

IN THE SUPREME COURT FOR STATE OF MONTANA

CAUSE NO. DA-24-0490

SHELBY RAGNER

Petitioner/Appellee,

vs.

STATE OF MONTANA,

Respondent/Appellant.

PETITIONER'S RESPONSE BRIEF

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ISSUE FOR REVIEW

THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED SHELBY RAGNER'S PETITION FOR POST CONVICTION RELIEF FOR INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, WHEN TRIAL COUNSEL KNEW OF KEY WITNESSES, YET FAILED TO CALL THE WITNESS AT TRIAL, AND WHOSE TESTIMONY WOULD NOT HAVE CONFLICTED WITH STATEMENTS OR EVIDENCE PRESENTED AT TRIAL, AND WOULD HAVE IMPEACHED STATE'S WITNESSES' BIASED AGAINST DEFENDANT, AND PROVEN SEXUAL ENCOUNTER WAS CONSENSUAL.

STATEMENT OF THE CASE

On May 10, 2019, Shelby Ragner (Shelby), age 21, was convicted of sexual intercourse without consent after a three-day jury trial on October 20-22, 2020. (**Appendix A:** Doc. 34 of DV-16-23-478-PR, Amended Petition for Post Conviction Relief, pg. 1-2.) The case was based on a complaint made by Chloe Marum, (Chloe), a friend of Shelby's roommate, Ciana McConnell (Ciana). On January 25, 2021, Shelby was sentenced to ten years MSP, with four years suspended. On February 11, 2021, the sentence was stayed on appeal. *Id.* The Montana Supreme Court affirmed. *Id.* Shelby self-reported to jail on January 6, 2023. *Id.* Shelby filed for Petition for Postconviction Relief on the grounds his Public Defender was ineffective. The District Court granted the Petition for Post Conviction Relief, and the State appealed.

While the State's Opening Brief correctly states the District Court ruled in favor of Shelby based on trial counsel's failure to call witness, Max Weimer (Max), the District Court did not specifically reject Shelby's additional arguments as to why his trial counsel was ineffective. The evidence at the Post Conviction Hearing was overwhelming that Shelby's trial counsel was ineffective for not calling other witnesses along with Max, failing to prepare Shelby for his testimony when he desired to testify and "clear his name," failing to retain an expert witness, not investigating the case, failing to impeach State's witnesses, and not introducing newly discovered evidence at the Post Conviction Hearing that Chloe told officers she had been assaulted earlier at the bar by another person.

Shelby argued, that among other errors, his public defender, Alex Jacobi (Jacobi), committed ineffective assistance of counsel as a result of the following:

- a. Failure to conduct any investigation into the case, including getting to know Shelby, the case, and failure to communicate adequately with Shelby;
- b. Failure to retain expert to review or rebut the State's physician expert on sexual assault evaluation; failure or investigate or rebut possible bias toward complaining witness due to State's expert having a personal relationship with Chloe and her mother; failure to call witnesses at trial, including Shelby's therapist, who was a fact witness who knew Ciana had

made sexual advances toward Shelby that he rejected; or Max who observed Shelby's sexual injuries immediately after the events, caused by Chloe;

- c. Complete failure to prepare Shelby for trial or his testimony, and for telling Shelby not to testify, as "the prosecutor would eat him alive." Shelby's testimony was vital as his testimony was the only testimony that would explain some of his statements to the officer. *Id.*

The District Court's Order found Mr. Jacobi had no communication with Petitioner before the August 18, 2019, Omnibus Hearing. (*Id.* at ¶ 16.) Shelby and his mother, Crystal Zellmer, (Zellmer) drove from Kalispell to Bozeman to attend the Omnibus Hearing. *Id.* Jacobi met Shelby and his mother for the first time, only for a few minutes after the Omnibus, in the hallway. *Id.*

At the Post Conviction hearing Colin Stephens, criminal defense attorney, testified as an expert for Shelby. (*Id.* at ¶31.) Mr. Stephens (Stephens) testified that 10 hours of direct contact trial counsel had with Shelby prior to trial (as claimed by Jacobi) fell beneath the standard of care in a sexual intercourse without consent case. (*Id.* at ¶ 32.) Stephens' opinion was that Jacobi breached his duty to investigate prior to trial. (*Id.* at ¶ 33.)

The District Court focused on Shelby going to Max' house immediately after he and Chloe had a sexual encounter. *Id.* Max described

Shelby's appearance as disheveled and in a state of shock. *Id.* Shelby told Max what happened during the proceeding evening and showed Max he had bruises all over his body. *Id.* Max saw the injuries. *Id.*

The State argues on appeal Jacobi was not aware of Max. This is false. **Mr. Jacobi testified he knew Max Weimer was a witness.** (Hearing Day 2, 85:25, 86:1-8.) When asked, "I'm wondering if you looked into anybody that could corroborate what Shelby had told you." **Mr. Jacobi answered, "Well, I know that Mr. Ragner talked to, I think, Max Weimer immediately thereafter."** *Id.* Jacobi was aware Shelby took photographs of his injuries as Max told him it would be a smart thing to do. (*Id.*, 86:22-23.)

Jacobi testified he did not know Max had seen bite marks and hickies all over Shelby's body. (*Id.*, 86:19-23.) Had Jacobi spoken to Max as requested by Shelby, he would have known that Max' testimony at trial would have been essential to Shelby's defense. Max, a computer engineer, traveled from Kalispell, Montana, to testify at the Post Conviction Hearing as to what he knew regarding the case. (Hearing Day 1, 76:22, 77:1-4.) Max knew Shelby since middle school, around 2011. (*Id.*, 16-17.) Max had been friends with Shelby, and knew him well. (*Id.*, 9-11.) Max also knew Ciana from Kalispell as they attended middle school together, though not well. (*Id.*, 18-23.)

Max testified he recalled on March 10, 2019, Shelby showed up to his apartment. (*Id.*, 79:22-25, 80:1-4.) Shelby was disheveled and not himself. (*Id.*, 80:6-9.) Max said Shelby is stable and normal, kind, and would go out of his way to help if you ever ask. (*Id.*, 80:10-21.) Max testified Shelby explicitly said that at some point during the night he was fading in and out of consciousness; Shelby told Max, I woke up and “there’s a pussy in my face.” (Hearing Day 1, 81:4-12.) Shelby told Max about the bruises he had, and Max told him to take pictures to document them. (*Id.*, 17-22.) Max testified Shelby told him he woke up to Chloe straddling his face. (*Id.*, 82:1-3.) Max recalled Shelby lifting up his shirt and showing him bruises, hickies and bite marks. (*Id.*, 5-12.)

Max testified Shelby told him he got the hickies and bite marks from Chloe. (*Id.*, 15-17.) Max testified Shelby seemed to be processing the situation and wasn’t fully himself at that point. (*Id.*, 18-23.)

