IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0677

JUAN ANASTASIO RODRIGUEZ,

Petitioner and Appellant,

vs.

STATE OF MONTANA.

Respondent and Appellee.

ON APPEAL FROM ORDER(S) DENYING PETITION FOR POSTCONVICTION RELIEF ENTERED IN THE EIGHTH JUDICIAL DISTRICT COURT OF CASCADE COUNTY IN THE STATE OF MONTANA BEFORE THE HONORABLE ELIZABETH BEST

BRIEF OF APPELLANT JUAN RODRIGUEZ

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I. Statement of the Issues Presented for Review.

Pursuant to M.R.App.P. 12(1)(b) Appellant Juan Anastasio Rodriguez, "Rodriguez," states the issues presented for review.

Issue 1: Whether the District Court had jurisdiction to issue the Amended Order Denying Petition for Postconviction Relief (ROA 21).

Issue 2: Whether Rodriguez timely "filed" his Petition for Postconviction Relief by delivering it to the Clerk prior to the deadline for filing it.

Issue 3: Whether Rodriguez was denied effective assistance of counsel at trial.

Issue 4: Whether Rodriguez was denied effective assistance of counsel on appeal.

Issue 5: Whether the district court abused its discretion when it declined to grant an evidentiary hearing or other relief that would have provided Rodriguez an adequate, effective and meaningful opportunity to present his claims.

II. Statement of the Case.

Pursuant to M.R.App.P. 12(1)(c), Rodriguez briefly indicates the nature of the case and the procedural disposition in the district court below, including only the procedural background relevant to the issues raised.

Rodriguez filed a Petition for Postconviction Relief ("Petition") pursuant to 46-21-101 et. seq., MCA. *See* Petition ROA Listing, Filing No. 3, "ROA [document sequence no.],"), ROA 3, pages 5-22. The district court ordered a response, Order to

Respond (ROA 5). The State filed its Response to the Petition (ROA 15), and a "Joint" Affidavit signed by both trial counsel (ROA 16), on August 22, 2023. Approximately twenty-four hours later, on August 23, 2023, the district court issued the Order Denying Petition for Postconviction Relief (ROA 17), denying the Petition on the grounds it was untimely filed and on the merits. *See Id.*, pages 4-6.

On September 7, 2023, Rodriguez timely filed a motion to reconsider pursuant to M.R.Civ.P. 59(e), seeking to demonstrate the Petition was timely filed. *See* ROA 18. On November 15, 2023 the State filed its Response to Motion for Reconsideration (ROA 20) conceding the Petition was timely filed but argued it should be denied on the merits. *Id.,* pages 3-4. Sixty days elapsed from the date Petitioner's Motion at M.R.Civ.P. 59(e) Motion, ROA 18, was filed without either (1) a ruling; or (2) the issuance of an order extending the time within which to rule on the motion. The Motion was therefore deemed denied on November 6, 2023. *See* M.R.CivP. 59(f).

Rodriguez filed his Notice of Appeal and Motion to Proceed Without Paying the Filing Fee with this Court, November 16, 2023. This Court granted the Motion and docketed this Appeal, the same day. Thereafter, November 17, 2023, the district court issued an Amended Order Denying Petition for Postconviction Relief (ROA 21). The district court found the Petition was timely filed but again denied it on the merits. *Id*.

III. Statement of the Facts Relevant to Issues Presented for Review.

Pursuant to M.R.App.P. 12(1)(d) Rodriguez states the facts relevant to the issues presented for review, with references to the pages/parts of the record at which material facts appear.

1. Statement of the Facts with Citation to the Record.

A. Rodriguez filed his Petition for Postconviction Relief within the one-year time limit for doing so.

i. Rodriguez was before this Court on direct appeal, Case No. DA 18-0328. *State v. Rodriguez*, 2021 MT 65, 403 Mont. 360, 483 P.3d 1080.

ii. This Court denied a Petition for Rehearing on April 20, 2021. *See* Order, April 20, 2021, in Case No. DA 18-0328.

iii. Rodriguez had 90 days to petition the United States Supreme Court for review. *See* U.S. Supreme Court Rule 13(1).

iv. Rodriguez's conviction became final 90 days after the time to petition for review in the U.S. Supreme Court expired, or July 19, 2021. *See* 46-21-102(1) and (2), MCA; *See Also*, Order, ROA 17, page 5.

v. 46-21-102, MCA provides a petition for postconviction relief may be filed anytime within 1 year of the date the conviction becomes final.

vi. Rodriguez had until July 19 2022, to file his Petition. *See* ROA 17, page 5.

vii. On July 13, 2022, Rodriguez gave his Petition, Memorandum in support of same, and related documents[1] to Montana State Prison Officials to mail to the Clerk of the Eighth Judicial District Court. Rodriguez included a "Certificate of Service," (ROA 3, pages 2-4), itemizing each enclosure.

1. The package containing the items which are now ROA 3 arrived at the Clerk's Office July 18, 2022 at 9:43 a.m. *See* ROA 18, page 7 (Exhibit B to Motion to Alter or Amend Judgment). *See Also*, ROA 20, page 1.

viii. On July 18, 2022, the Petition and Memorandum in Support of Petition, as well as all of ROA 3, were in the custody of the Eighth Judicial District Court Clerk.

[1] ROA 3 is a 918 page document containing the Petition and related documents. Rodriguez includes an Index of the contents of ROA 3 in the Appendix at APP 6.

1. Petitioner sent only one package to the Eighth Judicial District Court Clerk in July of 2022. ROA 18, pages 2-4.

ix. The Affidavit of Inability to Pay Filing Fees and Other Costs, ROA 1, was stamped filed by the Clerk on July 18, 2022.

x. The remaining documents were not stamped filed until July 26, 2022.

xi. The State conceded the Petition was timely filed. ROA 20, page 3.

B. Facts Underlying the Claims at Issue in the Petition.

i. State's presentation regarding the alleged circumstances surrounding the disclosure by J.S. to her Primary Medical Provider Ladonna Maxwell.

1. J.S. was the alleged victim in this case resulting in the conviction for which Rodriguez petitioned for relief. *See Rodriguez*, 2021 MT 65, ¶4.

2. Ladonna Maxwell, a Family Nurse Practitioner, testified she was J.S.'s primary care provider since approximately 2004. *See* Transcript of the Jury Trial,("TTX") December 11-13, 2017, APP4, TTX 398:10, 399:23-400:8.[2]

[2] Rodriguez included relevant Transcripts in his filing at ROA 3, pages 446-700. For easier review more legible excerpts referenced herein are included in the Appendix.

3. J.S. testified she had seen Ladonna Maxwell for approximately 14 years prior to her testimony. APP4, TTX 337:22-337:24. "Specifically," (J.S.) saw Maxwell for "…annual pap smear examinations" APP4, TTX 337:25-338:1.
4. The State characterized the nature and scope of Maxwell's treatment as routine and ordinary: "…runny noses, colds, minor surgery procedures, …anything that a family practice would do." APP4, TTX 400:11-400:18.
5. The State characterized Maxwell's treatment of J.S. as "episodic care....Episodic care is when someone comes in and it's not for a chronic illness; there are just coming in for like a runny nose or a cold or a sore throat." APP4, TTX 400:19-400:23.
6. July 19, 2011, allegedly, was one such routine visit, "[J.S.] was having severe anxiety, hadn't been sleeping. She had multiple stressors, was having a hard time coping, was afraid to leave her apartment, told me she had, broke down and that she had been kidnapped and sexually assaulted [nine years prior] at age 15…" APP4, TTX 407:8-407:12.
7. "…[H]er anxiety was worse because she had seen her attacker and it had flared everything again." APP4, TTX 407:13-407:15.

8. "As a result of that statement by [J.S.] to you in 2011, you indicated you made treatment recommendations…can you tell the jury what your plan with [J.S] at that point was?" APP4, TTX 408:2-408:5. Maxwell responded: "I wanted her to go inpatient in the psychiatric hospital…" APP4, TTX 408:9-408:10.

ii. Additional circumstances surrounding the disclosure available to trial counsel, but not presented at trial by trial counsel.

1. Maxwell never treated J.S. for a runny nose, cold or sore throat. Maxwell treated J.S. for many years for chronic conditions such as severe generalized anxiety disorder, agoraphobia, panic disorder, bipolar traits and severe depression. Maxwell's treatment records could not be fairly characterized and limited to routine or episodic care.
    a. 5/22/06: J.S. advised Maxwell she had quit school, quit working on her GED, was starving to death, and did not have money for diapers or baby supplies. ROA 3, page 287.
    b. 6/2/06: J.S. "…looked really bad…" She was experiencing many stressors. She had been robbed the night before, lost the money she needed to buy a new car, pay her rent, and move her new baby into a new apartment. She was instead going to

be evicted and had nowhere to go. She had been defrauded by a man whom she felt cared for her. She wanted to find a home for her baby and then "end it all." "…[J.S.] sobbed and sobbed." ROA 3, page 288.

c. 6/5/06: J.S. returned to Maxwell to "…for follow up of her…depression." ROA 3, page 286. She had been prescribed an antidepressant and it was "working well for her" *Id.*

d. 10/2/06: J.S. returned to Maxwell "…with extreme anxiety attacks…She had one so bad last night she actually ran her car into a pole…she was trying to get pulled over…she felt like she could not breath…She [was] having multiple stressors…she found out her mom [was] cheating on her step-dad…she also found out her mom [had] an affair with her old boyfriend who used to live with them [it happened when he was still with J.S.]…[J.S.] has had multiple, multiple stressors in the past." ROA 3, page 285. J.S. was also on Xanax. *Id.*

e. 7/21/08: J.S. returned to Maxwell "…under a tremendous amount of stress again and [was] having full blown anxiety attacks. She has been in the ER the last two or three nights

because of her anxiety." ROA 3, page 283. J.S. was given Valium for her anxiety. Maxwell also started her on Zoloft. *Id.*

f. 7/23/08: J.S. presented again with "full blown panic attacks, agoraphobia …waking up in the middle of the night with shaking-type behaviors…[J.S.] reports she twitches and shakes, …is aware that she is doing this and she is able to stop it. …The Emergency Room gave her Valium…" ROA 3, page 281. Maxwell gave her Lorazepam in addition to previously prescribed Zoloft. *Id.*

g. 7/24/08: J.S. returned to Maxwell because she believed she was having seizure activity, as well as "bad anxiety and agoraphobia attacks." ROA 3, page 282. She went (again) to the ER but "…they could not find any evidence of a seizure, but they did not do an EEG. They did studies of her brain." *Id.* Maxwell did a neurological exam, and it was "…completely normal." J.S. perceived conditions/symptoms that were real to her but objective testing demonstrated she imagined them.

h. 8/6/08: Maxwell noted "[J.S.] is completely overwhelmed." ROA 3, page 280.

