counsel, states: "A lawyer shall not...in trial,...assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant...."

> This Court has recognized the importance of Rule 3.4 in the context of a criminal proceeding. In *State v. Stringer* (1995), 271 Mont. 367, 897 P.2d 1063, we held that it is highly improper for the prosecutor to characterize either the defendant or witnesses as liars or offer personal opinions as to credibility. We recognized that when prosecutors make improper comments in the presence of the jury, "the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and add to the probative force of the testimony adduced at the trial the weight of the prosecutors' personal, professional, or official influence"... As a result, we warned, "this Court has been unequivocal in its admonitions to prosecutors to stop improper comment and we have made it clear that we will reverse a case where counsel invades the province of the jury..."

When the prosecutor in this case asserted that that the officer was "impartial" and had conducted a thorough investigation, and that Grady was an "independent witness," was credible, had no reason to lie, was seeking justice, etc., and that Sullivan was a liar, she clearly threw both the authority and prestige of the City, the officer and herself behind the officer's and Grady's testimony and denounced Sullivan. This erroneously led the jury to the natural conclusion that any gap in the evidence at trial (like their ignorance to what the allegations of the Complaint were) must be filled by other facts known to the government.

It is well settled that a prosecutor commits misconduct by lending the government's prestige through vouching for the witness. It is improper for the prosecutor to vouch or express a personal belief as to the credibility of a witness. Simply telling the jury that the witness had no reason to lie constitutes improper vouching. Here, the prosecutor told the jury that Grady had no reason to lie, etc. and that Sullivan was a liar. Sullivan's counsel rendered ineffective assistance

because he allowed this misconduct to occur without objecting to it.

When a case comes down to the word of one witness against the word of another, as here, an explicit governmental endorsement is prejudicial in a way that impacts the integrity of the proceedings. So here, when the prosecutor said that officer Malone was "impartial" and an expert and that Grady was "an independent witness," and was very regretful and apologetic, and who had no reason to lie, and was credible, and that based on their testimony, Sullivan lied, she went too far. Sullivan's counsel did nothing to stop or remedy this egregious misconduct.

Furthermore, the prosecutor compounded her error in closing argument when she highlighted her credibility vouching. She vouched that Grady was a credible, apologetic, regretful person, when she said:[9]

> You heard from Mr. Grady who has no reason to lie to you today[10]...He came all the way from Helena because he wanted you to hear what really happened because he had no faith that Mr. Sullivan was going to be honest.[11]
>
> Mr. Grady came all the way from Helena. [He] really has no axe to grind with Mr. Sullivan. [He is an] independent witness, meaning that [he] has no connection to Mr. Sullivan...so there's really no reason to question...[his] credibility...Being that [he's an] independent witness[ ], I would submit to you that [he is] credible.
>
> You know that [Mr. Grady]...made Mr. Sullivan whole[12]...He never made

---

[9]1/5/17 CD #4, Track 2 at 17:35.

[10]That is false. Grady had several reasons to lie and to ensure that Sullivan was convicted. The prosecutor has no idea whether Grady has any reason to lie or not.

[11]That is false. Grady came because the City subpoenaed him. Subpoena. Doc. 1, p. 76. Grady never said that he had no faith that Sullivan would not be honest, nor did he make any comment on Sullivan's credibility. Grady doesn't even know Sullivan.

[12]That is false. Grady has never paid any compensation for Sullivan's injuries, pain and

any excuses for his behavior.[13] He's very apologetic, very regretful.[14]

The prosecutor then vouched against Sullivan's credibility, asserting that Sullivan was a liar, who had a bad character because he had allegedly assaulted someone in the past and because Officer Malone vouched against him:

> Mr. Sullivan also lied to you an additional time today...when he told you he never raised a finger to anybody and that he's never laid a finger on anybody. That's a lie. He was convicted of...excuse me...he was charged with assault in 2006. He was charged...I misspoke when I said "convicted"...he was charged with assault, so he lied to you outright.[15]

Vouching was critical to the prosecution's case here because this case was simply a credibility contest between Sullivan and Grady. Therefore, such egregious vouching seriously affected the integrity of the proceedings and infected the jury's verdict. Sullivan's counsel failed to render effective assistance because he failed to file a motion in limine to prevent vouching, failed to object to the vouching, failed to request jury instructions regarding vouching, failed to argue this matter to the jury, failed to move to strike the vouching testimony, failed to request a mistrial due to the vouching, etc. The reasons for his failure are not in the record.