Max testified Shelby’s attorney never contacted him. (Hearing Day 1 trans., 83:18-21.) Max testified Shelby complained a lot about his lawyer not communicating, that he was having a hard time getting ahold of him and wasn’t getting any responses. (*Id.*, 84:1-9.)

Max gave Shelby a ride once for Shelby to meet with his lawyer. Shelby did not have much notice beforehand, just before a deadline in his case. (*Id.*, 9-12.) Max recalled the meeting was not very long. (*Id.*, 85:1-5.) Shelby

left the meeting with his lawyer irritated, and expressed he wished he had more communication with his lawyer. (*Id.*, 11-14.) Max knew Shelby gave his lawyer names of people who would testify and requested Jacobi talk to them, but “none of us were contacted by Mr. Jacobi.” (*Id.*, 15-20, 21-25.) Max would have gladly testified at trial in October of 2020. (*Id.*, 86:2-4.)

Max was never aware of any other allegations against Shelby. (*Id.*, 5-11.) In fact, Max testified Shelby was friends with a lot of women in high school and none of them had a problem with him. (*Id.*, 9-16.)

Max testified when he did not get a call from Jacobi, he felt a sense of hopelessness, he felt there was nothing he could do because he wasn't given the opportunity. (*Id.*, 15-19.) Max testified he had relevant facts to present to the jury, that Shelby appeared to have experienced a traumatic event the night before and he had bite marks and hickies on his body, and he had told Shelby to document them. (*Id.*, 93:2-7.)

Ms. Zellner testified her son Shelby is a great, loving, kind, protective, and good kid. (*Id.*, 100:6-10.) Ms. Zellner testified that Shelby and Ciana were close friends for years; she invited him to reside with her in Bozeman, Montana, for just \$300.00 a month. (*Id.*, 102:17-25.) Ciana and her boyfriend, Justin, went to Kalispell to help Shelby move to Bozeman. (*Id.*, 103:5-7.)

Zellmer testified Shelby told her Ciana would often hit on him and it was awkward as he felt bad for Justin. (*Id.*, 19-25.)

Zellmer testified Shelby called her on March 10, at around 10:30 a.m. and said Ciana and Justin told him he had to pack his stuff and move out, and that he was being accused of rape. (*Id.*, 105:16-25.) She testified he was upset, a mess, didn't know what to do. (*Id.*, 24-25.)

Zellmer testified Shelby told her about the night before and how they were all drinking, and Ciana was hitting on guys, and she and Chloe were making out with each other. (*Id.*, 106:14-17.) Zellmer testified Shelby told her that Ciana was drunk and Justin put her to bed. Chloe was on the couch, and he got her a bowl in case she puked. (*Id.* 106:24-25, 107:1-6.) Zellmer testified Shelby told her Chloe later got up and started kissing him and kept trying to pull him on top of her. (*Id.*, 5-7.)

Zellmer testified when she and Shelby traveled five hours to the Omnibus Hearing, they then learned he didn't have to attend; they did not even know what Mr. Jacobi looked like: they had never met or spoken to him. (*Id.* 111:2-11.) Zellmer testified Jacobi did not have time to meet with Shelby. (*Id.*, 23-25.) They were only able to talk to Jacobi for ten minutes in the hallway of the courthouse. (*Id.*, 112:1-4.)

Zellmer testified Shelby was trying to get in touch with Jacobi and she tried also but he would not return her calls. (*Id.* 115:7-16.) Zellmer was upset, “I need answers, there’s no answers, to anything, so I called, and I got ahold of a private investigator.” (*Id.* 115:15-20.) Zellmer discovered a bouncer who worked at Rocking R Bar where Shelby, Ciana, and Chloe had been that night. (*Id.* 112:12-15.) Zellmer reached out to the bouncer at the Rocking R, Bar, and he told her he worked that night and to get him a picture of Chloe. (*Id.* 113:2-25.) Zellmer knew Shelby was not able to contact any witnesses or be on social media. (*Id.*, 114:15-21.) So, she was going to hire the private investigator but needed to talk to Jacobi beforehand. (*Id.*, 116:10-11.) Zellmer was continuously concerned that Shelby was also unable to get in touch with Jacobi, he did not return calls or emails. (*Id.*, 116:19-25.) Zellmer gathered all the text messages between her and Shelby discussing Jacobi was not communicating with Shelby, and emails Jacobi did not respond to. (*Id.*, 116:24-25.)

Zellmer tried to contact Jacobi regarding Shelby’s counselor, Julie Frederick, to testify as she had facts important to Shelby’s defense. (*Id.* 120:18-21.) Zellmer wanted Jacobi to know she wanted to hire a private detective, had spoken to one, and needed a photograph of Chloe to give the bouncer at the bar where Shelby had been on the night of the events. (*Id.* 23-25.) Zellmer tried to get in touch with Jacobi because he was not responding or communicating with

Shelby, and she wanted to help. (*Id.*, 121:4-6.) Between the first Omnibus Hearing in August 2019, and the first trial setting of July 20, 2022, Zellmer never got a call back from Jacobi. (*Id.*, 18-24.)

Zellmer knew Shelby tried contact Jacobi before the first trial setting 7/16/20, and Jacobi never called him back. (*Id.*, 18-25, 125:1-3.)

Zellmer drove Shelby to Bozeman on 10/19/20, the day before trial. Shelby was finally able to meet with Jacobi at his office. (*Id.*, 128:8-25.) This was only the third in-person meeting Shelby had with his attorney: 1) the omnibus, 2) the day Max drove him to the short meeting with his attorney, and 3) the day before trial. (*Id.*, 129:1-3.)

Zellmer said the meeting, the day before trial, took less than one hour. (*Id.*, 4-6.) Zellmer was finally able to tell Jacobi Chloe was being evicted from her apartment and moved into Ciana's apartment after her allegations, only paying \$300.00 rent. (*Id.*, 11-22.) Jacobi told her that wasn't important. *Id.* Yet this was a motive to get Shelby out of Ciana's home.

Shelby inquired if Jacobi spoke to Julie Fredericks. (*Id.*, 130:1-2.) It was the first time Shelby learned from Jacobi they could not use Chloe's text message due to the rape shield law. (*Id.*, 4-8.) Chloe sent Ciana a text that began with, "I think Shelby and I had sex last night."

Jacobi did not talk to Shelby about testifying at trial before the trial began. (*Id.*, 12-15.) Jacobi had not discussed the events of the night of the incident with Shelby at all in person before the trial. (*Id.*, 20-23.) (*Id.*, 130:24-25, 131:1-2.)

The first day of trial Mr. Jacobi did not spend the lunch hour with Shelby or time at the end of the first day. (*Id.*, 132:21-25, 133:1-25.) His fourth meeting with Shelby, after trial day two, occurred at Jacobi's office, with Ms. Zellmer and Shelby's sister present. *Id.* Jacobi then told Shelby he did not want him to testify. (*Id.*, 143:8-11.) Jacobi said, "he was not prepared for it." (*Id.*, 18-22.)