i. 8/12/08: Maxwell noted, "I think this is psychosomatic because she can stop it. [and J.S.] is having severe panic attacks again." ROA 3, page 278. In other words J.S. imagined/generated conditions/symptoms, which objectively did not exist, and could start/stop them at will.

j. 8/19/08: Maxwell diagnosed J.S. with "…generalized anxiety disorder…" and "had a very hard time managing her anxiety. She also has multiple other stressors, issues and depression going on as well as financial stressors." ROA 3 page 277. An EEG indicated J.S. did not suffer from any seizure disorder as J.S. had alleged. Maxwell prescribed J.S. Lexapro. *Id.*

k. 8/27/08: J.S. continued to experience anxiety and "…continues to have …pseudo seizures or seizure type activity without any evidence of any epileptic changes on the EEG." ROA 3, page 276.

l. 4/16/09: J.S. continued to have anxiety and asked Maxwell to prescribe Xanax. Maxwell refused because "[t]there has been an issue in the past with increased benzodiazepine use." ROA 3, page 274. J.S. engaged in drug seeking behavior, which

Maxwell noted was an issue, yet the State produced no records documenting the facts of the increased use.

m. 12/8/2009: J.S. considered overdosing by taking all her remaining medications but chose not to. ROA 3, page 270.

n. 5/10/11: Maxwell summarized the medications she was using to try and control J.S.'s anxiety: Paxil, Prozac, Zoloft, Abilify, Seroquel, Clonazepam, and Diazepam. ROA 3, page 262. Maxwell also noted J.S. had "…multiple somatization. She reads the brochures [accompanying her prescription medication] and then has those side effects." *Id.*

o. 5/25/11, "[J.S.]'s anxiety is so severe that she is not able to get through taking anything without having side effects. She reads the package insert and says that she has that illness…" ROA 3, page 261. Again, J.S. believed she experienced conditions/symptoms, for no other reason than self-suggestion.

p. 5/31/2011: Dr. Elad Culcea, determined through EMG studies, J.S.'s pseudoseizures/tremors had no "neurological explanation." ROA 3, page 260. This confirmed Maxwell's

determination the "seizures" were pseudoseizures and psychosomatic as discussed above.

q. 6/13/11: Maxwell suspected J.S. was bipolar and attempted, for the second time, to convince J.S. to be admitted into inpatient psychiatric treatment. ROA 3, page 259.

r. 7/5/11: Maxwell diagnosed J.S. with "…severe generalized anxiety disorder, agoraphobia, panic disorder, some bipolar traits and severe depression…[and concluded, J.S.] will be following up with me on a weekly basis until we can get this stabilized. If she does not get any better she will need a psychiatric admission." ROA 3, page 257.

s. 7/14/11: Record notes, "[J.S.] states she is not taking [her] med for anxiety…feels her life is falling apart….thoughts are scattered." ROA 3, page 256.

iii. Trial counsel did not confront Maxwell with records or other evidence that:

1. Contrary to Maxwell's testimony that J.S.'s anxiety problem occurred at or near the 7/19/11 visit, J.S. had experienced anxiety, agoraphobia, panic disorder, bipolar traits and severe depression, enumerated above, many years before any alleged sighting of her

alleged attacker "flared" or triggered any such condition on 7/19/11.

2. Maxwell recommended inpatient psychiatric care for J.S. before her disclosure 7/19/11.
3. J.S. had numerous other circumstances/stressors, other than the alleged assault, which explained her anxiety.
4. Maxwell was treating J.S. for chronic mental disorders for many years prior to the 7/19/11 disclosure.

iv. Additional impeaching evidence in the possession of the State not disclosed and not sought by trial counsel.

1. In addition to the above regarding J.S.'s lengthy term of mental health disorders and treatment with Maxell, Trial Counsel was aware of the following.
   a. J.S. told Det. Slaughter (State's primary investigator), Maxwell referred her to an unnamed mental health counselor to whom J.S. asserted she disclosed the allegations of rape. ROA 3, page 237.
   b. Slaughter obtained records from the unnamed counselor and reviewed them and found no indication or description of the rape allegations. *Id.*

c. The State did not disclose the records reviewed by Slaughter or the identity of the unnamed counselor.

   i. The fact J.S. said she made the disclosure to a mental health professional, and the records demonstrated this statement was not true, was *Giglio* information.

   ii. Trial counsel did not request the records, did not seek to identify the counselor, did not cross examine Slaughter on the issue, and did not otherwise pursue appropriate action to present this information.

d. While reviewing the undisclosed records, Slaughter noticed a referral to a Hayden Hendrick in either the unnamed counselor's records or Maxwell's records. ROA 3, page 237.

e. Slaughter interviewed Hendrick regarding his treatment of J.S. "[Hendrick] stated he was seeing her for issues with her family and church… he did not recall ever speaking to her about her being raped or sexually assaulted." *Id.*

   i. Trial counsel did not seek to impeach or confront J.S. about her failure to disclose the alleged rape to Hendrick. Nor did they pursue the production of/or seek to obtain Hendrick's records which Slaughter alleged he possessed,

to determine what "issues" J.S. had with her family and church.

v. The date of the alleged assault and date Rodriguez acquired the Honda Civic.

1. The State's theory was the assault occurred sometime after June 27, 2003 and before J.S.'s 16th birthday in October, 2003.
   a. J.S. alleged she was assaulted in a Honda Civic owned by Rodriguez. APP4, TTX 322:2. The State demonstrated Rodriguez purchased and/or registered the vehicle in question on June 27, 2003. *See* ROA 3, page 915-916 (Exhibit 12, item 42).
   b. J.S. turned 15 in October, 2002, and 16 in October, 2003. She alleged the assault occurred while she was 15 and prior to her 16th birthday, while she was still residing with her parents. APP4, TTX 321:12-322:2.
2. The following evidence was available to Trial Counsel but not presented for the Jury's consideration at trial.
   a. J.S. told Slaughter, "…in an audio and video recorded statement…" the assault occurred "[i]n the spring of 2002…" ROA 3, Pages 294-295. Rodriguez did not acquire the Honda

Civic until over a year later. *See* ROA 3, page 916 (Exhibit 12, item 42).

b. Slaughter executed a sworn statement the assault occurred Spring of 2003. *See* ROA 3, pages 705-706.

i. Rodriguez did not acquire the Honda Civic until several months later.

ii. Slaughter did not document any reason for changing Spring 2002 to Spring 2003.

3. Jessica Hahn, J.S.'s friend at the time of the alleged assault testified the assault occurred no later than March/April of 2003.

a. Hahn and J.S. were friends but stopped talking or spending time together sometime prior to Hahn's senior prom. APP4, TTX 376:21-377:18. Hahn's senior prom occurred in March/April 2003. *Id.*

vi. Testimony regarding the J&R Roofing truck in 2008.

1. J.S. testified Rodriguez came to her house and parked outside in a black truck with a business logo associated with a business Rodriguez owned and managed, "J.R's. Roofing and Siding" displayed on it. APP4, TTX 332:4-333:24. *See Also*, Exhibit 2, at ROA 3, page 908.

2. J.S. did not specify a date or timeframe during which she saw the truck but Alexis Warren, f.k.a. Alexis Evans, testified she saw Rodriguez's truck parked outside J.S.'s apartment in 2008. The Truck had the logo "J.R.'s Roofing and Siding" displayed upon it. APP4, TTX 381:20-381:23, 387:16-389:1.
3. The following facts were available to trial counsel but not presented to the Court or Jury.
    a. Rodriguez did not purchase the truck in question until 2009, and did not affix the business name logo, "J.R.'s Roofing and Siding" upon the truck until 2011.
        i. Rodriguez submitted incorporation documents from the Montana Secretary of State indicating "J.R.'s Roofing and Siding" did not exist until August 15, 2011. He submitted invoices from Allegra Printing, demonstrating the logos were not purchased until 2011. ROA 3, pages 441-444; *See also,* ROA 3, page 25, ¶¶47-55.
    b. Trial Counsel admits "…[t]he defense strategy was to illuminate the fact Evans never saw Rodriguez during this interaction and nothing criminal had occurred. The vehicle…was a company truck, which could have been driven

by any employee…it was a construction company truck parked next to a hardware store." ROA 16, 13:9-13:19.

c. These objectives would have been achieved if Trial Counsel established the logos and the company did not exist until 2011, and any allegation they were on a truck in 2008 was incredible and unworthy of belief.

vii. State's characterization of the homelife and lifestyle of J.S.

1. The State characterized J.S.'s homelife/lifestyle as "…very strict religious upbringing…" APP4, TTX 301:3.
2. The State characterized J.S.'s parents as "…strict religious parents…" who might be angry if she went out with or got a ride home non-church member friends/boys. APP4, TTX 303:2-303:6. This was argued as an explanation for J.S.'s failure to disclose her allegations earlier. *Id.*
3. J.S. testified she was "…raised in a really religious household. It was very, very strict. We didn't celebrate any of the holidays. We didn't really talk to anybody that was outside the church. It was a really super strict environment. Everything was structured." APP4, TTX 316:19-316:22.

4. The Court acknowledged "I have heard in [J.S.'s] testimony was testimony about an extraordinarily religious household in which she was raised which related to her unwillingness to report this to her family." APP5, TTX 592:14-592:17.
5. The State argued in closing "[J.S.] didn't report this rape 14 years ago. Why?…her parents were strict, they were very religious." APP5, TTX 676:14-676:16.
6. The following facts were available to trial counsel but not introduced to rebut the characterization of the State.
    a. J.S.'s mother was cheating on her stepdad and had an affair with one of J.S.'s boyfriends while he was still with J.S. ROA 3, page 285.
    b. J.S.'s father was an intravenous drug user. ROA 3 page 288.

viii. Rodriguez's need and desire to testify.

1. Trial counsel stated in opening "…the only…true eyewitnesses that really know what happened are J.R. and [J.S.] so this does truly boil down to the classical he said-she said dilemma." APP4, TTX 308:22-308:25. Trial counsels' theme was recurrent throughout trial and in closing: "…like I said from the beginning,

…This truly does come down to he said-she said…" APP5, TTX 712:-712:7.

