THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0556

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PITASKUMMAPI DAVID GREEN,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Honorable Jason Marks

APPEARANCES:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

A. The Flawed "Knowingly" Jury Instruction and Facts of this Case Cannot be Distinguished from those of the Hamernick Case.

State's counsel goes to great lengths to distinguish the facts of this sexual intercourse without consent case, from those of *State v. Hamernick,* 2023 MT 249, 414 Mont. 307, 545 P. 3d 666. Both cases have the significant commonality that each defendant claimed the alleged victim consented to the sexual act. While the State refers to Hamernick's version of events as "plausible;" see Response Brief of Appellee, p. 21, and decries Mr. Green's account as implausible, as the victim testified that she fought him off, that does not equate to a foregone conclusion that Mr. Green was "undeniably aware of his own conduct."

Additionally, the Montana Supreme Court has rejected the very argument the State makes in its Response brief- that closing argument somehow cures or mitigates the erroneous jury instruction:

> We have previously rejected the argument that the closing argument of a party can substitute for proper jury instructions, and we reject that argument once again here. It is the duty of the court to instruct the jury on the law, and that duty cannot be delegated to counsel. *Kougl*, ¶ 26 (citations omitted). "Closing arguments are not evidence, neither do they substitute for proper jury instructions[.]" *Kougl*, ¶ 26 (quoting *United States v. Pedigo*,

12 F.3d 618, 626 (7th Cir. 1993)).

State v. Secrease, 2021 MT 212, ¶ 16, 405 Mont. 229, 236, 493 P.3d 335, 340.

Moreover, *Hamernick,* id, is controlling here, for the critical proposition that:

> "Under the language of the statute, the crime does not consist of sexual intercourse with a high probability the other person does not consent; rather, it is sexual intercourse with the awareness that it is *without* that person's consent, which may permissibly be inferred from all of the facts and circumstances of the case. *Christensen*, ¶ 126; § 45-2-103(3), MCA. Thus, to determine whether Hamernick is guilty of SIWOC, the question must be whether Hamernick was aware of his conduct—that is, whether he knowingly had sexual intercourse with S. without her consent."

State v. Hamernick, 2023 MT 249, ¶ 26, 414 Mont. 307, 319, 545 P.3d 666, 674.

This core precept was recently reaffirmed in:

> "A conviction will not be overturned due to improper jury instruction unless the error prejudiced the defendant's substantial rights. *Gerstner*, ¶ 15. If jury instructions lower the State's burden to prove each element beyond a reasonable doubt, they violate the defendant's right to due process. *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625. We will reverse a conviction if the State's burden of proof was lowered by an incorrect "knowingly" jury instruction, and the defendant suffered prejudice to their substantial rights as a result. *Hamernick*, ¶ 27....."

State v. Rowe, 2024 MT 37, ¶ 33, 415 Mont. 280, 296, 543 P.3d 614, 625–26.

Mr. Green has met his burden of showing his trial counsels were markedly ineffective- they failed him in three significant ways . First, by not submitting a trial brief and presumably, educating themselves about the necessary jury instructions needed in a felony sexual intercourse without consent case to competently try such an important case. Second, by not submitting any of the four defense jury instruction on the intent element of "knowingly." Third, by failing to object to the faulty jury instruction proffered by the State and approved by the lower court. JT TR, pp. 390-96.

Despite the State's efforts to excuse, and diminish the extent of trial counsels' malpractice toward their indigent client, facing up to 100 years imprisonment and receiving 80 years- a virtual life sentence, *State v.*, 2014 MT 226, ¶ 21, 376 Mont. 267, 272–73, 332 P.3d 240, 245, and *State v. Secrease,* 2021 MT 212, ¶ 15, 405 Mont. 229, 235, 493 P.3d 333, are more than adequate authorities to find trial counsel ineffective as a matter of law, in this case.

As this Court aptly noted in the latter case, it is the lightening of the mandatory burden of proof, which occurs when an erroneous jury instruction is utilized, that strikes at the heart of the defendant's constitutional rights:

> By instructing the jury that Secrease only need to be aware of his conduct—that he was refusing the blood test—rather than properly instructing them that Secrease needed to be aware of the result of his conduct—that refusing the blood test after Trooper Burton had obtained a search warrant was obstructing, hindering, or impairing the enforcement of the criminal law—*the State's burden in proving the crime was reduced. See Johnston*, ¶ 16.

State v. Secrease, 2021 MT 212, supra at ¶ 15. (emphasis supplied).

B. The "Implicit" Plain Error Doctrine Must Be Applied in this Case. Such a Ruling Accords with IAC Prior Precedents for Failure to Object to Improper State of Mind Jury Instructions.