Julie Frederick, Shelby's therapist since 2018, testified at the Post Conviction Hearing. (Hearing Trans. Day 1, 14:11-18.) Shelby told her about residing with Ciana and Justin. (*Id.*, 16:1-25.) Ms. Fredericks was aware of Shelby's concerns of Ciana using suggestive language with him about possibly hooking up: facts vital for Shelby's defense, showing motive for Ciana to testify against Shelby. (*Id.*, 18:7-14.)

Ms. Fredericks was aware Shelby was upset about the events of March 9, 2019. Both Ciana and Chloe were "very friendly" to people in the bar and "also to each other," and they were all drinking, and he was worried he kept losing sight of them at bars. (*Id.*, 23:19-25, 24:4-15.)

Mr. Fredericks testified Shelby excitedly uttered, when they got back to his apartment he passed out and was woken up by Chloe “straddling his face, begging him for oral sex.” (*Id.*, 27:4-10.) Ms. Fredericks was concerned Jacobi thought Shelby was guilty, because Jacobi told Ms. Fredericks, “Poor little girl. I know the family, I can’t believe that she would lie about things like this,” referring to Chloe. (*Id.*, 32:23-25, 33:1-12.)

Jacobi was always in a hurry when he spoke to her. (*Id.*, 16-25.) Ms. Fredericks told Mr. Jacobi Ciana had come on to Shelby, but Jacobi was not interested in hearing about it. (*Id.*, 35:15-18.) Jacobi spent more time talking with Ms. Fredericks than he did Shelby. (*Id.*, 34:8-10.)

Ms. Fredericks worked with victims of sexual assault, and was shocked Chloe moved into Ciana’s home after she claimed being assaulted there. (*Id.*, 40:6-17.) Ms. Fredericks knew facts important to Shelby’s defense yet was not called as a witness by Jacobi.

Expert witness, Colin Stephens (Stephens), criminal defense attorney, testified for Shelby at his Post Conviction Hearing. (Hearing Trans. Day 1, 162:24-25.) Stephens has practiced law in Montana for 18 years and is licensed to practice law in the U.S. District Court for the District of Montana, Ninth Circuit Court of Appeals, and the U.S. Supreme Court. (*Id.*, 163:1-8.) Stephens graduated from the University of Montana School of Law in 2005 and is

a Life Member of the National Association of Criminal Defense Lawyers and Montana Association of Criminal Defense Lawyers (MACDL). (*Id.*, 10-19.) Stephens received the annual John Adams Award bestowed by the Federal Defenders of Montana, has been the Criminal Defense Lawyer of the Year from the MACDL, and received the annual award from the Innocence Project in 2017. (*Id.*, 163:23-25, 164:1-8.) Mr. Stephens was the president Montana Criminal Defense Attorneys Association for over three years. *Id.* Stephens filed Post Conviction Relief cases for approximately 15 years and has testified as an expert witness in said cases. (*Id.*, 15-25, 165:1-2.) He is a partner in the law firm, Stephens and Brook. (*Id.*, 4-10.)

Stephens was retained to review the case against Shelby. He testified he reviewed the prevailing norms in the community, State of Montana, ABA standards for the criminal defense function, Montana Public Defender System, minimum standards, practice journals, law review articles, and case law. (*Id.*, 169:1-20.) As to Shelby's first claim trial counsel failed to investigate the case, Stephens reviewed the PCR, then compared and contrasted Jacobi's responses, reviewed the Montana Supreme Court briefing, and what occurred at trial. (*Id.*, 70:7-20.)

Stephens testified it is within the professional norms to have contact with your client as soon as humanly possible, preferably before the initial

appearance, unlike Jacobi who did not have any contact with Shelby before the Omnibus Hearing. (*Id.*, 171:1-12.) It is vital to meet with the client to help guide how defense counsel interprets the discovery, and guide the entire theory of the defense on how to approach jury instructions and formulate your theory of defense. (*Id.*, 171:12-25, 172:1-3.)

Contact with the client absolutely must occur before the first Omnibus hearing according to Stephens. (*Id.*, 4-19.) He testified lawyers need to extend as many investigative tentacles as possible, interview witnesses, in this case roommates, patrons and employees at various bars, and, Justin, the designated driver, as he was the one with the most unimpeded memory. (*Id.*, 6-15.) It is important to cast a wide net as soon as possible. (*Id.*, 17-25.) Stephens testified, it is important to reach out to the clients' family, as parents are often valuable resources for any number of issues. (*Id.*, 174:5-16.) It is within the professional norms to retain a private investigator as soon as possible, but certainly by the time he has received the first round of discovery. (*Id.*, 18-23.)

Stephens testified Jacobi should have reached out to Max, as he was the first-person Shelby spoke and met with immediately after the initial outcry. (*Id.*, 175:14-25, 176:1.) Stephens testified in this case, he would have presented evidence Shelby had hickeys and bite marks, as it would be contrary to the allegations. (*Id.*, 2-14.) This evidence would show the encounter was consensual

between Shelby and Chloe. (*Id.*, 15-18.) Stephens testified Max' testimony would have been favorable for Shelby. (*Id.*, 177:1-3.) Testimony Shelby was awakened by Chloe's vagina in his face would have been relevant to how the case projected towards trial. (*Id.*,18-25, 178:1-6.)

He testified it would have been important to call Ms. Fredericks at trial because she was aware Ciana made sexual advances toward Shelby. (*Id.*,13-25.) If proven or even hinted to, that Ciana's advances toward Shelby were rejected by Shelby, it would show potential bias for motive for Ciana to testify against Shelby, and he believed it would have been absolutely important to bring up at trial. (*Id.*, 21-25, 179:1-3.) Jacobi did none of this, even though he was aware of it. Failure by Jacobi to present this evidence at trial fell below the professional norms. (*Id.*, 4-13.)

Jacobi was aware Chloe had a medical examination by Dr. Davenport, who had a professional relationship with Chloe's mother, and it was clear from cross-examination that Dr. Davenport knew the complaining witness. (*Id.*, 180:11-19.) Stephens testified, "at minimum it becomes incumbent on defense counsel to retain or sit down with a professional of equal standing" to show a bias. *Id.*

Jacobi never met with Dr. Davenport, nor did he retain an independent opinion from a medical professional regarding Dr. Davenport's bias.

(*Id.*, 5-14.) Stephens testified failure to investigate or retain a medical expert in Shelby's case to review Ms. Davenport's evaluation of Chloe under the first prong of *Strickland* absolutely fell below the professional norms. (*Id.*, 186:21-25, 187:1-7.)

Stephens testified he just finished a sex case that went two years from charge to trial, and he spent easily over 100 hours with the client. (*Id.*, 182:8-16.) Stephens testified client contact under three hours is concerning, and certainly falls below the professional norms for two felony charges. (*Id.*, 3-7.) Stephens testified Jacobi's contact with Shelby, as recounted in Mr. Jacobi's affidavit and the Petition, fell below professional norms. (*Id.*, 186:10-20.)