2. Trial counsel stated in their affidavit:
   a. "…the jury believed J.S. over Rodriguez." ROA 16, 9:12.
   b. "As is common for these types of allegations, there were only two people with first-hand knowledge of the incident: Juan Rodriguez and J.S." ROA 16, 9:-9:6.
3. Rodriguez offered in his affidavit, "I told [trial counsel] from the [beginning] of the case that I wanted to testify…in my own defense…[trial counsel] told me that it was not my decision and that it was up to them if I got on the stand and testified or not because they were my trial counsel…I wanted to get on the stand and testify…[trial counsel] knew this and deliberately prevented me from doing so." ROA 3, page 27, ¶¶105-110.
4. Having impliedly promised Rodriguez's testimony to the jury, characterizing the case as "he said-she said," trial counsel did not present his testimony, yet they state the jury believed J.S. over Rodriguez.
5. Rodriguez wanted and needed, to testify. Had he done so, he would have stated:

a. He did not commit the crime. ROA 3, page 12, Ground 15;

b. He did not speak with Paliga or confess any crime or make any admission. He did not speak with him at all. *Id.*;

c. He did not know J.S. nor "hang out" with her. *Id.*

d. He did not enter the State of Montana until sometime after March/April of 2003. ROA 3, page 25, ¶¶64-71;

e. He formed the legal entity, J.R.'s Roofing and Siding in 2011 and purchased business logos from Allegra for his truck in 2011. His truck could not have been parked anywhere in 2008 because he did not own the truck then and did not apply any logos to it until 2011. ROA 3, page 25 ¶¶47-55;

f. He did not purchase the Honda Civic until after he met his wife. ROA 3, page 12, Grounds 15-16; *See also* ROA, 3, pages 23-25, ¶¶'s 14-16, 66-71. He was blessed with a beautiful wife, they did not purchase the Honda Civic until long after the alleged assault occurred, and he did not socialize with teenage girls, nor would his wife permit him to do so. *Id.*;

g. He never went to the Flamingo. ROA 3, page 12, Ground 15.

ix. J.S.'s In-court identification of Rodriguez.

1. J.S. never identified Rodriguez prior to trial.
2. At trial, J.S. was asked, "…do you see Juan Rodriguez in the courtroom today?" APP4, TTX 343:6-343:7; Only then did she identify Rodriguez. APP4, TTX 343:11-343:16.
3. There was only one Hispanic male in the courtroom.
4. J.S. identified Rodriguez.
5. Trial Counsel made no objection to the identification procedure.

x. Expert medical testimony by Det. Slaughter.

1. Slaughter was the primary investigator. He had no medical education, training, knowledge or experience as a medical expert.
2. Slaughter testified evidence of trauma in the vagina or anus was "very unlikely" because "[b]oth the anus and the vagina of a human being are very, very quick-recovering tissues…so to say that there would been [sic] any physical evidence in this case, I would say from my opinion would be highly unlikely." APP5, TTX 640:1-640:9.
3. Trial counsel did not object to this testimony.

xi. Vouching for Robert Paliga.

1. Paliga testified he was in jail the same time as Rodriguez and Rodriguez confessed his guilt to Paliga, a total stranger. APP4, TTX 477:20-478:2, 481:14. Rodriguez kept his silence at all other times.
2. The State characterized Paliga's motivation to testify as "[Paliga] needed to this as a good citizen;" APP4, TTX 485:1-485:3. They did so again in closing. APP5, TTX 695:17-695:20.
3. Trial counsel did not confront Paliga with evidence he was not a good citizen or otherwise rebut the State's characterization of his motive and interest.

xii. Evidence of Unrelated Criminal Charges against Rodriguez.

1. During Paliga's direct testimony, he stated Rodriguez had been charged with "several prior felonies" APP4, TTX 482:8.
2. Trial counsel objected. The trial court "struck" the statement. APP4, TTX 482:10-482:22. Having done so, the court then immediately gave a M.R.Evid. 404(b), MCJI 1-120 instruction, APP4, TTX 483:14-484:1, in which it instructed the jury they could consider the evidence for a variety of purposes. The State admitted the evidence was not proper. APP4, TTX 494:18-495:5.

i. Both the state and district court appeared to be under the mistaken impression the court had instructed the jury, "…disregard that testimony from the witness concerning statements about prior prosecutions…" APP5, TTX 566:2-566:13.

1. The Court gave no such instruction.
2. Trial counsel did not correct this misunderstanding or request a proper curative instruction.

3. Both the district court and State referred to the evidence as "…404(b) prohibited information." APP4, TTX 495:5.

xiii. Juror Underwood.

1. Trial counsel questioned a potential juror, Juror Underwood.
2. Underwood's ex-wife was unfortunately raped when she was 15 years old. APP3, TTX 164:24-164:25. "…it was covered up, seemed like she wasn't believed…" APP3, TTX 165:13-165:14.
3. Underwood's current girlfriend was also raped. APP3, TTX 165:1-165:2.
4. Underwood, a psychologist, was "often the first point of contact for people to report they have been sexually assaulted and/or raped." APP3, TTX 165:4-165:7; 167:2-167:4.

a. These contacts/disclosures occurred on average weekly. APP3, TTX 165:6-165:7; 167:25-168:3.

5. In this capacity, Underwood stated he was predisposed to believe the accuser of sexual assault or rape. APP3, TTX 168:7-168:9.
6. Trial counsel did not move to exclude Underwood for cause, even when prompted by the Court,[3] and did not exercise a peremptory challenge against him.
7. Underwood became the foreperson.
8. Trial Counsel alleged "[t]his issue was never raised at trial…Mr. Underwood explained that he could be fair and impartial." ROA 16, 17:14-17:16.

xiv. Rodriguez's lack of communication with trial counsel.

1. Rodriguez alleges he never met with trial counsel Mittelstadt to prepare for trial. ROA 3, page 15, Ground 27.
   a. He met with her on only one occasion, approximately six weeks prior to trial. ROA 3, page 26, ¶¶92-94;
   b. Mittelstadt alleges she met with Rodriguez in person but does not dispute it was only on one occasion. ROA 16, 9:14-9:16.

[3] APP3, TTX 169:13.

c. Mittelstadt alleges she/Owens or both spoke on the phone with Rodriguez on several occasions. *Id. See also, Id.,* page 4, note 1.

2. Rodriguez alleges he met with trial counsel Owens on one occasion also, Sunday night prior to trial. ROA 3, page 27, ¶¶110-117.

   a. Owens does not address the frequency or length of client meetings with Rodriguez but alleges they did occur. ROA 16, 9:21-10:8.

xv. Rodriguez's Request for Hearing, Motion to Compel and for other "just and equitable" relief.

1. Rodriguez requested an evidentiary hearing in his Petition. ROA 3, page 22.

2. The State indicated reviewing affidavits of Rodriguez's trial and appellate counsel were necessary to formulate its response to the Petition. State's Motion to Continue Deadline, ROA 8, page 1. The Court agreed. *See* Order, ROA 9.

3. In anticipation of unknown allegations by prior counsel, Rodriguez attempted to supplement the record, but because of his indigency[4], he was unable to afford to make copies of same.
4. Rodriguez filed a Motion. ROA 12.
    a. Rodriguez requested, *inter alia*,"…any other relief the Court deems just and equitable." *Id.,* page 2.
    b. Rodriguez identified 44 additional exhibits he desired to submit for the court's consideration. *Id.*, pages 4-5.
        i. These exhibits were collectively 388 pages long, and copies for each entity would have totaled 1,164 pages. At the rate he was allowed to make copies by the Montana State Prison and/or Department of Corrections, Rodriguez needed 40 months to produce adequate copies. *Id.,* page 3.
    c. Rodriguez also requested the Court order MSP and/or DOC make available free copying for the 388 pages of exhibits (legal copies) he wished to file. *Id.*

[4] Both this Court and the district court below found Rodriguez to be without sufficient funds to pay a filing fee. Order of this Court, 11/16/23 and ROA 2.

d. The court denied the Motion on the grounds Rodriguez did not serve MSP/DOC with his Motion even though they were not parties to the action. Order, ROA 14.

e. The court did not consider conducting an evidentiary hearing where Rodriguez could have presented his evidence/exhibits, nor any other alternative relief.

IV. Statement of the Standard of Review.

Pursuant to M.R.App.P. 12(1)(e) Rodriguez states the standard of review for each issue presented.

A. Issue 1. Standard of Review applicable to whether the district court had jurisdiction to issue the Amended Order (ROA 21).

"Whether a court lacks subject matter jurisdiction to adjudicate a controversy is a question of law reviewed *de novo* for correctness." *Gottlob v. DesRosier*, 2020 MT 210, ¶5, 410 Mont. 50, 470 P.3d 188 (citations omitted).

B. Issue 2. Standard of Review applicable to whether Rodriguez timely filed his Petition for Postconviction Relief by delivering it to the Clerk prior to the filing deadline.

This Court "'…review[s] a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct.'" *Main v. State*, 2024 MT

215, ¶14, 418 Mont. 159, 556 P.3d 940 *quoting Marble v. State*, 2015 MT 242, ¶13, 380 Mont. 366, 355 P.3d 742. "'Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court has misapprehended the effect of the evidence, or [this Court's] review of the record convinces us that a mistake has been made.'" *Id. quoting State v. Warclub*, 2005 MT 149, ¶23, 327 Mont. 352, 114 P.3d 254.

C. Issue 3. Standard of Review applicable to whether Rodriguez was denied the effective assistance of counsel at trial.

This Court reviews ineffective assistance claims *de novo*. "Ineffective assistance of counsel claims present mixed questions of law and fact that are reviewed de novo." *Stock v. State*, 2014 MT 46, ¶9, 374 Mont. 80, 318 P.3d 1053, *citing Miller v. State*, 2012 MT 131, ¶9, 365 Mont. 264, 280 P.3d 272.

"To prevail on an IAC claim, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense." *Rose v. State*, 2013 MT 161, ¶15, 370 Mont. 398, 304 P.3d 387 (citations omitted).

D. Issue 4. Standard of Review applicable to whether Rodriguez was denied the effective assistance of counsel on appeal.

The same standard applies to claims against both trial and appellate counsel, *Rose, supra*, but in the context of a claim against appellate counsel, this court has

characterized the standard as "'…whether there is a reasonable probability that, but for counsel's unprofessional errors, the petitioner would have prevailed on appeal.'" *DuBray v. State*, 2008 MT 121, ¶31, 342 Mont. 520, 182 P.3d 753, (citations omitted)[5].

E. Issue 5. Standard of Review applicable to whether the district court abused its discretion when it declined to grant an evidentiary hearing or other relief providing Rodriguez an adequate, effective and meaningful opportunity to present his evidence.

This Court "…review[s] discretionary rulings, including whether to hold an evidentiary hearing, in a postconviction proceeding for abuse of discretion." *Id.* citing *Marble*, ¶13.

[5] *Marble v. State*, 2015 MT 242, ¶31, 380 Mont. 366, 355 P.3d 742 overruled *Dubray* to the extent it employed a different standard than set forth in 46-21-102(2), MCA when resolving a claim based on new evidence. *Henderson v. State*, 2024 MT 253, ¶50, 558 P.3d 749, overruled *Marble*, ¶32-39. Rodriguez submits neither *Marble* nor *Henderson* affects the proposition for which *Dubray* is cited above.