When adjudicating IAC claims on direct appeal, the Montana Supreme Court has ruled that such claims can typically only be considered in a post conviction setting. See, *State v. White*, 2001 MT 149, ¶ 12, 306 Mont. 58, 60, 30 P.3d 340, 342. However, the Court has carved out a limited exception to that general precept barring appellate review of IAC on a direct appeal.

Notably, in one prior case where trial counsels failed to object to an improper state of mind jury instruction, involving obstructing a peace officer, the Montana Supreme Court appeared to implicitly invoke the plain error rule, in light of IAC of trial counsel in failing to object to an improper jury instruction, that had no plausible explanation whatsoever.

> "We concluded that we could review this ineffectiveness claim on direct appeal because there was no plausible justification for failure to seek the instructions. *Kougl,* ¶ 21. We reasoned that trial counsel " had nothing to lose" by seeking the instructions and had "failed to use the law to strike at the heart of the State's case." *Kougl,* ¶ 20. We reach the same conclusion here. Trial counsel had nothing to lose in seeking a correct instruction, and the failure to do so allowed the prosecutor to argue that Johnston had essentially confessed to the crime by his testimonial admission that he had been dishonest with the officers, thus reducing the State's burden in proving the crime. Counsel's representation was deficient and prejudiced Johnston's case "such that there is a reasonable probability [the jury] would have arrived at a different outcome." *Kougl,* ¶ 26. The error thus requires reversal.

State v. Johnston, 2010 MT 152, ¶ 16, 357 Mont. 46, 50–51, 237 P.3d 70, 74. [1] Importantly, the Montana Supreme Court reviewed the IAC claim under the " implicit " plain error doctrine, in granting Mr.

[1] It is unclear in *Kougl,*supra if trial counsel made an objection at trial- it appears they did not. It is also unclear that the Montana Supreme Court explicitly invoked the plain error rule in granting relief. Id, at¶ ¶11, 12 & 27.

Johnson relief. Thus, as in *State v. Secrease*, supra, this Court noted that it need not proceed under the plain error rule, reasoning as follows:

> ¶17 As we have determined Secrease was prejudiced by ineffective assistance of counsel at trial, *it is unnecessary to address his alternative claim regarding the incorrect jury instruction under plain error review.*

State v. Secrease, 2021 MT 212, ¶ 17, 405 Mont. 229, 236, 493 P.3d 335, 340.

Consequently, to the degree this precept applies in Mr. Green's case, and no invocation of plain error is needed, he would contend a decision in this case, can be premised under that precedent, as well.

Nonetheless, to the extent plain error review remains in play, the State's arguments against invoking plain error, ignores a line of precedent in which the Montana Supreme Court has endorsed reviewing trial counsel's alleged IAC, provided the case facts fit into a unique category of such cases:

> Generally, in addressing ineffective assistance of counsel claims, we ask "why" counsel did or did not perform as alleged and then seek to answer the question by reference to the record. *State v. White,* 2001 MT 149, ¶ 20, 306 Mont. 58, ¶ 20, 30 P.3d 340, ¶ 20. If the record on appeal explains "why," we will then address the issue on appeal. If, as is usually the case, the claim is based on matters outside the record on appeal, we will refuse to address the

issue on appeal and allow the defendant to file a postconviction proceeding where he/she can develop a record as to "why" counsel acted as alleged, thus allowing the court to determine whether counsel's performance was ineffective or merely a tactical decision.

"¶ *15 Sometimes, however, it is unnecessary to ask "why" in the first instance. An example of this is when counsel is faced with an obligatory, and therefore non-tactical, action. See Hans v. State* (1997), 283 Mont. 379, 392, 942 P.2d 674, 682. Then the question is not "why" but "whether" counsel acted, and if so, if counsel acted adequately. The answer may or may not be in the record."

State v. Kougl, 2004 MT 243, ¶¶ 14-15, 323 Mont. 6, 10–11, 97 P.3d 1095, 1098.(emphasis supplied).

In the latter case, the Court held it could rule on the IAC claim, which involved the failure to request a critical accomplice testimony " review with distrust " instruction, and it also held that such IAC so prejudiced the Defendant that the second *Strickland* prong was met. Id,¶26& 27.

C. Conclusion.

Mr. Green respectfully submits the IAC of his trial counsel's is genuinely proven in this case, on his direct appeal, and he humbly petitons this Court for relief consonant with the highly similar and applicable cases, cited in his Opening and Reply Briefs.

DATED this 27th day of September, 2024.

/s/ *Penelope S. Strong*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced 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 1,640 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

DATED this 27th day of September, 2024.

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CERTIFICATE OF SERVICE

I, hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon each attorney of record, and each party not represented by attorney in the above-referenced District Court action as follows:

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