Stephens testified a client's choice to testify at trial or not is not counsel decision to make: "Counsel can guide, but we can't stop them." (*Id.*, 190:15-25.) "It is trial counsel's duty to have multiple conversations with your client and to meet with them and discuss their testimony at trial." (*Id.*, 191:1-5.) These cases come down to he said/she said situations, as in many sex cases. (*Id.*, 191:6-10.)

Stephens was aware Shelby made statements to law enforcement that appeared to be against his interest. (*Id.*, 14-19.) Stephens was aware those telephone calls were played for the jury, and the jury wanted to re-hear those statements. (*Id.*, 192:12-20.) Stephens knew from Shelby's affidavit, statements

to his friends and family he had the desire to have his story told. (*Id.*, 19-25, 193:1.)

Stephens testified a lawyer's duty is to prep your client to testify in a way that doesn't have them come off too prepped; you want that preparation, have those discussions, so at the end of the State's case you don't look at your client to ask them if they want to testify and you haven't prepared them at all. (*Id.*, 103:9-20.) Stephens testified, the sooner the better to start preparing your client's testimony at trial. (*Id.*, 20-25.) Stephens noted Jacobi denied he told Shelby the prosecutor would "eat him alive" but never indicated in his affidavit any time he prepared Shelby for his testimony. (*Id.*, 194:7-15.)

Stephens testified there were a number of things Shelby could have put into context had he testified, especially regarding two voluntary statements he made to the officer. (*Id.*, 16-23.) Shelby's testimony at trial certainly would have helped the jury come to a more robust conclusion about those statements. (*Id.*, 195:1-3.)

Stephens testified Jacobi failed in his duty to investigate Shelby's case, "he failed in his duty on certain very fundamental aspects of it." (*Id.*, 196:4-9.) Sufficient evidence shows "further investigation would have absolutely benefited Shelby. (*Id.*, 11-13.)

Stephens testified “there’s certainly a reasonable probability that trial could have resulted in a different outcome if Mr. Jacobi had done an investigation.” (*Id.*, 11-18.) Stephens testified that overall, there is a reasonable probability if Jacobi investigated the case, called witnesses and prepared Shelby to testify as he wanted to, under the *Strickland* test the outcome at trial would have resulted in a different outcome. (*Id.*, 203:18-25, 204:1-4.)

Jacobi had worked only as a public defender starting in 2011. (Hearing Trans. Day 2, 8:12-20.) Shelby had sent him a letter; though he did not know how he received it or when, but it was several months after he had been appointed at his trial lawyer. (*Id.*, 13:3-4.) The letter stated, Chloe made Shelby finger her. (*Id.*, 15:20-25.) Jacobi said Shelby’s letter and his few conversations with him were consistent, and inconsistent with what Shelby told officers, yet he did not inquire into this with Shelby. (*Id.*, 16:10-13.)

Jacobi didn’t recall if he interviewed Justin, the only sober witness during the events. (*Id.*, 17:9-10.) Jacobi admitted Shelby gave him a list of individuals to talk to; Jacobi testified he did not speak to four of the names provided by Shelby. (*Id.*, 19:1-17.)

Jacobi was aware that Ciana had come on to Shelby, but was concerned he would not get that testimony from Ciana. (*Id.*, 20:8-14.) Only Shelby could have testified to that bias at trial, or Ms. Fredericks; neither were

called as a witness. Shelby wanted Jacobi to interview Justin as he was present and sober that night, but Jacobi never did. (*Id.*, 21:8-12.)

Jacobi is required to keep a log on time spent on cases. (*Id.*, 23:15-18.) Jacobi did not log his time spent on this case as. (*Id.*, 24:23-24.) Jacobi had under 40 hours logged for working on Shelby's entire case, including the three-day jury trial. (*Id.*, 25:17-22.) Jacobi testified this case consisted of about 700 pages of discovery. (*Id.*, 133:14-16.). He guessed he spoke to Shelby a total of 10 hours or less as his attorney. (*Id.*, 26:8-14.)

Jacobi agreed it's best practice to consult an expert, and "thinks it is something that should be done." (*Id.*, 41:2-9.) He did not consult an expert in this case. He was aware Dr. Davenport knew Chloe and her mother, yet he did not cross examine her about this potential bias. Jacobi testified he was never concerned about bias in Dr. Davenport's examination. (*Id.*, 43:20-22.)

Jacobi admitted Shelby "wanted to clear his name," "wanted to testify at trial." (*Id.*, 49:2-14.) Jacobi testified, "[I] can't deny unequivocally that I said, 'the prosecutor would eat him alive.'" (*Id.*, 51:9-13.) He later testified, "he didn't think Shelby would testify," contrary to his previous testimony, "of course if he changed his mind, we would've been prepared, yes, prepared him for his testimony, but it was cursory." (*Id.*, 52:23-25, 52:1-5.) Jacobi admitted, "there was not a lot of preparation put into his testifying." *Id.* Jacobi stated, "generally

there's a little preparation in terms of what a cross could look like. I try to have it done before, but sometimes it happens after...well, it's almost always before they testify." (*Id.*, 53:11-19.)

Jacobi admitted he did not have contact with Shelby before the Omnibus in August 2019 though Shelby tried to contact him. (*Id.*, 69:2-16.)

Jacobi testified he believed he spoke to Shelby longer than 10 minutes after the Omnibus but couldn't imagine it was over 30 minutes. (*Id.*, 10-15.)

Jacobi admitted he never had a sit-down with Shelby about his letter, but thought they talked about it. (*Id.*, 72:6-9.) He did not recall sitting down with Shelby to go over the case with him, but "imagined at some point we talked about the versions." (*Id.*, 12-15.)

Jacobi testified, "if Shelby told me Ciana put the moves on him I would have known that," but doesn't know what he knew at the time of trial. (*Id.*, 73:2-13.) Yet, he did not cross examine Chloe about being a "jilted lover." (*Id.*, 20-23.)

Jacobi also knew Ciana and Chloe kissed earlier in the night. (*Id.*, 75:1-6.) Jacobi did not request an interview with Chloe until July 8, 2020, 13 days before trial. (*Id.*, 7-12; **Appendix B**, Petitioner's Exhibit 5, pg. 40.) This interview never happened as trial was continued. (*Id.*, 96:15-19.) Jacobi put off

the interview of Chloe until just four days before trial in October. (*Id.*, 97:4-13.)

His only interview of Ciana occurred at the same time. (*Id.*, 98:3-13.)