V. Argument.

Pursuant to M.R.App.P. 12(1)(f) and (g), Rodriguez makes his Argument and precedes same with a summary of the argument.

1. Summary of Argument.

The district court was without jurisdiction to issue the amended order denying petition for postconviction relief because it issued the amended order after a timely and proper notice of appeal was filed.

Rodriguez's Petition for Postconviction Relief was timely filed because he delivered it to the custody of the clerk of district court before the time for filing had expired. The date of delivery was conclusively established, and Appellant/Respondent admitted same. The clerk's delay in stamping the documents, "filed," is not relevant because Montana Law provides the relevant event is the date of delivery to the clerk's custody.

Trial counsel's performance was deficient for many reasons. The errors of trial counsel, separately or combined, prejudiced Rodriguez such that there is a reasonable probability that, but for the errors, the result of the proceeding would have been different.

Appellate counsel's performance was only deficient if this Court concludes one or more claims of ineffective assistance were record-based and necessary to bring on direct appeal. Rodriguez contends all claims of ineffective assistance are

non-record based and therefore proper for postconviction relief, but to the extent he is incorrect, appellate counsel's failure to raise these issues creates a reasonable probability Rodriguez would have prevailed on appeal.

The district court abused its discretion when it denied Rodriguez an evidentiary hearing. Rodriguez filed a Motion in which he alleged he was without sufficient funds to make copies of specified documents he needed to prosecute his claims. ROA 12, pages 2-6. Rodriguez's Stated and Federal rights to the Courts entitled him to submit these documents to the court to substantiate his claims. Rodriguez's request for relief in his motion included any relief the court deemed "just and equitable." An evidentiary hearing was a "just and equitable remedy" which would have permitted Rodriguez to submit his documents and evidence to answer the defenses of the State and claims of trial counsel.

2. Argument.

A. Issue 1. The District Court did not have Jurisdiction to Issue the Amended Order (ROA 21).

i. Rodriguez Timely Filed a Notice of Appeal.

The district court issued an Order Denying Petition for Postconviction Relief, (ROA 17), August 23, 2023. M.R.Civ.P. 59(e) authorizes a litigant to file a Motion to alter or amend a judgment within 28 days after the entry of judgment. Rodriguez filed his motion to alter or amend a judgment, September 7, 2023. ROA 18. He filed

it less than 28 days after the entry of the order at ROA 17. M.R.Civ.P. 59(f) provides a motion made pursuant to M.R.Civ.P. 59(e) is deemed denied if no ruling on same is issued within sixty days from the filing of the motion and if no order extending the time within which to rule is issued. Neither such ruling nor order was issued by the district court within sixty days from the filing of the motion, so it was deemed denied on November 6, 2023.

"The Montana post-conviction relief procedure is civil in nature…" *Coleman v. State*, 194 Mont. 428, 433, 633 P.2d 624, 627 (1981); *See Also, Henderson v. State*, 2024 MT 253, note 11, 558 P.3d 749. M.R.App.P. 4(5)(a)(i) provides in civil cases, for non-governmental entities, "…the notice of appeal shall be filed…within 30 days from the date of entry of the judgment or order from which the appeal is taken…" M.R.App.P. 4(5)(a)(v) further provides "[i]f a timely motion pursuant to the Montana Rules of Civil Procedure is filed in the district court…(C) [u]nder rule 59 to alter or amend a judgment…the time for appeal…shall run from the entry of the order granting or denying any such motion, or…from the time such motion is deemed denied at the expiration of the 60-day period established by M.R.Civ.P. 59(f)…" Rodriguez's thirty days to appeal began November 6, 2023, he timely filed his notice of appeal with this court November 16, 2023, less than 30 days later. This Court docketed the appeal that day.

ii. The District Court Lacked Jurisdiction to Enter the Amended Order (ROA 21) Except to Acknowledge the Date of Filing.

"When a notice of appeal has been filed, jurisdiction passes from the District Court and vests in the Supreme Court." *Powers Mfg. Co. v. Leon Jacobs Enterprises* (1985), 216 Mont. 407, 411-412, 701 P.2d 1377, 1380. M.R.App.P. 4(5)(a)(v)(E) provides for the retention of jurisdiction by a district court in the event a notice of appeal is filed prematurely, but not if one is timely filed. "It is familiar law that an appeal to this court divests the district court of jurisdiction over the order or judgment from which the appeal is taken. Thereafter the lower court is without jurisdiction to proceed upon any matter embraced therein." *In re Estate of Hansen,* (1955) 129 Mont. 261, 264, 284 P.2d 1007, 1009 (citations omitted).

One exception to this rule is that "[t]he district court retains the power to correct clerical errors even after the appeal is initiated." *In re Marriage of Becker,* (1990) 244 Mont. 469, 476, 798 P.2d 124, 129, citing *Powers Mfg. Co.* at 216 Mont. 407, 701 P.2d 1377. The district court's re-calculation of the "filing" date of Rodriguez's Petition was a clerical error correction, and the district court had jurisdiction to correct the error and acknowledge the Petition was filed on the day it was placed in the custody of the clerk, July 18, 2022. *See* ROA 21, pages 2, 5.

Regarding all other findings/conclusions in the Amended Order, ROA 21, pages 2-7, "…[T]he filing of the notice of appeal divested the District Court of

jurisdiction over the order and judgment from which the appeal was taken." *Bartmess v. Bartmess,* (1981) 193 Mont. 200, 202, 631 P.2d 299, 300, *citing McCormick v. McCormick* (1975), 168 Mont. 136, 541 P.2d 765. This Court noted in its Order, March 20, 2024, "Rodriguez appeals an August 23, 2023 Order Denying Petition for Post-Conviction Relief…" This Order, ROA 17, is the subject of this appeal, and not the Amended Order, ROA 21.

B. Issue 2. Rodriguez Timely Filed his Petition for Postconviction Relief.

In the event this Court disagrees the district court was correcting a "clerical error" in ROA 21. Rodriguez submits the district court erred in concluding the Petition was untimely in the original Order, ROA 17.

The district court found Rodriguez's Petition was due on or before July 19, 2022. ROA 17, page 5. This finding was based on the date the Petition was stamped "filed" by the clerk. *See* ROA 3, page 1. The district court mistakenly concluded the date of filing as the date the clerk physically stamped the petition "filed," July 26, 2022. ROA 17, page 5. In fact, the date of filing is the date the Petition was received into the clerk's custody, or July 18, 2022, (*See* Section III(1)(A)(vii)-(ix) above.

M.R.Civ.P. 5(d)(2) provides "A paper is filed by delivering it: (A) to the clerk;…" "…[F]iling by mail is not complete until the pleading is placed in the custody of the clerk of court." *Fielder v. Bd. Of County Comm'rs*, 2007 MT 118,

¶15, 337 Mont. 256, 162 P.3d 67, *citing Schaffer v. Champion Home Builders Co*., 229 Mont. 533, 536, 747 P.2d 872, 874 (1987). "…[T]he 'filed' stamp is not conclusive in deciding that [defendant's] motion had been timely filed…a document is deemed filed on the date that the clerk receives the document." *Fielder*, ¶17, *quoting United States v. Nguyen*, 997 F.Supp 1281, 1288 (C.D.Cal. 1998). "To construe the rule otherwise could lead to jurisdiction turning on such fortuities as whether the deputy clerk left for dinner a half hour early, or dashed to the hospital because her child became ill." *Fielder* at ¶16, *citing Sheviakov v. I.N.S.,* 237 F.3d 1144, 1148 (9th Cir. 2001).

"'If a judge…is not available to approve a request for a waiver of fees prior to filing a pleading, the pleading must be filed subject to subsequent approval.'" *Nava v. State*, 2011 MT 77, ¶9, 360 Mont. 96, 255 P.3d 53*, quoting* 25-10-404(2), MCA. The district court below subsequently approved the filing. *See* Order at ROA 2. The Petition was "filed" upon receipt by the clerk and should have been stamped filed and docketed *pending* approval by the district court, as required by Montana Statute, and not *after* approval.

In *Shaffer*, this Court upheld dismissal because the Appellant failed to present any evidence his complaint was in the clerk's custody prior to the expiration of the statute of limitations. *Shaffer*, 229 Mont. at 536.; *See Also, Fielder,* ¶15. Conversely, in *Fielder*, "[t]he undisputed evidence revealed that Fielder's complaint arrived at

the Clerk of the District Court's office [on or before the deadline] and was therefore timely filed." *Fielder,* ¶18. Similarly, the undisputed evidence in the district court was Rodriguez delivered his Petition, ROA 3, pages 5-22, and all other supporting documents, on or before July 18, 2022. *See* ROA 18, pages 1-2[6]. Rodriguez placed all the documents making up what are ROA 1 and 3 in a single mail-piece. *Id*. This single mail-piece was deposited in the U.S. Mail on July 13, 2022. *Id.* pages 1 and 4, Exhibit A (DOC Special Mailing Request), and Exhibit B (USPS Tracking Information). *Id*. The undisputed evidence below was Rodriguez delivered his Petition to the custody of the Cascade County Clerk at 9:43 a.m. on July 18, 2022. *See* Section III(1)(A)(vii)-(ix) above. The State conceded this fact below. ROA 20, page 3. Rodriguez's Petition, and associated documents, were timely filed.

C. Issue 3. Rodriguez was Denied Effective Assistance of Counsel at Trial.

i. Rules applicable to the interpretation of the grounds asserted in the Petition.

Rodriguez was *pro se* in the district court. Documents filed *pro se* should be liberally construed. "[A] *pro se* complaint 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers…'" *Estelle v.*

[6] The factual statements are supported by a declaration pursuant to 1-6-105, MCA, on page 4.

Gamble, 429 U.S. 97, 106 (1976) *quoting Haines v. Kerner*, 404 U.S. 519, 520-521 (1972). This Court grants wider latitude to *pro se* litigants so long as, it does not grant latitude "so wide as to prejudice the other party." *Neil Consultants, Inc., v. Linderman*, 2006 MT 80, ¶8, 331 Mont. 514, 134 P.3d 43.

ii. Claims appropriate for review in a postconviction petition.

Record-based ineffective claims must be reviewed on direct appeal and non-record-based claims must be raised in a post-conviction petition. "A claim is record-based if 'the record fully explains *why* counsel took the particular course of action.'" *State v. Herman*, 2008 MT 187, ¶15, 343 Mont. 494, 188 P.3d 978 *quoting State v. White*, 2001 MT 149, ¶20, 306 Mont. 58, 30 P.3d 340 (emphasis in the original). If a claim of ineffective assistance is not record-based, rather based on matters outside the record on appeal, it must be raised in a postconviction proceeding where the petitioner can more fully develop the record. *See Herman*, at ¶15, *citing State v. Kougl*, 2004 MT 243, ¶14, 323 Mont. 6, 97 P.3d 1095. "[W]here ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal. *Hagen v. State*, 1999 MT 8, ¶12, 293 Mont. 60, 973 P.2d 233. Any claim "which 'could have been raised on direct appeal'" is barred. *Id.,* ¶13, *quoting Beach v. Day* (1996), 275 Mont. 370, 373, 913 P.2d 622, 624.