---

suffering, mental and emotional distress, etc.

[13]That is false. Grady made lots of excuses for his behavior to the officer, blaming Sullivan.

[14]That is totally unsupported by the evidence. The prosecutor has no idea whether Grady is regretful or not.

[15]There was no evidence presented to the jury that Sullivan was charged with an assault or that in that supposed assault, that Sullivan had committed the alleged assault by laying a finger on anyone. This "laying a finger" allegation was completely manufactured by the prosecutor.

Sullivan's other 71 unopposed claims of non-record-based ineffective assistance of counsel also warrant relief from the conviction.

III. The Court erred in holding that Sullivan was convicted of violating § 45-8-101(a) and (c), MCA, and in failing to find ineffective assistance of counsel for counsel's failure to request a specific unanimity jury instruction.

In its *Order Denying Relief*, the Court found that Sullivan was convicted of violating § 45-8-101(a), MCA, [quarreling, challenging to fight, or fighting] and (c), MCA [using threatening, profane, or abusive language]. *Order, p. 2, D. C. Doc. 23.* That finding is incorrect. There is no evidence that Sullivan was convicted of violating either of those subsections of § 45-8-101, MCA. There is not one iota of evidence that he was convicted for those acts.

The Court's confusion about what Sullivan was convicted of further illustrates why Sullivan's counsel was ineffective. Sullivan's counsel failed to provide effective assistance by failing to defend Sullivan on the grounds that the court had to instruct the jury that it had to reach a unanimous verdict as to at least one specific underlying act of Disorderly Conduct charged in the Complaint and at least one specific violation of a specific subsection of the Disorderly Conduct statute, and that its failure to do so was in violation of Sullivan's right to Due Process and a unanimous verdict.

Counsel provided ineffective assistance because he failed to request that the court instruct the jury that it had to reach a unanimous verdict as to at least one

specific underlying act of disorderly conduct charged in the Complaint and at least one specific violation of a specific subsection of the Disorderly Conduct statute. Said failure violated Sullivan's right to Due Process and his right to a unanimous verdict. Counsel failed to inform the court that it had to instruct the jury that it was required reach unanimity with regard to the specific underlying conduct charged that it determined Sullivan committed in violation of a specific element of the statute.

Sullivan's counsel rendered ineffective assistance in defending Sullivan by failing to ensure that the jury reached a unanimous verdict on whether the charged conduct violated a specific element of the statute.

This is a case in which the charged conduct in the Complaint would permit jurors to find Sullivan guilty of the crime of Disorderly Conduct based on at least 3 discrete acts: 1) committing disorderly conduct by exiting his vehicle; 2) committing disorderly conduct by speaking "obscenities" and, 3) committing disorderly conduct by challenging-to-fight. In addition, the court instructed the jury on 6 additional acts of disorderly conduct and the element of disturbing the peace.

In order for Sullivan to be convicted of disorderly conduct, it was necessary for the jury to determine, with respect to charged acts, that:

1. Sullivan unlawfully exited his vehicle because exiting a vehicle is prohibited by § 45-8-101; or

2. Sullivan uttered "obscenities." Of course, in order to complete the second inquiry, the jury had to determine that the speech Sullivan spoke constituted "obscenities."[16] Upon finding that Sullivan had uttered "obscenities," the jury had to decide whether § 45-8-101 prohibited speech that constituted "obscenities." Once this determination was made, the jury had to decide whether the federal and state Constitutions allow the prohibition of speech that constituted "obscenities; or,

3. Sullivan challenged someone to fight.

Here, there is no way of determining whether the jury rendered a unanimous verdict because the City charged Sullivan with 3 different allegedly wrongful underlying acts in one count and then the City and the court told the jury that those 3 acts were encompassed within 6 alternative methods of committing Disorderly Conduct, despite the fact that only one of those 6 methods matched one of the 3 specific underlying acts charged (i.e. challenging to fight) and that said act(s) disturbed the peace.