Jacobi thinks he spoke to Shelby for around 5 hours before the first trial setting. (*Id.*, 99:2-6.) Ms. Zellmer testified, and Shelby in his affidavit stated, Jacobi spoke with Shelby a total of about two and a half hours between the Omnibus and the trial. Jacobi admitted he did not respond to all of Shelby's emails to him. (*Id.*, 100:3-5.) Shelby sent four emails trying to get in touch with him. (*Id.*, 99:16-17, 100:3-5.) Jacobi thinks he may have spoken to Shelby after the first trial setting, maybe 5 hours, although he had no documentation of this communication with Shelby. (*Id.*, 100:6-17.) Jacobi testified "ten hours on a rape case is a lot, and it's not a lot, so, you know." (*Id.*, 116:10-24.)

Mr. Jacobi admitted the only negative character evidence against Shelby was on social media—created by Ciana, Chloe and their friends. (*Id.*, 97:4-5, 22-24; 103:1-7.)

Jacobi provided documents the second day of the Post Conviction Hearing that Shelby had never seen. (*Id.*, 76:5-19.) The newly produced documents were Petitioner's Exhibit 5. (**Appendix B.**) Madison County Police Report, page 32, of these newly produced documents, dated 3/9/19, shows Chloe alleged she was "first attacked at Rockin R Bar" in Bozeman. (*Id.*, 78:18-22.)

Chloe never claimed Shelby attacked her at Rocking R Bar. This evidence was completely ignored by Jacobi.

This evidence would have been relevant in getting Chloe's text messages admitted at trial, it was evidence that someone else caused her bite marks and hickies. Shockingly, Jacobi admitted he was aware of the Madison County police report. (*Id.*, 145:1-25, 146:1-17.) Yet, he did not investigate or interview Chloe regarding her claim another person attacked her at the Rocking R bar earlier the same night. (*Id.*, 79:1-9.) He did not cross-examine Chloe about being attacked at the Rocking R Bar by another. Jacobi admitted assault at the Rocking R Bar the same night she claims Shelby assaulted her would be important for trial. (*Id.*, 18-24.)

Mr. Jacobi did not recall if he interviewed Dr. Davenport. (*Id.*, 80:1-4.) Jacobi did not consult any expert about injuries to Chloe being caused by another individual. (*Id.*, 9-14.) Jacobi stated "because Shelby said he did it" did he not retain an expert. (*Id.*, 15-18.) However, Shelby said to the officer, "Well, I must have done that," after the officer told him Chloe had bite marks on her. Jacobi does not believe he sat down with Shelby regarding Dr. Davenport report or diagrams of her bite marks. (*Id.*, 19-24.)

Mr. Jacobi testified he did know Shelby saw and spoke to Max "immediately after," and Max provided a letter. (*Id.*, 86:3-8.) Jacobi testified he

did not know Max saw a lot of hickeys all over Shelby's body. (*Id.*, 19-23.) Had Jacobi spoken to Max as Shelby requested, he would have known this vital information for trial.

Jacobi recalled meeting Shelby for an hour the day before trial, although he would have expected to meet longer than one hour, "he has a loose recollection of it being an hour." (*Id.*, 89:15-23.) Jacobi said he sent an investigator to try to get videos from the bars, but he didn't request the investigator talk to employees at bars. (*Id.*, 91:1-25, 92:1-2.)

Jacobi knew Shelby believed if alcohol is involved in sexual interactions, consent is questionable; he admitted that is not the law, and only Shelby testifying would clear up these statements to the officer. (*Id.*, 108:16-25, 109:25, 110:1-17.)

Mr. Jacobi did not prepare Shelby for his testimony because, "I was more focused on making sure Shelby understood the consequences and the significant risk he faced in testifying." (*Id.*, 112:1-8.) Jacobi admitted, "he wanted—I mean I'm sure he wanted to get up there and testify, but when I said look, this is the risk and this is what you're dealing with, it was my understanding he wasn't going to testify, so we did not go through a direct examination." (*Id.*, 19-24.)

Jacobi admitted Shelby would not be prepared to testify because he had not prepared him. (*Id.*, 114:7-13.) Jacobi admitted he would not call a client to testify that he hadn't run through their testimony before trial. (*Id.*, 115:1-25, 116:1-4.) This supports Shelby's affidavit Jacobi told him not to testify that "the prosecutor would eat you alive," and he was not prepared for his client to take the stand.

Jacobi admitted Shelby was frustrated that he was not responding or communicating with him. (*Id.*, 160:23-25, 161:1-4.)

On the form submitted to the appellate defenders' office, Jacobi admitted an issue for appeal would be "ineffective assistance of counsel." *Id.* Mr. Jacobi admitted that he did not do a very good investigation into this case, stating, "I agree, I could have done a better job, yeah, absolutely." (*Id.*, 177:17-20.)

STATEMENT OF THE FACTS

On the night of March 8, 2019, Shelby was invited to go out to bars with Ciana and Chloe. At the end of the night out, while they were waiting for Justin to drive them all home, Chloe began to shout out, "Shelby's going to fuck me when we get home," in an excited and happy manner. (Supreme Court Appellant Opening Brief, pg., 5, citing Tr A, 72-77; Tr B, 44; 107.)

At home, all four visited for about half an hour before Justin and Ciana went to bed. Justin testified at trial he heard moaning from the living room. (Tr B, 6-8;106-113.) Chloe testified she left at 4:00 a.m. when her alarm went off; she got dressed and drove from Bozeman to Belgrade for work. (Tr. B, 179-182.) After she worked the morning rush, she sent the following texts to Ciana:

“Hey. If you find some false lashes, they’re mine. Also, I’m pretty sure Shelby fucked me...but I really don’t remember anything...”

“...I’m still drunk, so I can’t remember if I said yes after we got home, but I remember crying on the street because I was afraid he would try to fuck me after we got home...”

“I love you...And wish I could remember what happened. I haven’t blacked out in so long...”

“I’m really embarrassed. Like really, what the hell. How is it that this has happened to me three times now. Jesus, I need to quit drinking, at least around men...”

(State Exhibit #18 (admitted at Tr. C, 181, with exception of the fourth text, excluded by the Court on rape shield grounds), Tr. A, 147.)

Later, Chloe said she discovered bite marks on her breast and thighs and had some pain in her vaginal area. She left work, and her mother took her to the hospital. A sexual assault exam was done, and revealed small abrasions in the vaginal opening, and on the cervix, and bite marks which, according to her physician, could have been caused by either consensual or non-consensual contact. (Tr. B, 77-78, 92, 93.)

Justin testified everyone on the ride home seemed “jovial” no-one seemed in distress or in danger, or when they arrived home (Tr. B, 124-127.)

In their Opening Brief, the State claims Shelby, when asked if he’d had sex with C.M., first “denied it completely.” However, he had amended a prior response, stating, “Well, it depends on what you define as sex... we did stuff.” (Tr. (2) at 12.), (State’s Opening Brief, p. 17.) Shelby had readily admitted to oral and digital intercourse but had stated he had tried to discourage Chloe’s advances and felt violated.