A claim which, by its nature, can never be raised on direct appeal, and which is therefore not barred by the doctrine of *res judicata* or 46-21-105(2), MCA, is

ineffective assistance of appellate counsel. *See Hagen* at ¶39 and ¶42. *See Also*, *Miller v. State*, 2012 MT 131, ¶11, 365 Mont. 264, 280 P.3d 272. To the extent any claim against trial counsel is record-based, Rodriguez raises it in Issue 4 below, as a claim of ineffectiveness of appellate counsel.

iii. Considerations applicable to claims of ineffective assistance.

Regarding claims of ineffective assistance against both trial and appellate counsel, "[t]he concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' But the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.' *Ibid*." *Weaver v. Massachusetts*, 582 U.S. 286, 300, (2017) *quoting Strickland v. Washington,* 466 U.S. 668, 696 (1984).

Rodriguez asserts many claims of ineffective assistance based on omissions or failures to act by trial counsel. *White* held "counsel's failure to adequately investigate, or failure to prepare a defense, or failure to familiarize him or herself with critical areas of the applicable law..." are usually a non-record-based area of representation. *White,* ¶18, *citing Hagen,* ¶21. Similarly, "…[A] claim based on an

omission which does not appear of record could not be raised on direct appeal and properly would be brought in a postconviction proceeding." *Hagen,* ¶21.

Rodriguez also asserts cumulative errors and their effects and deficiencies of counsel amount to prejudice and, therefore, ineffective assistance. *See* Ground 28, ROA 3, page 15 (trial counsel) and Ground 55, ROA 3, page 20 (appellate counsel). "Montana acknowledges the 'cumulative error doctrine.' This refers to the accumulation of errors which prejudice a defendant's right to a fair trial. *State v. McKenzie* (1978), 177 Mont. 280, 581 P.2d 1205." *State v. Grant*, 221 Mont. 122, 137, 717 P.2d 562, 572 (1986). "Cumulative error can serve as the basis for reversal, even when individual errors alone would not serve as a sufficient basis for reversal." *Kills on Top v. State,* 279 Mont. 384, 392, 928 P.2d 182, 187 (1996) *citing Grant, supra*, and *State v. Close,* 191 Mont. 229, 245, 623 P.2d 940 (1981). Similarly, "[w]hen we examine whether trial counsel gave effective assistance, we examine all aspects of the counsel's performance at different stages, from pretrial proceedings through trial and sentencing...Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance…They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003)(citations omitted).

This court should analyze the claims asserted by Rodriguez both separately and together to determine whether to reverse or affirm the district court below.

iv. District Court findings regarding claims of ineffective assistance.

The district court acknowledged Rodriguez made claims of ineffective assistance of trial and appellate counsel. ROA 17 It reviewed the Affidavit of Trial Counsel, Mittelstadt/Owens, ROA 16, as well as relied on its observations of counsel during trial. ROA 17, page 6. With no findings or explanation, the district court concluded trial counsels' representation was not deficient. *Id*.

1. Trial Counsel was ineffective because they failed to effectively confront the witnesses J.S. and Maxwell.

Trial counsel's confrontation of the State's primary witness and alleged victim, J.S. and her therapist, Ladonna Maxwell, was deficient. *See* ROA 3, pages 8, 9, 13, Grounds 2, 3 (J.S.) and 19 (Maxwell). These claims alleged inadequate investigation and/or confrontation of the witnesses which, if conducted, would have discredited J.S. Trial counsel addressed these claims in their affidavit: "J.S. was asked questions about her memory of the event. Trial Trans., 343-362."[7] ROA 16,

[7] Trial Counsel referenced the entire cross examination of J.S. The cited portion evidences no challenge to J.S.'s memory.

10:14-10:16. Regarding Maxwell, trial counsel stated "…we investigated and determined these issues would not be effective arguments." ROA 16, 16:8-16:11.

Rodriguez's claims were very specific and not refuted, or even addressed, by Trial Counsel. Rodriguez submitted documents which were not part of the record at the time of direct appeal and thus his claims are non-record-based. Rodriguez submitted medical records that were in the possession of trial counsel because they were obtained by the State in discovery. ROA 3, pages 223, 248. These records, Maxwell's records, demonstrated (1) J.S. made inconsistent statements regarding the nature and extent of the assault (ROA 3, pages 249-291); (2) J.S. experienced "somatization" (*Id.* page 262); (3) J.S. experienced memory loss, or "…find herself in places and did not know how she got there." (*Id.* page 264); (4) J.S. experienced pseudo or false seizures and similar psychosomatic disorders, *(Id.,* pages 276-279, 282); (5) J.S. experienced erratic and attention seeking behavior (driving car into fixed obstacle to attract attention of police), (*Id.* page 285); and (6) J.S. experienced a variety of psychological problems, disorders and diagnosis for which she took, or was taking, at both the time of disclosure and time of trial, various medications which could have affected her cognitive function, ability to recall events, and/or to testify truthfully. ROA 3, pages 222-236, 249-291.

Rodriguez identified an additional Maxwell record indicating J.S.'s memory loss issues were so severe she could not recall her own name. ROA 3, page 9 (Ground

3), page 26, ¶82, and page 223, ¶8. Rodriguez alleged this record was in discovery, and the claim was not rebutted or contested. In addition, J.S. alleged she disclosed the fact of the assault to another provider Hendrick, but trial counsel did not confront Slaughter, or subpoena Hendrick, to demonstrate this assertion was untrue. ROA 3, page 237.

The State did not address these specific assertions, and while Trial Counsel did not specifically address them either, they did admit that challenging J.S.'s memory was their strategy. ROA 16, 10:14-10:16, 10:22-10:24. Having chosen this strategy, they should have implemented it effectively with documents and information available to them. They did not confront J.S. with her inconsistent statements, nor confront J.S. or Maxell about J.S.'s somatization, memory loss issues, pseudoseizures or psychosomatic disorders, attention seeking behavior, or the medications she was taking and why, or the effects they had on her, or inaccurate statements J.S. made other disclosures to other providers.

Trial Counsel did not seek to demonstrate the allegation of abuse was first disclosed twelve years after the alleged event, and the disclosure occurred at the same time as J.S. was complaining of a variety of perceived, but non-existent, psychosomatic and somatic complaints. Given the questions trial counsel did ask, and their alleged strategy, this was a constitutionally deficient strategy if a strategy at all. Trial counsel do not acknowledge the existence of these documents, nor their

knowledge regarding the content or reason for not confronting J.S. and Maxell about them. J.S.'s credibility was the exclusive foundation for the charge upon which Rodriguez was convicted.

Rodriguez was prejudiced by trial counsels' failure to adequately impeach J.S.'s credibility with the information in their possession at the time of trial. Trial counsel states "[J.S.] adamantly testified that she clearly and distinctly remembered Rodriguez raping her." ROA 16, 10:15-10:17. Competent counsel would have countered such allegations with evidence and/or testimony, J.S. sometimes imagined facts and events which were real to her, but which, objectively, are demonstrated not to exist. For example, (1) she had "…imagined reactions to medications…" (ROA 3, page 249); (2) "…[J.S.] reads the package insert and says that she has that illness…" (ROA 3, page 261); (3) "[Maxwell] did finally get her to agree she has multiple somatization. She reads the brochures and then has those side effects." (ROA 3, page 262); (4) "…[J.S.] continues to have what we call pseudo seizures or seizure type activity without any evidence of any epileptic changes on the EEG…" (ROA 3, page 276).

Not only was trial counsels' representation substandard in regard to the above, the State characterized Maxwell's treatment of J.S. as "routine" medical care/issues like "annual pap smears." APP4, TTX 337:25-338:2 (pap smears); APP4, TTX 403:1, 419:15 (routine). The State opened the door to the nature and reason for J.S.'s

visits to Maxwell, and no reasonable defense attorney would have failed to correct this mischaracterization by demonstrating the real reasons why J.S. saw Maxwell and the non-routine nature of her visits by confronting J.S. and Maxwell on the facts/information illustrated in Maxwell's records (ROA 3 pages 225-236, 249-291). For example, Maxwell treated J.S. because (1) she had "imagined reactions to medications" (she was taking many[8]). (ROA 3, page 249); (2) she was taking so many Maxwell recommended medication management, but [J.S.] was "…resistant to those ideas…" (*Id.*); (3) she experienced extreme dizziness and an inability to move. (ROA 3, page 251); (4) she had trouble "coping," and was experiencing "severe anxiety." (ROA 3, page 255), as well as "anxiety disorder, panic disorder, some bipolar traits and severe depression" and likely required, a "psychiatric admission" (ROA 3, page 257); (5) There was no neurological explanation for what Maxwell diagnosed as pseudo seizures. (ROA 3, page 276); (6) Maxwell got J.S. to agree to "cognitive behavioral feedback…" (ROA 3, page 262); (7) her anxiety was so severe "she cannot take her medication." ROA 3, page 262); (8) she had considered, or was considering, suicide, (ROA 3, page 270, 288). Effective trial counsel would not have permitted the State to characterize Maxwell's treatment of

[8] J.S. at various times during Maxwell's treatment, was taking, Paxil, Prozac, Zoloft, Abilify, Seroquel, Clonazepam, Diazepam, Ativan, Skelaxin, Valium, Klonopin, Propranolol, Benzodiazepine, Xanax, Lorazepam, and Hydrocodone (ROA 3, 249-291).

J.S. as colds, runny noses and pap smears. Rodriguez's trial counsel's performance was deficient by permitting the State to do so.

In addition, the State, through J.S., characterized (and later argued), J.S.'s twelve year delay in disclosure was easily explained by her strict Christian upbringing and devout religious household environment. *See* Section III(1)(B)(vii) above. The State opened the door to these facts and effective counsel would have rebutted this theory and explanation by confronting J.S. with the facts surrounding the activities in her allegedly devout Christian home: her mother was cheating on her step dad as well as having an affair with J.S.'s boyfriend, (ROA 3, page 285), and her father was an intravenous drug user, (ROA 3 page 288). The household in which J.S. lived was not the oppressive religious environment the State made it out to be in an effort to explain the delay in disclosure. Effective trial counsel would have rebutted the evidence presented by the State, and Rodriguez was prejudiced by the deficient performance.

2. Trial Counsel was ineffective because they failed to effectively impeach allegations J.S. and Evans saw Rodriguez's truck parked outside J.S.'s Apartment in 2008.