In this type of case, the court had to provide the jury a specific unanimity instruction in order to ensure that a unanimous verdict meant something more than simply a guilty verdict. The court had to instruct the jury that it should agree unanimously as to which of the 3 charged underlying acts were disorderly conduct, if any, and which act(s) set out in the Disorderly Conduct statute those underlying

[16]This Court holds that "obscene material must be *erotic* and *appeal to the prurient interest in sex...*" *State v. Dugan*, 303 P.3d 755 (Mont. 2013). No witness ever testified that Sullivan's speech was *erotic, etc.* Therefore, no witness testified that Sullivan speech constituted "obscenities." Uttering "obscenities" is not prohibited by the disorderly conduct statute. Sullivan could not have been properly convicted of disorderly conduct for uttering obscenities. His counsel ineffectively failed to request a jury instruction on this matter.

acts constituted and which of all those acts Sullivan committed, and whether any of that constituted "disturbing the peace." Since Sullivan's counsel failed to request that the court do so, some jurors may have believed that Sullivan committed one act of disorderly conduct in satisfaction of an element of the offense, while other jurors may have believed that Sullivan committed different bad acts, but not the same disorderly conduct as the first group of jurors. It is possible without such a specific unanimity instruction that all the jurors did not agree as to which act of disorderly conduct Sullivan allegedly committed.

There are hundreds of combinations of the three charged underlying acts with the 7 acts set out in the subsections of the Disorderly Conduct statute that the court gave the jury.

In *State v. Weaver*, 1998 MT 167, 964 P.2d 713, this Court held that a specific unanimity instruction to the jury is required when different criminal acts are charged in one count, as here. The Court noted that:

> When a genuine possibility exists that different jurors will conclude a defendant committed disparate illegal acts subsumed under the single count, the special instruction serves to direct the jurors to reach a unanimous verdict on at least one specific criminal act before finding guilt for the multiple-act count....Such an instruction is necessary in order to comply with the Constitution.

See, also, *State v. Hardaway*, 2001 MT 252, 36 P.3d 900.

The City charged Sullivan for 3 different underlying criminal acts in 1 count, and the crime charged allegedly consisted of 7 different acts. The need for a

specific unanimity instruction is required in this situation. The jury could have convicted Sullivan under the Disorderly Conduct statute without agreeing unanimously as to what Sullivan did.

Sullivan's counsel failed to provide effective assistance by his failure to request the court give a specific unanimity instruction because the Disorderly Conduct statute provides for many alternative means of committing the offense. Due to counsel's ineffective assistance in failing to ask the court to give a specific unanimity instruction, Sullivan suffered a manifest miscarriage of justice.

IV. The Court erred in dismissing the *Petition* prior to the State filing a Response.

Section 46-21-201(1)(a), MCA, states that the court shall cause notice of the petition to be sent to the county attorney and attorney general and order that a responsive pleading be filed. The Court thus twice ordered the County Attorney and Attorney General to respond to the *Petition* within 20 days. D. C. Docs. 5, 13. Despite twice being ordered to respond, the State has never filed a responsive pleading.

Section 46-21-201(1)(a), MCA, states that "following its review of the responsive pleading the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue." The statute is clear that the Court can only dismiss the petition following review of the State's responsive pleading. The Court erred in dismissing the *Petition* because it was

only allowed to do dismiss the *Petition* following its review of the responsive pleading from the State.