On March 27, 2019, a detective called Shelby. (Tr. B, 232.) The recordings were played at trial. In the recordings, Shelby detailed the events of March 8-9, 2019. In summary, Shelby stated he recalled, at the bars, Chloe and Ciana became more and more intoxicated, and he drank less, but still “too much;” him helping Chloe put her boots on in the bar; helping her walk outside on the ice; and Chloe saying loudly in the street “Shelby’s going to fuck me,” strangers coming up to them to ask if they were all right or needed a ride; Justin picking them up; the ride home, Chloe “touching herself” and saying several times, “Shelby’s going to fuck me;” helping Chloe get from the car to the house; her collapsing on the couch; him sitting on the other part of the couch; and some conversation with everyone. (State’s Trial Exhibit #1A.)

Shelby began feeling a little sick and laid down on his section of the couch. Chloe said she was cold, so he brought her a blanket. Chloe continued to say she was cold, and “was saying a lot of sexual stuff” and she was touching him. He tried to discourage her from intimacy: he relates, “You’re too drunk, we can’t do this.” But she kept insisting, kissing, grabbing him, “talking sexual talk.” They eventually made out and had digital and oral intercourse. Chloe grabbed his hand and pushed his fingers further inside her. Chloe bit him, sexually, so he bit her as she insisted. He remembered going to the bathroom and she went to sleep. He put a blanket on her. Chloe woke up wanted more, so he used his mouth on her again. She had an orgasm, he says, then she went to the bathroom. They both went to sleep briefly, and he remembered Chloe saying she had to go to work, got dressed, and left. Shelby told the detective, “She only said positive things the whole time, she was moaning, saying please fuck me...” (State’s Ex. 1A.)

Shelby remembered the afternoon of March 9, 2019; having a difficult conversation with Ciana and Justin about what happened, and denying he took advantage of Chloe; being told they didn’t want him as a housemate any longer; packing up and leaving; later learning Chloe had taken his place as their housemate. (State’s Exhibit 1A; 1B.)

When pressed on whether Chloe was too drunk to consent, Shelby acknowledged he told her she was, that they “shouldn’t be doing this” but that she insisted, both in words and conduct.

SUMMARY OF THE ARGUMENT

Shelby’s public defender committed ineffective assistance of counsel for the following reasons:

- a. Failure to conduct any investigation into the case, including getting to know Shelby, the case, and failure to communicate adequately with Shelby;
- b. Failure to retain expert to review or rebut the State’s physician expert on sexual assault evaluation; failure to investigate or rebut possible bias toward complaining witness due to State’s expert having a personal relationship with Chloe and her mother; failure to call witnesses at trial, including Shelby’s therapist, who was a fact witness who knew Ciana had made sexual advances toward Shelby that he rejected; or Max who observed Shelby’s sexual injuries immediately after the events, caused by Chloe;
- c. Complete failure to prepare Shelby for trial or his testimony, and for telling Shelby not to testify, as “the prosecutor would eat him alive.” Shelby’s testimony was vital as his testimony was the only testimony that would explain some of his statements to the officer.

The Sixth and Fourteenth Amendments to United States Constitution, and Article II, Section 24, of the Montana Constitution, similarly guarantee criminal defendants the right to effective assistance of counsel.

In a claim of ineffective assistance of counsel, the Montana Supreme Court has adopted the two-part test articulated by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

In this case Mr. Jacobi was ineffective for failing to call vital witnesses to Shelby’s defense. Jacobi was ineffective for failing to retain an expert to review a biased medical examiner. Jacobi was ineffective as he did not prepare Shelby to testify at trial as he desired, and said the prosecutor “would eat him alive”.

Mr. Jacobi did not investigate the case, speak to his client before the Omnibus hearing, and only admittedly communicated with Shelby a total of 40 hours in total, including three days of jury trial.

STANDARD OF REVIEW

Discretionary rulings in postconviction relief proceedings, including rulings, are reviewed for an abuse of discretion. *Watson v. State*, 2002 MT 329, 313 Mont. 209, 61 P.3d 759.

ARGUMENT

THE DISTRICT COURT DID NOT ERR WHEN IT GRANTED SHELBY RAGNER'S PETITION FOR POST CONVICTION RELIEF FOR INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, WHEN TRIAL COUNSEL KNEW OF KEY WITNESSES, YET FAILED TO CALL THE WITNESS AT TRIAL, AND WHOSE TESTIMONY WOULD NOT HAVE CONFLICTED WITH STATEMENTS OR EVIDENCE PRESENTED AT TRIAL, AND WOULD HAVE IMPEACHED STATE'S WITNESSES' BIASED AGAINST DEFENDANT, AND PROVEN SEXUAL ENCOUNTER WAS CONSENSUAL.

Mr. Ragner's counsel committed ineffective assistance of counsel.

MT CONST Art. 2, § 24 Rights of the accused provides:

In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

The Sixth and Fourteenth Amendments to United States Constitution, and Article II, Section 24, of the Montana Constitution, similarly guarantee criminal defendants the right to effective assistance of counsel.

The performance of counsel is constitutionally ineffective only if both deficient and prejudicial. *State v. Miller*, 2022 MT 92, 408 Mon. 316, 510 P.3d 17. A performance is constitutionally deficient only if it “fell below an objective standard of reasonableness measured [by] prevailing professional norms” under the totality of the circumstances at issue. (*Id.*)

In order to analyze ineffective assistance of counsel claims, the Montana Supreme Court has adopted the two-part test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. (*Id.*) This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

A defendant must satisfy both prongs of this test in order to prevail on an ineffective assistance of counsel claim. *Id.* “The defendant bears the burden to show that his counsel's performance fell below an objective standard of reasonableness.” The proper measure of counsel's performance is objective reasonableness. *Id.* In other words, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065.

The United States Supreme Court stated that “[m]ore specific guidelines are not appropriate” and that there is no “checklist” for judicial evaluation of attorney performance. *Id.* Rather, in any case presenting an ineffectiveness claim, the performance inquiry must be “whether counsel's assistance was reasonable considering all the circumstances.” *Id.*

The Supreme Court cautioned that in scrutinizing counsel's performance, every effort must be made “to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. The reviewing Court “must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,” and the defendant “must overcome the presumption that,

under the circumstances, the challenged action might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Summarizing the pertinent inquiry under the first prong, the Supreme Court stated as follows:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.* In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Strickland, 466 U.S. at 690, 104 S.Ct. at 2066 (emphasis added).

The pertinent inquiry, therefore, is not simply whether counsel's conduct flowed from ignorance or neglect—though this is certainly a relevant consideration in the analysis. *Id.* For purposes of claim of ineffective assistance of counsel in criminal case, the *Strickland* test requires the defendant to show that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *State v. Welde 2003 MT 315 Mont. 452, 69 P.3d 1162.*

Under the *Strickland* test, the Petitioner must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Hagen v. State*, 1999 MT 8, 293 Mont. 60, 973 P.2d 233.