Evans and J.S. testified they saw Rodriguez's truck parked outside J.S.'s apartment in 2008. The Truck had the logo "J.R.'s Roofing and Siding" prominently displayed upon it. *See* Section III(1)(B)(vi) above. In fact, Rodriguez did not

purchase the truck in question until 2009, and did not affix the business name logo, "J.R.'s Roofing and Siding" upon the truck until 2011. Rodriguez submitted incorporation documents from the Secretary of State indicating "J.R.'s Roofing and Siding" did not exist until August 15, 2011, and invoices from Allegra Printing demonstrating the logos were not purchased until 2011. ROA 3, pages 441-444.

Rodriguez was prejudiced by trial counsels' failure to adequately prepare and impeach Evans' and J.S.'s credibility with information in their possession at the time of trial. If J.S. and/or Evans were untruthful in one or more aspects of their testimony, MCJI 1-103, (ROA 3, page 835) given at APP5, TTX 667:4-668:22, required the jury to reject said testimony and view all other testimony with distrust.

3. Trial Counsel was ineffective because they failed to confront J.S. regarding the date she alleged the assault occurred or establish the date the Honda Civic was purchased, which demonstrated the impossibility of J.S.'s allegations.

In Grounds 16 and 37, (ROA 3 pages 12, 17), Rodriguez claimed trial counsel was ineffective for failing to establish Rodriguez did not purchase the Honda Civic until well after the date on which J.S. alleged she was assaulted. Trial counsel stated "…the State provided evidence that the Honda Civic was registered to Rodriguez prior to the time of the allegation." ROA 16, 15:17-15:19. This assertion is

misleading and demonstrates trial counsels' ignorance regarding the significance of evidence in their possession, but not introduced, at the time of trial.

The State established, with Exhibit 12, (ROA 3, page 916), the date Rodriguez purchased and registered the Honda Civic in question was June 27, 2003. J.S. also asserted, unchallenged, that she could not recall the exact, or approximate, date the assault occurred, but it was, conveniently, sometime after June 27, 2003. Effective trial counsel would have impeached J.S. and established J.S. had stated, on repeated prior occasions, the alleged rape occurred prior to June 27, 2003.

J.S. told Det. Slaughter, "…in an audio and video recorded statement…" the assault occurred "[i]n the spring of 2002…" ROA 3, pages 294-295. Rodriguez did not acquire the Honda Civic until over a year later. Slaughter later executed a sworn statement the assault occurred Spring of 2003, which was presented to the district court, that the assault occurred in the Spring of 2003. ROA 3, pages 705-706. Rodriguez also sought to introduce additional inconsistent statements of J.S., in the possession of trial counsel at the time of trial, but which also went unrevealed to the jury. ROA 12, page 4, ¶¶'s 5, 6. Hahn, J.S.'s friend, testified the assault occurred sometime prior to March/April of 2003. *See* Section III(B)(v) above.

At trial, the State changed the date of the assault to after June 27, 2003, and trial counsel failed to impeach J.S. or confront J.S. and Slaughter with their earlier assertions the assault occurred no later than April of 2003. Trial counsel did not, and

still do not, appreciate the significance of these statements and facts. They did not make a strategic choice to omit this information from trial and no reasonable and effective defense attorney would have done so.

4. A structural defect exists because Rodriguez was not permitted to testify in his own behalf and Trial Counsel was ineffective because they promised the jury a "he said-she said" defense but did not present the testimony of Rodriguez.

Rodriguez swears "I told [trial counsel] from the beginning of the case that I wanted to testify in. my own defense…[trial counsel] told me that it was not my decision and that it was up to them if I got on the stand and testified or not because they were my trial counsel…I wanted to get on the stand and testify and [trial counsel] knew this and deliberately prevented me from doing so." ROA 3, page 27, ¶¶105-110. The U.S. Supreme Court has recognized "…the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty…" *Weaver v. Massachusetts,* 582 U.S. 286, 295 (2017). Specifically, U.S. Supreme Court held, "…the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to…testify in his or her own behalf…" *Jones v. Barnes*, 463 U.S. 745, 751 (1983). It was the sole and exclusive province of Rodriguez to determine whether he would testify and he established below that he wanted to testify.

Rodriguez submits defendant's right to testify cannot be assessed for harmlessness, and it is therefore "structural." *See McCoy v. Louisiana*, 584 U.S. 414, 427 (2018). *McCoy* explained "[a]n error may be ranked structural…'if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.' *Weaver,* 582 U.S. at 295, (citing *Faretta [v. California],* 422 U.S. [806] at 834 [(1975)]). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. [*Weaver*] 582 U.S. at 295-296 (additional citations omitted)." *McCoy, supra*. Structural errors are "…fundamental constitutional errors that 'defy analysis by 'harmless error' standards.'" *Neder v. United States*, 527 U.S. 1, 8 (1999), *quoting Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Structural errors "…are so intrinsically harmful as to require automatic reversal (i.e. 'affect substantial rights') without regard to their effect on the outcome." *Neder, supra quoting Chapman v. California*, 386 U.S. 18, 23 (1967). Rodriguez submits denial of his right to testify is such an error. It is a right of such character that "…the right

is either respected or denied; it's deprivation cannot be harmless." *See McCoy,* 584 U.S. at 427 *quoting McKaskle v. Wiggins,* 465 U.S. 168, 177, n. 8 (1984).

Trial counsel did not specifically deny Rodriguez's claim he was not allowed to testify. Trial counsel stated "…many of the issues Rodriguez wanted us to address in trial were either unfounded or completely inaccurate. When discussing these contradictions we found with him, he would [respond unproductively]." ROA 16, 6:6-6:8. Trial counsel does not describe these "many issues" but Rodriguez identifies several above, all of which are both founded and accurate. He did not move to Great Falls until March/April 2002; did not purchase the Honda Civic in question until June 27, 2003, after the date which J.S. originally alleged the assault occurred; did not form his business or label any business vehicles until 2011, three years after J.S. and Evans alleged they saw these labeled vehicles outside J.S.'s apartment; and last but not least, Rodriguez would have denied committing the assault. *See* ROA 3, pages 23-34.

Trial Counsel stated "…we (including Rodriguez) agreed he should not testify..." ROA 16, 6:12-6:13. Rodriguez submits this contention by trial counsel is inadequate to refute his express assertion, he was denied his right to testify. Furthermore, Trial counsel does not speak at all to Rodriguez's claim of ineffective

assistance for failure to call him as a witness. Trial counsel stated in opening "…[a]nd the only true eyewitness or true eyewitnesses that really know what happened are J.R. and [J.S.] so this does truly boil down to the classical he said-she said dilemma." APP4, TTX 308:22-308:25. Trial counsel's theme was recurrent in the trial and stated in closing: "…and like I said from the beginning…This truly does come down to he said-she said…" APP5, TTX 712:4-712:7. Trial counsel maintain this theory post-conviction: "…the jury believed J.S. over Rodriguez." ROA 16, 9:12. In order to present their "he said-she said" defense, in order to give the jury an opportunity to believe Rodriguez over J.S., Rodriguez needed to testify. Adequate trial counsel, having promised a defense in which "…there were only two people with first-hand knowledge of the incident: [Rodriguez] and J.S." (*Id.* 9:4-9:6), would have presented the testimony of Rodriguez, who clearly wanted to testify.

A structural defect exists because Rodriguez was not allowed to testify in his own defense. Alternatively, trial counsel rendered deficient performance by asserting a "he said she said defense," and asking the jury to "believe" Rodriguez over J.S. and then failing to present his testimony.

5. Trial Counsel was ineffective for failing to object to J.S.'s in-court identification of Rodriguez as the alleged assailant.

Rodriguez submits Ground 26 of the Petition, (ROA 3 pages 14-15), construed liberally as required by *Estelle, Haines,* and *Linderman,* is most properly construed as a claim Trial Counsel was ineffective for failing to object to J.S.'s in-court identification of Rodriguez. APP 4, TTX 343:5-343:15.

In *City of Billings v. Nolan*, 2016 MT 266, 385 Mont. 190, 383 P.3d 219, a victim/witness made no pre-trial identification of the defendant but was allowed to attempt an in-court identification. *Nolan* at ¶18. "A defendant's constitutional right to due process bars the admission of evidence derived from suggestive identification procedures where there is a substantial likelihood of irreparable misidentification." *Id*., ¶19 (citations omitted). This Court applies "…a two-step process for determining whether evidence of an identification is admissible. First, we examine whether the identification procedure was impermissibly suggestive. Second, if the procedure was impermissibly suggestive, we must consider several factors for determining whether the identification is nevertheless reliable under the totality of the circumstances." *Id*. (citations omitted). *Nolan* concluded an in-court identification, without a prior pretrial identification, was impermissibly suggestive. *Id.*, ¶22. "A procedure is

unnecessarily suggestive if a positive identification is likely to result from factors other than the witness's own recollection of the crime." *Id.,* ¶20 (citations omitted). The in-court identification in *Nolan* was found to be suggestive because (1) Nolan was the only black person in the courtroom, *Id*., ¶21; (2) "there was little question that Nolan was the accused and the person the State and law enforcement suspected of committing the criminal offenses[,]" *Id*.; and (3) the Nolan defendant had never been previously identified by the victim. The *Nolan* Court held "…[t]the Second Circuit has found that when a defendant was the only black person in the courtroom, and was seated at the defense table, the in-court identification by [witnesses was] 'so clearly suggestive as to be impermissible….Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor.'" *Nolan*, ¶21 *quoting United States v. Archibald*, 734 F.2d 938, 941-943 (2d Cir. 1984).

The second prong of *Nolan* requires a determination the impermissibly suggestive identification, under a totality of the circumstances, gives rise to a "substantial likelihood of irreparable misidentification." *Nolan*, ¶¶19, 23. "*Biggers* sets forth five factors to be considered in evaluating the likelihood of

misidentification: (1) the opportunity for the witness to view the suspect defendant at the time of the crime; (2) the witness' degree of attention at the time; (3) the accuracy of the witness' prior description of the suspect defendant; (4) the level of certainty demonstrated by the witness at the time of identification; and (5) the length of time between the crime and the time of identification." *Nolan*, ¶23 *quoting Neil v. Biggers*, 409 U.S. 188, 199-200, (1972). These factors indicate a substantial likelihood of irreparable misidentification by J.S.

Fifteen years passed between the time of the alleged offense and the in-court identification, no level of certainty was expressed or inquired into, and there was no prior description of Rodriguez by J.S. Additionally, while J.S. had an opportunity to view the perpetrator, there was no evidence of what degree of attention, if any, J.S. employed at the time. Under a totality of the circumstances, there was a substantial likelihood of irreparable misidentification.