The City Attorney did file a pleading. However, the City is not the State, nor does the City Attorney represent the State. The City is not a party in this case. Therefore, the City's pleading is null and void. The statute clearly only allows the County Attorney and the Attorney General to respond. It does not allow a city attorney to respond. Section 46-21-201(1)(a), MCA, states that "the attorney general shall determine whether the attorney general will respond to the petition and, if so, whether the attorney general will respond in addition to or in place of the county attorney." Nowhere in the statute is the attorney general allowed to determine that a *city attorney* should respond. Under the canon *expression unius est exclusio alterius*, this Court interprets the expression of one thing in a statute to imply the exclusion of another. *State v. Good*, 2004 MT 296, 100 P.3d 644. Clearly, the Legislature did not intend to permit a city attorney to file a responsive pleading, or it would have listed city attorneys along with county attorneys and the Attorney General. *Dukes v. City of Missoula*, 2005 MT 196, 119 P.3d 61.

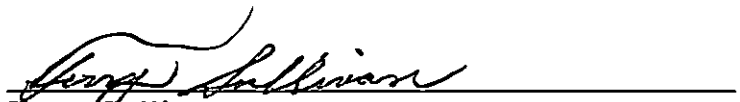
Four years ago the Court ordered the State to respond within 20 days. Since 20 days is long past, it is unfair to require Sullivan to keep waiting for the State to respond to the *Petition* he filed 4 years ago relating to an incident that occurred 8 years ago.

By failing to respond, the State has effectively conceded that Sullivan's *Petition* should be granted. *In re Estate of Snyder*, 2009 MT 291, 217 P.3d 1027.

CONCLUSION

The Court should issue its order reversing the District Court's Order and direct it to grant Sullivan's *Petition.*

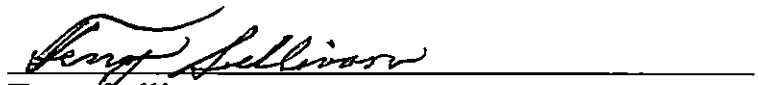
RESPECTFULLY submitted this 19th day of July, 2024.



Terry Sullivan

Certificate of Compliance

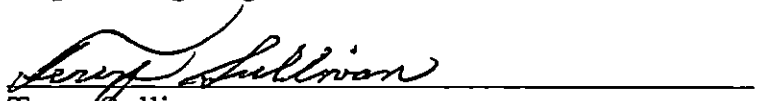
I certify that the foregoing Brief is proportionally-spaced typeface of 14 points and does not exceed 10,000 words.



Terry Sullivan

Certificate of Service

I certify that I filed this Brief with the Clerk of the Montana Supreme Court and delivered a copy to the attorney of record: Montana Attorney General, P.O. Box 201401, Helena, MT 59620-1401, *tplubell@mt.gov.*



Terry Sullivan

APPENDIX

Table of Contents

Hon. Shane A. Vannatta
District Court Judge, Dept. 5
Missoula County Courthouse
200 W Broadway St
Missoula, MT 59802-4292
(406) 258-4765

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

TERRY J. SULLIVAN, Petitioner, vs. STATE OF MONTANA, Respondent.	Dept. 5 Cause No.: DV-20-1304 ORDER DENYING AMENDED PETITION FOR POST-CONVICTION RELIEF

This matter comes before the Court upon an *Amended Petition for Post-Conviction Relief* ("Amended Petition") (Dkt #17) and *Memorandum in Support* ("Memorandum") (Dkt #18), filed June 16, 2022, by Petitioner Terry J. Sullivan ("Sullivan"). The Respondent State of Montana filed a *Response and Motion to Dismiss* ("Response") on July 13, 2022 (Dkt #20). Sullivan challenges the validity of his convictions in Missoula Municipal Court Case No. CR-2016-001045.

ORDER

IT IS HEREBY ORDERED that the Amended Petition for Post-Conviction Relief (Dkt # 17) filed by Petitioner Sullivan is DENIED.