The thrust of Shelby's claim, is Mr. Jacobi's failure to investigate the case, witnesses, and prepare Shelby to testify at trial. Jacobi failed to get to know Shelby, failed to communicate and learn from Shelby his version of events and his history, failure to investigate and call witnesses Shelby wanted at trial, all leading to Shelby's conviction.

To establish a claim of ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient—that is, that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment—and that counsel's deficient performance was prejudicial. *Stevens v. State*, 2007 MT 137. Claims of ineffective assistance of counsel are mixed questions of law and fact. *State v. Henderson*, 2004 MT 173, 322 Mont. 69, 93 P.3d 1231.

Shelby's case is similar to Henderson as Shelby's trial counsel had little to any contact or commune with him. Henderson's counsel was appointed to represent Henderson in March of 1996 and met with Henderson only twice. *Id.* At the first meeting in March, Henderson explained that he was innocent, and the contraband was not his. *Id.* At the post-conviction hearing, Henderson's counsel testified that

he performed no investigation, research, or analysis, nor did he file any pretrial motions. *Id.*

Shelby's lawyer admittedly had contact with him for ten hours before trial and spent a total of 40 hours from his appointment, through day-three of a jury trial. Shelby testified he only had contact with Jacobi for two and a half hours before the jury trial.

Henderson's counsel performed a total of four hours of work on Henderson's case. *Id.* The four hours included clerical work such as preparing transport orders, appearing on behalf of Henderson, and then appearing with Henderson at the final change of plea hearing. *Id.* One quarter of Henderson's counsel's time on the case, about one hour, was spent persuading Henderson to plead guilty, half of that repeating the process when Henderson's initial change of plea was not accepted. *Id.*

In Shelby's case, Mr. Jacobi did not spend time with Shelby other than meeting him for a few minutes when Shelby appeared at the 2019 Omnibus Hearing, a short meeting before a deadline in the case, and an hour before trial started. In 2019, Shelby had driven 5 hours from Kalispell, Montana, to Bozeman, Montana, as he had not been advised he was not required to be in attendance. Jacobi spoke to the court a few moments, introduced himself to Shelby, then told him he had to go. No time was spent with Shelby going over the case other than a short ten-minute conversation in the hallway.

Over the next year, Shelby would call, email, and try to correspond with Jacobi to no avail. Jacobi did not return calls or keep Shelby apprised of court dates.

Shelby told Jacobi about Max, whose home he went to right after the events with Chloe. Shelby told Max details of the night, and how he was accused of something he didn't do. Jacobi did not contact Max at all until after Shelby was convicted at trial. Jacobi was aware of Max before trial and was ineffective in not talking to Max or calling him as a witness for the defense.

Jacobi did not call Shelby's counselor, Julie Frederick, LCPC, who also had been told by Shelby what had occurred the night. Shelby's counselor was open to testifying on his behalf, yet legal counsel did not call the counselor as a witness. Similar ineffectiveness was seen in *State v. White* 2001 MT 149, 306 M 58.

Jacobi did not engage, investigate, or retain an expert to rebut the testimony of the physician who did the sexual assault exam. Shelby's counsel incorrectly cross-examined the State's expert, "she had known Chloe for six years since she moved to Ennis?" (Tr. B, 90:12-16.) The State's expert testified she had "only met her for about two weeks the year before." (*Id.*, 90:12-18). In fact, Chloe's mother had worked with the State's expert for years, and Jacobi did not cross-examine regarding the bias.

Jacobi did not hire an independent physician to rebut though "scabs" on the witness's cervix may have been older than the few hours between any contact with

Shelby and the exam. Shelby would have been able to show that he did not cause the scabs.

Surprisingly, at the PCR hearing, Jacobi brought a police report from Madison County law enforcement: Chloe had made a claim she was previously assaulted at the Rockin R Bar the same night. Shelby was never accused of assaulting Chloe at the Rockin R Bar. Mr. Jacobi had read the Madison County police report before trial, yet never cross-examined Chloe about any other individual having caused her injuries she observed the next day. Shelby had never seen the Madison County report until his PCR hearing.

In claims of ineffective assistance of counsel, the Montana Supreme Court applies the highly deferential standard of *Strickland* to all strategic decisions, recognizing the inherent artistry in the practice of law, because no two attorneys would defend a particular client in the same way. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 695. In *Henderson*, the Montana Supreme Court stated, they are not presented with counsel's strategic decisions, but rather, the complete failure of counsel to honor his duty to investigate the case. *State v. Henderson*, 2004 MT 173, 322 Mont. 69, 93 P.3d 1231.

The assistance of counsel as contemplated by the United States and Montana Constitutions contemplates that counsel do more than merely accompany the accused in court. *Id.* Counsel must give assistance in the role of advocate, a role

which is critical to just results in our adversarial system of justice where a lack of effective counsel may impinge the fundamental fairness of the proceeding being challenged. *Id.*

In *Hamilton*, one issue presented for IAC was Hamilton's attorney told him not to testify, saying, "it was not going to do any good to testify." *Id.* The Montana Supreme Court focused on the fact Hamilton's lawyer had met with him, prepared a testimony by his client and based thereon, advised him not to testify. *Hamilton v. State*, 2010 MT 25, 355 Mont. 133, 226 P.3d 588.

Jacobi did not go over Shelby's background, or his events of that night of March 8-9, 2019, and if Shelby wished to testify, he would not have been prepared. Shelby's attorney told him the "prosecutor would eat him alive."

The overarching duty of criminal defense counsel is to advocate on behalf of the defendant, to meet, test, and refute the case of the prosecution. *Id.* Henderson's counsel, like Shelby's counsel, disregarded the statements and wishes of his client, while accepting as true all the statements of law enforcement.

Shelby's testimony at trial is the only testimony that could have explained his incriminating statements to the detective, and as a result, the statements to the detective were not in fact as incriminating as their use against him. Jacobi admitted he could have spent more time on Shelby's case.

In *Cheetam v. State*, 2019 MT 290, 398 Mont. 131, 454 P.3d 673, the Montana Supreme Court found that counsel was not ineffective when advising Cheetam not to testify at trial. However, Cheetham's lack of memory, his substance abuse, his infidelity, and because he persistently advanced conspiracy theories about N.S., even during preparatory questions in anticipation of trial, counseled that Cheetham "didn't make a lot of sense" and feared his testimony would be used to impeach Cheetham on cross-examination. *Id.* However, Scott stated he also advised Cheetham that testifying was ultimately his decision. *Id.*

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. In addition, the Fourteenth Amendment secures the right of a criminal defendant to choose between silence and testifying in his own behalf." *Id.*

In this case, trial counsel did not investigate and talk to Shelby about his side of the events, his history, or why he explained things the way he did to the detective. Here, counsel only told Shelby, "This prosecutor will eat you alive." Shelby was not counseled by his lawyer to prepare his direct or cross-examination. In fact, Shelby's counsel failed to run him through what his testimony would be at trial. As a result, the public defender's performance was ineffective, resulting in prejudice to the outcome of the trial.