Trial counsel's purported reason for not objecting was "…we incorporated the identification issues as part of our defense. We determined that any courtroom identification issues were not accurate." ROA 16, page 17:1-18:3. Rodriguez submits this is no strategy at all, or alternatively, effective trial counsel would have

objected to and excluded any inadmissible in-court identification rather than embark on an effort to demonstrate it as inaccurate (which they did not do).

6. Trial Counsel was ineffective for failing to exercise a peremptory challenge against Juror Underwood.

In *State v. Chastain,* 285 Mont. 61, 947 P.2d 57 (1997), this court considered defense counsel's failure to challenge for cause or to exercise a peremptory challenge to a juror who had indicated strong feelings unfavorable to the defendant. *See State v. Vukasin*, 2003 MT 230, ¶41, 317 Mont. 204, 75 P.3d 1284 (describing *Chastain*). "'[W]here as here, defense counsel abandons his client's right to challenge a juror for no apparent reason, error must be attributed to the lawyer.'" *Id. quoting Chastain,* 285 Mont. at 65. *Vukasin* "overrule[d] *Chastain*'s holding that a claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record which is silent as to the lawyer's reasoning." *Vukasin*, ¶42. Rodriguez raises his claim on postconviction and submitted evidence regarding why defense counsel did not peremptorily challenge Juror Underwood.

Trial counsel expressed no strategic reason regarding *why* they declined to strike Underwood or why they struck the jurors they did. Trial counsel simply asserts, "Mr. Underwood explained he could be fair and impartial." ROA 16, 17:10-

17:16, ¶24. This is no strategy at all. It is clear, from the record, as in *Chastain*, Underwood "indicated strong feelings unfavorable to the Defendant" and trial counsel "abandon[ed] [their] client's right to challenge a juror for no apparent reason…" Underwood became the foreperson of the jury. ROA 3, page 841 (Verdict Form). Trial counsel, not Rodriguez, chose which jurors to challenge. ROA 3, pages 827-829 (Jury List). No other potential juror was more worthy of challenge and trial counsel does not assert otherwise. No reasonable and effective defense attorney would have failed to challenge Underwood and trial counsels' performance was deficient in failing to do so.

7. Trial counsel was ineffective for failing to object to the State's improper vouching of Paliga, or in the alternative, for failing to confront him.

The State argued Paliga provided his testimony not because of any bias or motive to obtain leniency in his own prosecution, but because he was a good citizen. Rodriguez submits this was improper vouching. This court held "it is reversible error for a prosecutor to comment directly on the credibility of witnesses." *State v. Hayden*, 2008 MT 274, ¶28, 345 Mont. 252, 190 P.3d 1091 (citations omitted). *Hayden* found plain error review, and reversal, was appropriate. Rodriguez argues

no reasonable defense attorney would have failed to object. To the extent the questions and argument of the State was not improper vouching as set forth in *Hayden*, trial counsel rendered deficient performance by not confronting Paliga with evidence of his lack of good citizenship. At no time during cross of Paliga, did trial counsel confront him about why he was in jail during his alleged meeting with Rodriguez, or take him through his instances of bad conduct that would cast doubt on the State's assertion of good citizenship. Such evidence would be properly admissible pursuant to Mont.R.Evid. 608(b) because the State introduced his good character/citizenship for the purpose of supporting Paliga's credibility. Trial counsel rendered deficient performance by not objecting to evidence of Paliga's "good citizenship" before its introduction, and by not attacking it with evidence of facts impeaching the allegation of good citizenship after it was introduced. Such evidence would also be admissible pursuant to *State v. Gommenginger*, 242 Mont. 265, 273, 790 P.2d 455 (1990), which held "[c]ourts have long recognized that the testimony of informants should be scrutinized closely to determine 'whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interests.'" *Id. quoting Fletcher v. United States*, 158 F.2d 321, 322 (D.C. Cir. 1946).

Trial counsel was ineffective for failing to object to the inquiry, or, in the alternative, failing to attack the assertion on cross examination. Trial counsel provided no justification for these deficiencies. Trial counsels' answer to Rodriguez's allegations, (ROA 16, 11:27-12:10, 14:11-14:19) provide no relevant reason why trial counsel permitted the vouching of Paliga and no justification for failing to attack his claim of good citizenship. Trial counsels' strategy can only be interpreted as no strategy at all. Trial counsels' performance was deficient.

8. Counsel was ineffective for not investigating false claims by J.S. of sex abuse.

Rodriguez informed trial counsel of several allegations of potential false claims of sexual abuse by J.S. These included: (1) J.S. alleged her uncle sexually assaulted her when she was three years old; (2) J.S. alleged her mother was sexually involved in an adulterous relationship with J.S.'s boyfriend without J.S.'s knowledge and (3) J.S. alleged her mother was sexually involved in an adulterous relationship with another man in addition to J.S.'s boyfriend.

Trial counsels' response was limited to the first claim, allegations by J.S. her uncle sexually assaulted her. ROA 16, 11:18-11:26. Trial counsel admitted there was a basis for the need to investigate based on "…a note documented in the J.S.[sic]

medical records…" The note was from the records of State's witness Barbara Bottomly. *See* ROA 3, page 232. Trial counsel interviewed Bottomly, recorded and transcribed the interview. *See* ROA 12, page 4, ¶14. Rodriguez was denied an adequate and meaningful opportunity to submit this transcript and was therefore denied his right to present his case on this issue. *See* Section III(1)(B)(vii)(6) above.

Adequate counsel should have requested a hearing pursuant to 45-5-511(3), MCA and *State ex rel. Mazurek v. District Court of the Mont. Fourth Judicial District*, 277 Mont. 349, 922 P.2d 474 (1996). *Mazurek* required trial counsel to (1) provide written notice of their intent to introduce evidence of prior false accusations; and (2) to request a pretrial hearing at which counsel would have the opportunity to present evidence of the allegation and proof of their falsity. *See Id.* at 358. Trial counsel failed to do so.

Trial Counsel did not respond to the other two claims that J.S. made other false claims of sexual misconduct. Moreover, because the false claims did not involve claims of past sexual conduct by J.S., but rather, past sexual conduct of J.S.'s mother and boyfriend, 45-5-511(2), MCA would not prohibit the evidence and no notice or hearing would have been required. To the extent the latter claims may have

proven true, they were admissible to demonstrate her household was not so strict as represented by the State and as such, her delayed disclosure could not be explained by her alleged strict Christian upbringing. *See* Section III(1)(B)(vii) above.

9. Rodriguez was constructively denied his right to counsel because he could not communicate with counsel.

Rodriguez claims his relationship with counsel was such he could not communicate with them sufficiently to amount to constructive denial of counsel. The mere physical presence of counsel does not satisfy the Sixth Amendment guarantee of the right to effective assistance of counsel. *See Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). "While a defendant is not entitled to counsel of his choice or even to a meaningful relationship with counsel, he is constitutionally entitled to counsel with whom he may mount an adequate defense." *State v. Johnson*, 2019 MT 34, ¶17, 394 Mont. 245, 435 P.3d 64 (citations omitted). "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel…'" *Id*. *quoting Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). "When communication between counsel and defendant becomes so compromised that mounting a defense is impossible, the defendant is neither being heard by counsel nor receiving effective assistance." *Id*. ¶18. "[A] defendant's Sixth Amendment right

to counsel is violated if the defendant is unable to communicate with his or her counsel during key trial preparation times." *Daniels v. Woodford,* 428 F.3d 1181, 1197 (9thCir. 2004) *citing Riggins v. Nevada,* 504 U.S. 127, 144 (1992). "…[A] defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf." *Riggins* 504 U.S. at 144.

Rodriguez submits he was not able to be heard, and not able to mount a defense or cooperate with counsel based on the following facts. Rodriguez submitted sworn statements trial counsel did not meet with him to allow him to be heard or participate in decision making, including: preparing him to testify discussing his desire to impeach/confront J.S. and Maxwell regarding the reasons for J.S.'s treatment, somatization, psychosomatic illnesses, manufactured symptoms, alleged conservative Christian household, false allegations of sexual misconduct, failure to disclose any sexual allegations to Dr. Hendrick, discussing the content and need for testimony of John Marion and Sharlee Rodriguez, Smelko rebuttal, discussing time of purchases of the truck and Honda Civic, time of his move to Montana, his

marriage and living arrangements in 2003, the date of the alleged assault, and the need to remove juror Underwood. *See* ROA 3, pages 8-14, Grounds 1-3, 6, 8-10, 16, 19-20, 24. *See also* ROA 3, pages 23-34.

Rodriguez submits the failure to be heard and failure to mount a defense is a "structural error." Rodriguez submits failure to be heard by counsel and provide needed information to counsel and participate in the making of decisions made on his behalf is of a structural nature and renders his trial fundamentally unfair.

Alternatively, if the standard analysis applies, Rodriguez submits trial counsels' performance was deficient in that they did not hear him or allow him to participate in decision making.

10. Trial counsel was deficient for additional reasons.

Trial counsel failed to object to improper expert medical testimony by Det. Slaughter, (Section III(1)(B)(x) above), and failed to notice the improper instruction the district court gave in response to Paliga's improper testimony regarding Rodriguez's several prior felonies. *See* Section(1)(B)(xii) above. These errors amounted to deficient performance.

Trial counsels' response to the claim regarding Slaughter's unqualified expert testimony was it "…was not prejudicial to Rodriguez's defense theory." ROA 16, 17:8-17:9. Rodriguez's defense theory was J.S. fabricated the allegations, he did not own the Honda Civic at the time of the alleged offense, he did not live in Montana at the time of the offense, and there was no corroborating or circumstantial evidence against him. The testimony was directly contrary to his theory of defense.

As illustrated by the transcript, trial counsel appreciated the impropriety of Paliga's testimony but was deficient in failing to secure a meaningful result from the district court ostensible agreement with trial counsels' objection. Trial counsel does not address their failure to address the improper instruction or its invitation to the jury to in fact consider the evidence they could have successfully excluded.

As above, trial counsel's performance was deficient.