PROCEDURAL BACKGROUND

In CR-2016-001045, Sullivan was charged with disorderly conduct in May 2016. § 45-8-101, MCA provides that:

(1) A person commits the offense of disorderly conduct if the person knowingly disturbs the peace by:
(a) quarreling, challenging to fight, or fighting;
(b) making loud or unusual noises;
(c) using threatening, profane, or abusive language;
(d) rendering vehicular or pedestrian traffic impassable;
(e) rendering the free ingress or egress to public or private places impassable;
(f) disturbing or disrupting any lawful assembly or public meeting;
(g) transmitting a false report or warning of a fire or other catastrophe in a place where its occurrence would endanger human life;
(h) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose; or
(i) transmitting a false report or warning of an impending explosion in a place where its occurrence would endanger human life.

On January 5, 2017, a jury found Sullivan guilty of the offense under § 45-8-101(a)&(c). Sullivan subsequently sought post-conviction relief, claiming he was wrongfully convicted under § 45-8-101, MCA, for disorderly conduct. The procedural background of Petitioner's appeal has been extensive. This Court provided a timeline of Petitioner's appeal process in its Order. (Dkt. #16 at 2-3.). On October 13, 2020, Petitioner filed his first Petition for Post-Conviction Relief, which was denied by Order dated May 17, 2022. Petitioner filed an Amended Petition on June 16, 2022.

In his Amended Petition, Petitioner asserts that his conviction for disorderly conduct should not be upheld because he did not commit the sub-offense of "rendering vehicular or pedestrian traffic impassable" contained in § 45-8-101(1)(d), MCA. Petitioner states:

> "The Complaint does not charge the crime proscribed by § 45-8-101(1)(d), MCA of rendering 'vehicular traffic impassible.' The Complaint this failed to establish probable cause that Petitioner committed the offense of 'rendering vehicular travel impassable' and could not constitute the basis for conviction of 'rendering vehicular traffic impassable.'"

(Dkt. #18 at 2.) He further states that "(1) A person commits the offense of disorderly conduct if a person knowingly disturbs the peace by: (d) rendering vehicular...traffic impassable." (Dkt. #18 at 2.) Petitioner is correct in asserting that he was never "charged" with this sub-offense, nor did this Court make such a finding. However, this does not necessitate that Petitioner's conviction should be set aside, for several reasons.

In its Order, this Court held that "Sullivan's actions arose to probable cause allowing the officer to issue him a disorderly conduct ticket. The jury listened to the facts of the case and determined Sullivan should be convicted of disorderly conduct." (Dkt. 16 at 6.)

ANALYSIS

Montana law provides a process for individuals to challenge the validity of their sentence:

> A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or

other common law or statutory remedy may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.

Mont. Code Ann. § 46-21-101(1).

Montana law requires a petition for post-conviction relief to include the following:

> (1) The petition for postconviction relief must:
>
> > (a) identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations;
> > (b) identify any previous proceedings that the petitioner may have taken to secure relief from the conviction; and
> > (c) identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.
>
> (2) The petition must be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities.

Mont. Code Ann. § 46-21-104.

Montana law further provides a process to amend a petition that challenges the validity of an individual's sentence:

> (1) (a) All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended original petition. The original petition may be amended only once. At the request of the state or on its own motion, the court shall set a deadline for the filing of an amended original petition. If a hearing will be held, the deadline must be reasonably in advance of the hearing but may not be less than 30 days prior to the date of the hearing.

(b) The court shall dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition.

(2) When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter. Ineffectiveness or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised in a second or subsequent petition under this part.

(3) For purposes of this section, "grounds for relief" includes all legal and factual issues that were or could have been raised in support of the petitioner's claim for relief.

Mont. Code Ann. § 46-21-105.

A. Sullivan's Amended Petition is Based on a Mistaken Understanding of Mont. Code Ann. § 45-8-101.

The Montana Criminal Law Commissions comments to § 45-8-101, MCA provide:

> "The crime of disorderly conduct appears to be directed at curtailing that kind of behavior which disrupts and disturbs the peace and quiet of the community by various kinds of annoyances...The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb 'others.'"

Petitioner asserts that, because he was not charged with one of the possible nine enumerated subsections of § 45-8-101, MCA, that his conviction should be set

aside. This is a misunderstanding of the law as well as the public policy underlying § 45-8-101, MCA.