"Counsel cannot justify failure to investigate simply by invoking strategy... counsel's investigation must determine strategy, not the other way around."

Garding v. Montana Dept. of Corrections, In the United States’ Dist. Court for the Dist. of Montana, Missoula Div. CV 20-105-M-DLC, citing *Weeden v. Jonson*, 854 F.3d 1063, 1070 (9th Cir. 2017). In *Garding*, the Federal District Court of Montana, stated, “In the same vein, a Court should not seek to justify a failure to investigate by invoking trial strategy, particularly when the record suggests a contrary finding.” *Garding v. Montana Dept. of Corrections*, In the United States Dist. Court for the Dist. of Montana, Missoula Div. CV 20-105-M-DLC.

To reach a conclusion that the trial strategy employed was reasonable, counsel is first obligated to “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Garding v. Montana Dept. of Corrections*, In the United States Dist. Court for the Dist. of Montana, Missoula Div. CV 20-105-M-DLC, citing *Strickland*, 466 U.S. at 691.

23. The 9th Circuit has repeatedly held that:

A lawyer who fails to adequately investigate and introduce... evidence that demonstrates his client’s factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.

Duncan v. Ornoski, 528 F.3d 1222, 1235 (9th Cir. 2008), citing, *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002).

“Failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence”. *Duncan*, 528 F.3d at 1234-35, citing

Rios Rocha, 299 F.3d 796, 805 (9th Cir. 2002). Further, Garding had adamantly maintained her innocence throughout the proceedings. *Id.*

Strickland holds counsel has a duty to investigate, which exists when there is no reason to believe that doing so would be fruitless or harmful. *Garding v. Montana Dept. of Corrections*, In the United States Dist. Court for the Dist. of Montana, Missoula Div. CV 20-105-M-DLC, citing *Strickland*. In *Garding*, the defense counsel was held to have been ineffective when she failed to investigate and consult with experts. *Id.* Counsel in *Garding* failed to consult and retain an accident reconstructionist to rebut the conflicting officers' testimony regarding their version of how the accident occurred. *Id.*

Mr. Jacobi admitted at the PCR hearing he did not contact individuals Shelby requested for his defense. Jacobi admitted he was aware of Max, that Shelby went to Max' house immediately after the events with Chloe. Jacobi was aware Max observed bite marks and hickies on Shelby, yet never contacted him before trial, and failed to call Max as a witness at trial.

PREJUDICE

Once a Petitioner demonstrates counsel's performance was deficient, the Court next engages in the prejudice analysis. *Garding v. Montana Dept. of Corrections*, In the U.S. Dist. Court for the Dist. of Montana, Missoula Div. CV 20-105-M-DLC. To satisfy the prejudice standard, a Petitioner "must show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466, U.S. at 691.

To constitute *Strickland* prejudice, the likelihood of a different result must be substantial, not just conceivable. *Richter*, 562 U.S. 86, at 112.

In this case, there is no doubt that Shelby's ineffective counsel resulted in prejudice. The jury deliberated for several hours and returned with two questions regarding Shelby's statements recorded by the detective. Shelby's statements to the officer, "she was too drunk to consent" had to be rebutted in a consent defense case. Shelby's therapist, his friend Max, and Shelby himself, could have explained this statement. Surely the jury could have heard from Max, who could have testified about the bite marks and hickies on Shelby caused by Chloe.

Only Shelby's testimony would have provided an explanation of his particular statements, as testified by expert, Colin Stephens. Jacobi's pre-trial and trial performance fell well below the professional standards, and clearly the outcome would be different had he called vital witnesses, retained an expert to review Dr. Davenport's bias, and prepared Shelby to testify as he desired.

Failing to call a rebuttal expert or investigate an expert for the defense was highly prejudicial. The evidence that Chloe had scabs on her cervix, when this could have occurred, and whether it had been prior to Shelby, was something that should have been investigated, including evidence never raised at trial, and known

to Jacobi that Chloe had reported she was assaulted in the bar by another individual the same night of the incident. Failure to raise such relevant facts and to rebut an expert was outright prejudicial to the outcome of Shelby's case.

In employing the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), required to prove ineffective assistance of counsel claims, the District Court Judge found Mr. Ragner sufficiently proved both prongs, leading her to rule, "it is hereby ORDERED that the Petitioner's Petition for Post Conviction Relief is GRANTED."

In granting the Petition, the Court found Mr. Jacobi could have provided eye-witness testimony to the injuries on Shelby's body the morning after the incident. Max described those injuries as "pock marks, hickeys and bite marks." Max' observations of Shelby's body hours after the sexual encounter were exculpatory. Jacobi failed to recognize or explore the significance or value of Max' testimony.

The second prong of the IAC test requires Petitioner to "demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Baca*, supra, ¶17.

Here, Mr. Jacobi admitted an issue for appeal was "ineffective assistance of counsel on the appeal form he submitted to the appellate defender's office." Mr. Jacobi admitted that he did not do a very good investigation into this

case, stating, “I agree, I could have done a better job, yeah, absolutely.” (Hearing Trans, 177:17-20.)

CONCLUSION

Mr. Jacobi’s neglect in failing to investigate the case, meet with Shelby to go over the State’s case with him, failure to prepare him for his trial testimony, failure to call vital defense witnesses, and failure to cross-examine Chloe on a claim she was assaulted by another person hours before her encounter with Shelby resulted in ineffective assistance of counsel, and there is certainly more than a reasonable probability of a different outcome for Shelby had Mr. Jacobi represented him within the professional norms. There is no doubt, but for Mr. Jacobi’s errors, the result at trial would have been different.

Submitted this 5th day of March 2025.

/s/Jami Rebsom
Jami Rebsom
Attorney for Petitioner/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify this Response Brief is written with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word is 9836 excluding the forematter, Certificate of Compliance and Certificate of Service, signature blocks and any appendices.

DATED this 5th day of March 2025.

/s/Jami Rebsom
Jami Rebsom

CERTIFICATE OF SERVICE

I hereby certify that I served a full, true and accurate copy of the foregoing Brief, Appellee’s Response document on the 5th day of March 2025, to the following named person:

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/s/Rita Rozier
Rita Rozier

IN THE SUPREME COURT FOR STATE OF MONTANA

CAUSE NO. DA-24-0490

SHELBY RAGNER

Petitioner/Appellee,

vs.

STATE OF MONTANA,

Respondent/Appellant.

APPENDICES: PETITIONER’S RESPONSE BRIEF

Doc. 34 of DV-16-23-478-PRAppendix A

Petitioner’s Exhibit 5 of Trial,
DC-19-189B, dated 3/9/19..... Appendix B

CERTIFICATE OF SERVICE

I, Jami L. Rebsom, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-05-2025:

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