11. Rodriguez was prejudiced by the deficient performance of counsel.

Assessment of ineffective assistance claims requires examination of "…all aspects of the counsel's performance at different stages…" and "[s]eparate errors by counsel at trial…should be analyzed to see whether their cumulative effect deprived the defendant of his right to effective assistance…" because they are "…not separate claims, but rather different aspects of a single claim of ineffective assistance of trial

counsel." *Sanders*, 342 F.3d at 1001. Trial counsel purported to pursue a he said-she said defense and concludes "…the jury believed J.S. over Rodriguez…" ROA 16, 9:12. Trial counsel did not attempt to discredit J.S. with a substantial amount of impeachment evidence sitting on the defense trial table. *See* Section III(1)(B) above. Trial counsel allowed the State free reign to portray circumstances in a positive but false light, (J.S. was healthy and happy until she was suddenly stricken with anxiety on July 19, 2011 after allegedly seeing Rodriguez; Paliga was a good citizen; J.S. lacked objective physical signs of assault because in Slaughter's (non)-expert opinion, the tissues were too resilient and fast to repair such that no indications would be present; J.S. lived in a conservative household where she was afraid to make any disclosure for twelve years. Trial counsel did not confront Maxwell or J.S. about J.S.'s somatization and tendency to fabricate including her psychosomatic complaints, allegations of non-existent seizures, and did not inquire about her memory problems or erratic attention seeking behaviors. The State opened the door to this evidence but trial counsel did not respond. Evans and J.S. swore to facts which were objectively false regarding the truck and its alleged logos, but again, Trial counsel was silent. *See* Section III(1)(B) above. J.S. originally alleged she was assaulted prior to Rodriguez's move to Montana and prior to the time he acquired the Honda Civic, and again, trial counsel was silent and allowed the State to simply change the date of the allegation, from 2002 to late 2003, to accommodate its

evidence. *See* Section III(1)(B) above. Trial counsel failed to attempt to introduce evidence of prior false allegations of sexual misconduct by J.S. *See* Section III(1)(B) above. Trial counsel also failed to communicate with Rodriguez and whatever communications they had, they failed to prepare him to testify and having promised the jury his testimony, they failed to present it. Having failed to impeach J.S. and other State's witnesses, and having failed to present Rodriguez's testimony, it is no mystery why "…the jury believed J.S. over Rodriguez." ROA 16, 9:12. To make matters worse, trial counsel permitted an impermissibly suggestive in-court identification, failed to object to an improper "limiting instruction" which allowed, rather than prohibited, the jury to consider improper testimony regarding other crimes allegedly committed by Rodriguez.

These omissions give rise to a reasonable probability that had trial counsel not been deficient, for each separate reason or all the reasons combined, the result of the proceedings would have been different, and trial counsels' inadequacies led to a proceeding which was fundamentally unfair. *Weaver, supra*. Rodriguez was prejudiced by the deficient performance.

D. Issue 4. Rodriguez was Denied Effective Assistance of Counsel on Appeal.

Rodriguez submits all the claims above are non-record based claims that can only be brought in a postconviction petition. While appellate counsel raised some

ineffective assistance claims, this court held "…Rodriguez's claims of ineffective assistance are not record-based and are not appropriate for direct appeal." Rodriguez at ¶37. Rodriguez therefore brings his claims of ineffective assistance on postconviction. To the extent any claim above is found to be record-based, Rodriguez submits the claims are clearly stronger than those presented in *Rodriguez,* 2021 MT 65.

The presumption of effective assistance of appellate counsel "…will be overcome only when the ignored issues are clearly stronger than those presented. *Dubray, supra* ¶31.

The State indicated an effort to obtain an affidavit from appellate counsel,[9] but none was submitted. The district court made no findings or references regarding Rodriguez's representation on appeal. ROA 17, page 6. Generally, when there is a claim of ineffective assistance of appellate counsel, the district court will consider the testimony or affidavit of counsel on appeal. *See Crabtree v. State,* 2022 MT 133, ¶26, 409 Mont. 211, 512 P.3d 1187; *Rogers v. State*, 2011 MT 105, ¶40, 360 Mont. 334, 253 P.3d 889; *Rosling v. State*, 2012 MT 179, 366 Mont. 50, 285 P.3d 486. The district court did not do so below, and did not address either prong of the *Strickland* standard with regard to the performance of appellate counsel.

[9] *See* ROA 8, page 1.

E. Issue 5. The District Court Abused its Discretion when it Denied Rodriguez an Evidentiary Hearing.

As noted above, Rodriguez was *pro se* in the district court below and his pleadings are therefore entitled to liberal construction. *See Estelle, Haines,* and *Linderman.* Rodriguez filed a Notice of Issue and Motion for Standing Order to Compel and Brief in Support. ROA 12. Rodriguez alleged he was without sufficient funds to make copies of specified documents, *Id.*, pages 4-6. Rodriguez's request for relief therein included any relief the court deemed "just and equitable," *Id.,* page 2, as well as an order providing the ability for him to "…fully comply with any and all legal filing requirements." *Id.,* page 3. Rodriguez specified the documents he wanted to submit. *Id*., pages 4-5. An evidentiary hearing was a just and equitable remedy which would have permitted Rodriguez to submit documents and evidence to answer the defenses of Respondent and claims of trial counsel. Because the Court issued its Order Denying Petition, ROA 17, approximately twenty-four hours after Rodriguez was served with the State's Response, ROA 15 and trial counsel's Affidavit, ROA 16, Rodriguez had no opportunity to address any factual claims. Whether he had a right or not to rebut the claims, he applied for an opportunity to present evidence in support of his claims months before any response from the State and any Order from the court. The district court abused its discretion by failing to order an evidentiary hearing or otherwise allowing Rodriguez to submit his evidence and/or rebuttal.

"The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *State v. Weldele*, 2003 MT 117, ¶72, 315 Mont. 452, 69 P.3d 1162. A substantial injustice resulted because Rodriguez was denied an opportunity to fairly present his claims and present his evidence. "The right of individuals to pursue legal redress for claims which have a reasonable basis in law and fact is protected by the First and Fourteenth Amendments." *Harrell v. Cook*, 169 F.3d 428, 432 (7th Cir. 1999), *citing Bill Johnson's Rests, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). Art. II, §16 of the Montana Constitution provides "[c]ourts of justice shall be open to every person." This Court acknowledged "…a prisoner has a constitutional right of access to the courts." *State v. Lance*, 222 Mont. 92, 105, 721 P.2d 1258, 1267 (1986). Access must be "...adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). "The right of access to the courts is the right of an individual, whether free or incarcerated, to obtain access to the courts without undue interference." *Snyder v. Nolen*, 380 F.3d 279, 291 (9th Cir. 2004). Rodriguez had no adequate, effective, or meaningful access to the district court because he was unable to afford to make copies under the constraints of MSP/DOC, and did not otherwise have access to copy capability/services. ROA 12, page 3.

Hatfield v. Bailleaux, 290 F.2d 632, 637 (9th Cir. 1961), held,

> …access to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in

> order to commence or prosecute court proceedings affecting one's personal liberty….

The district court denied the Motion because, "[t]he Cascade County Attorney does not represent MSP or the DOC…Neither the MSP nor the DOC are parties to this case, and in any event, Rodriguez did not properly serve them." ROA 14. Despite his *pro se* status, and request for any just or equitable relief, the district court did not consider any alternatives to an order requiring MSP or DOC to make the requested copies. The district court did not provide or consider adequate, effective or meaningful access to the courts for Rodriguez "…to prepare file and serve…documents…necessary or appropriate…to commence or prosecute court proceedings affecting [his] personal liberty…" *See Hatfield, supra.* Such alternatives could have included waiver of the requirement to serve copies or an evidentiary hearing where Rodriguez could submit his evidence. The district court acted arbitrarily without employment of conscientious judgment and/or exceeded the bounds of reason when it denied any/all "just and equitable relief" because MSP and DOC were not parties and were not properly served.

As Rodriguez demonstrated in his Petition and this Brief, he makes complaints against his counsel for omissions of action, and more specifically, a failure to introduce evidence and testimony and impeaching statements. The following would have proven invaluable in a fair assessment of the following claims:

Dr. Bowman Smelko was a timely disclosed defense expert witness who was anticipated to rebut testimony of State's Expert Jean McAllister. *See* ROA 3, page 11 (Ground 9); *See Also,* APP4, TTX 429:18-476:9 (McAllister Testimony). Rodriguez attempted to introduce the "Rebuttal Commentary, by Bowman Smelko, Psy.D., ABPP, dated 12-5-17." ROA 12, page 4, ¶2. Trial counsel alleged Smelko "…would have nothing to refute from the State's witness [McAllister], and nothing to add." ROA 16, 13:6-13:8. The Smelko Rebuttal Commentary would have indicated what testimony Smelko could have presented. Rodriguez sought to introduce transcripts of J.S.'s statements. ROA 12, page 4, ¶¶5-6. These transcripts would have been used to further demonstrate the inadequacy of J.S.'s confrontation. Rodriguez alleged other witnesses were inadequately confronted, or not presented in his defense. These witnesses included Eric Stephens, Jennifer Hahn, Alexis Evans, Barbara Bottomly and Nick Peterson. Rodriguez attempted to submit interview transcripts of each witness. ROA 12, page 4, ¶¶7-15. These transcripts would have demonstrated in what respect the confrontation was deficient, and in what regard the testimony could have been favorable. Last, Rodriguez alleged above his communication with trial counsel was inadequate and he was not involved in important decision making. Rodriguez sought to introduce correspondence with counsel in order to support this claim. ROA 12, page 4-5, ¶¶'s 24-37, 40-43.

With regard to all these issues, because of his indigency, Rodriguez did not have an adequate, effective, or meaningful opportunity to submit his evidence. Rodriguez suffered a substantial injustice for the above reasons and by virtue of being denied an opportunity to submit facts contrary to those alleged by trial counsel in ROA 16 and/or those necessary to support his claims above.

VI. CONCLUSION.

Pursuant to M. R. App. P. 12(1)(h) Rodriguez states his conclusion and the precise relief sought.

Rodriguez was denied his constitutional right to the effective assistance of counsel; constructively denied counsel; denied his right to testify in his own behalf. The district court below abused its discretion and denied Rodriguez access to the courts when it denied him an adequate, effective, and meaningful opportunity to present the evidence at ROA 12, pages 4-5.

Rodriguez requests the following relief: (1) the Sentencing Order and Judgment, be set aside and vacated, and in the alternative, (2) his case be remanded to the district court to conduct an evidentiary hearing at which Rodriguez will have an adequate, effective, and meaningful opportunity to present his evidence and the Court order counsel be appointed to assist him at this evidentiary hearing pursuant to 46-21-201(2), MCA, and (3) for such other or further relief as the Court deems appropriate.

Respectfully submitted this 4th day of March, 2025.

/s/ Shandor S. Badaruddin

_____

Shandor S. Badaruddin

Attorney for Appellant Juan Rodriguez.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure and this Court's Order on February 25, 2025, I certify this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac version 16.47 is 14,982 words, excluding table of contents, table of citations, certificate of service, certificate of compliance and the appendices per M. R. App. P. 11(4)(d).

So certified this 4th day of March, 2025.

/s/ Shandor S. Badaruddin

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APPENDIX

Pursuant to M. R. App. P. 12(1)(i) and (5)

Table of Contents

CERTIFICATE OF SERVICE

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Service Method: eService

Electronically signed by Tricia Lynn Treichel on behalf of Shandor Badaruddin
Dated: 03-05-2025