"[T]he statute only requires that a defendant 'knowingly disturb the peace' by committing one of the acts enumerated in subsections (a) through (j) [subsection (j) has since been repealed] of the statute..." *State v. Ashmore*, 2008 MT 14, ¶ 13, 341 Mont. 131, 176 P.3d 1022. Petitioner was convicted under § 45-8-101(a)&(c), MCA. This was sufficient for a conviction of disorderly conduct. Petitioner's conviction will not be set aside simply because Petitioner was not *also* convicted of subsection (d).

B. Petitioner's claims are barred because they could have been reasonably raised on direct appeal and Petitioner has not presented good cause as to why he did not assert his present claim in his original Petition for Post-Conviction Relief.

Criminal defendants may not substitute postconviction relief for direct appeal. *DeShields v. State*, 2006 MT 58, ¶ 15, 331 Mont. 329, 132 P.3d 540. "The plain language of these provisions establishes that the courts lack any authority to consider (hear and entertain) or decide (determine) legal and factual issues that could reasonably have been raised on direct appeal if an adequate remedy of appeal was available to the petitioner." *State v. Osborne*, 2005 MT 264, ¶ 14, 329 Mont. 95, 124 P.3d 1085. "[I]t is not the purpose of the post-conviction relief statute to provide successive opportunities for access to the appellate court simply because petitioner is not pleased with his conviction or has failed on direct appeal." *State v.*

Henricks, 206 Mont. 469, 477, 672 P.2d 20, 25 (1983), overruled on other grounds in part by *Kills on Top v. State*, 273 Mont. 32, 901 P.2d 1368 (1995).

When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered or decided in postconviction proceedings. § 46-21-105(2), MCA. "The object of this section is to eliminate the unnecessary burden placed upon the courts by repetitious or specious petitions. It is highly desirable that a petitioner be required to assert all his claims in one petition. Unless good cause is shown why he did not assert all his claims in the original petition, his failure to so assert them constitutes a waiver." § 46-21-105 (Commission Comments).

The procedural bar in § 46-21-105, MCA, also applies to issues that were not properly preserved at the trial level for appeal. *Adgerson v. State*, 2007 MT 336, ¶ 11, 340 Mont. 242, 174 P.3d 475, overruled on other grounds in part by *Whitlow v. State*, 2008 MT 140, ¶ 18 n.4, 343 Mont. 90, 183 P.3d 861; *State v. Evert*, 2007 MT 30, ¶¶ 15-16, 336 Mont. 36, 152 P.3d 713; *State v. Baker*, 272 Mont. 273, 901 P.2d 54 (1995).

Postconviction relief is a special, statutory collateral relief remedy, created by the Legislature, found at Mont. Code Ann. §§ 46-21-101 to -203. It is not a right that is constitutionally based. Postconviction relief is a civil remedy. See

Dillard v. State, 2006 MT 328, ¶ 13, 335 Mont. 87, 153 P.3d 575. Mere allegations of error, unsupported by proof, are insufficient to warrant any relief. *Griffin v. State*, 2003 MT 267, ¶ 12, 317 Mont. 457, 77 P.3d 545. The petitioner in post-conviction relief proceedings has the burden to show by a preponderance of evidence that the facts justify relief. *State v. Godfrey*, 2009 MT60, ¶ 13, 349 Mont. 335, 203 P.3d 834.

Petitioner had more than an adequate remedy of appeal of his municipal court conviction to Missoula County District Court. Petitioner could have reasonably raised his argument concerning § 45-8-101(d) at any time throughout the appeal process but did not do so until his Amended Petition. Petitioner may not substitute postconviction relief for direct appeal, which he has exhausted. Furthermore, Petitioner has not provided good cause to show why he did not assert his argument concerning § 45-8-101(d) in the original petition.

CONCLUSION

Petitioner Sullivan has not shown by a preponderance of evidence that the facts justify relief. For the above-stated reasons, the Amended Petition is properly DENIED and DISMISSED.

ELECTRONICALLY SIGNED AND DATED BELOW.